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Case Numbers: 7942 of 2008/CR-2020-002886

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

7 Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 11 October 2022

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

Before :

THE HONOURABLE MR JUSTICE HILDYARD

Between :

(1) ALISON GRANT
(2) DAVID JAMES KELLY
(3) GILLIAN ELEANOR BRUCE
(4) EDWARD JOHN MACNAMARA
(the joint administrators of Lehman Brothers International (Europe))

Applicants

- and -

(1) FR ACQUISITIONS CORPORATION (EUROPE) LTD
(2) JFB FIRTH RIXSON INC.

Respondents

Mr Daniel Bayfield KC and Mr Ryan Perkins (instructed by **Linklaters LLP**) for the **Applicants**
Mr Robin Dicker QC and Mr Henry Phillips (instructed by **Macfarlanes LLP** for the **Respondents,** though since 12 September 2022 the Respondents have been represented by **Cleary Gottlieb Steen & Hamilton LLP**)

Hearing dates: 13th and 14th January 2021

APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10:30 on 11 October 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

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THE HONOURABLE MR JUSTICE HILDYARD

Mr Justice Hildyard:

1. This application for directions made by the joint Administrators of Lehman Brothers International (Europe)[1] ("the "Administrators" and "LBIE" respectively) concerns the construction and effect of various standard form Events of Default provisions which were (and typically are) included in the 1992 and 2002 versions of the ISDA Master Agreements (multicurrency – cross border versions).[2]

2. LBIE is a party to two interest rate swap transactions (together, "the Swaps") each incorporating the terms of an ISDA Master Agreement. One is a sterling interest rate swap ("the Sterling Swap") to which the first Respondent, FR Acquisitions Corporation (Europe) Ltd ("FRAC"), is a party. The Sterling Swap is governed by the 1992 ISDA Master Agreement. The other is a US dollar interest rate swap ("the Dollar Swap") with the second Respondent, JFB Firth Rixson Inc ("JFB") now governed by the 2002 ISDA Master Agreement.[3] FRAC and JFB (together, "Firth Rixson") are part of the Firth Rixson group of companies, which make and supply rings, industrial forgings and other specialised metal products, primarily to aerospace engine manufacturers.

3. It is common ground between the parties that under the two interest rate swap agreements (together "the Transactions") there is owing to LBIE (a) by FRAC, under the terms of the Sterling Interest Rate Swap, a principal amount of more than £8 million and (b) by JFB, under the Dollar Interest Rate Swap, a principal amount of more than US$53 million.

4. However, since the inception of the administration of LBIE by order of the Court on 15 September 2008, and thus now for considerably more than a decade, Firth Rixson have relied on a provision in both ISDA Master Agreements (together "the ISDA Master Agreements"), Section 2(a)(iii), to suspend their payment obligations to LBIE. Section 2(a)(iii) makes any payment obligation arising under the Transactions subject to the condition precedent that:

   "no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing".

5. There is no doubt or dispute that the making of the Administration Order triggered that suspensory condition. Between 2010 and 2012, the Administrators engaged in litigation with Firth Rixson (and a number of other parties) before the High Court and the Court of Appeal as to the meaning of Section 2(a)(iii). It was held that Firth Rixson are entitled to rely on Section 2(a)(iii) to suspend their payment obligations until such time as there are no longer any continuing Events of Default in respect of LBIE (or, as the Court of

[1] Since the application was issued, there have been changes in the identities of the Joint Administrators. In particular, Mr Russell Downs, who made two Witness Statements in support of the Application (his 20th and 21st), is no longer an Administrator. The title page lists those presently in office.
[2] The 1992 ISDA Master Agreement was published in 1992 by the International Swaps and Derivatives Association ("ISDA"). The 2002 ISDA Master Agreement was published by ISDA in 2002.
[3] LBIE's original counterparty to the Dollar Swap was FRAC; but by way of a "Novation Confirmation" dated 29 August 2008 the Dollar Swap was novated from FRAC to JFB. The Novation Confirmation also had the effect that the Dollar Swap became governed by the 2002 ISDA Master Agreement, although nothing turns on this in the present dispute.

Appeal put it, until all Events of Default have been "cured"): see *Lomas v JFB Firth Rixson Inc* [2012] 1 CLC 713 at [35] and [62].

6. On that basis, Firth Rixson have declined to pay LBIE any of the amounts owing. It seems likely, as Mr Bayfield suggested was the case, that in relying on the suspensory condition (rather than terminating the Swaps), Firth Rixson probably expected that the administration would end in LBIE's dissolution, rather than its exit from administration as a solvent company. What has transpired was difficult, if not impossible, to foresee.

7. For in the event, the administration of LBIE has been highly successful. The Administrators have paid in full (or fully reserved for) all provable debts (including subordinated debts), statutory interest entitlements and non-provable liabilities. Substantial assets remain available in the estate.

8. In those circumstances, the Administrators are now working to bring LBIE's administration to an end by terminating their appointments and returning LBIE to the control of its directors. On 15 July 2020, Sir Geoffrey Vos C (as he then was) held in *Re Lehman Brothers International (Europe)* [2020] Bus LR 1875 that the Administrators were pursuing (and were entitled and bound to pursue) the first objective under paragraph 3 of Schedule B1 to the 1986 Act (i.e., rescuing LBIE as a going concern).

9. The Administrators contend that, if and when their appointments terminate under paragraph 79 of Schedule B1 of the Insolvency Act 1986 ("IA 1986") and LBIE is placed under the control of its directors, no Event of Default or Potential Event of Default will be "*continuing*" with respect to LBIE under the ISDA Master Agreements. They contend that at that stage, the suspensory condition provided for by Section 2(a)(iii) will fall away, and Firth Rixson will become liable to make payment.

10. Firth Rixson disagree. They contend that the mere termination of the Administrators' formal appointment and the other proposed Relevant Steps (as defined in footnote 20 below) will not, particularly in the circumstances that have transpired, undo or "cure" the effects of those events over the last ten years nor mean that the relevant Events of Default have been "cured" such that they are no longer "*continuing*".

11. The disagreement arises out of two essential factors:

    (1) First, Firth Rixson assert that various events in the course of LBIE's administration, including, *inter alia*, both the scheme of arrangement proposed by the Administrators and sanctioned by the Court on 18 June 2018 (the "Scheme"), and a successful application and order made for its recognition and enforcement in the USA under the US Bankruptcy Code ("Chapter 15"), have given rise to freestanding Events of Default separate from (and additional to) the original Event of Default triggered by LBIE's entry into administration.

    (2) Second, Firth Rixson assert that certain Events of Default (including the Event of Default triggered by LBIE's entry into administration, its subsequent conversion into a distributing administration, and the alleged Event of Default arising out of the Scheme and its US recognition) will continue to have effect and are incapable of cure.

12. In these contexts:

    (1) In relation to what they submit is the continuing effect of the Event of Default which occurred when the Administration Order was made, Firth Rixson have emphasised that LBIE became a distributing administration in December 2009. They submit that since that date the administration has been *"functionally equivalent"* to a liquidation, in that LBIE's assets have been realised and the proceeds distributed to its creditors in respect of their provable claims pursuant to a mandatory statutory regime involving permanent alterations to creditors' rights. They suggest that, in those circumstances, there is no going back, and the notion that the effects of such matters and more than ten years of continuous Events of Default can be undone or "cured" merely by taking certain formal steps at the close of the administration is incorrect and does not reflect the true meaning and effect of the ISDA Master Agreements.

    (2) Firth Rixson maintain that, in any event, the Scheme also constituted an Event of Default, which, since the Scheme's provisions continue in full force and effect, must be regarded as *"continuing"*.

    (3) Furthermore, Firth Rixson contend that the Order made in the US under Chapter 15 ("the Chapter 15 Order") and its ancillary orders (including a permanent injunction) recognising and giving effect to the Scheme in the United States, also constituted an Event of Default, and that the fact that it is *"continuing"* is illustrated vividly by the continuation of the permanent injunction granted as part of the Chapter 15 Order.

13. If Firth Rixson's arguments are accepted, the result will be that Firth Rixson would be under no obligation to make payments in aggregate of £8,149,086 and US$53,629,230 (exclusive of interest). That result, the Administrators contend, would be uncommercial and unfair, especially in circumstances in which (as Mr Bayfield put it in opening) Firth Rixson would be relying on *"a provision which the court has held to be designed to mitigate counterparty credit risk"* and *"Firth Rixson is not subject to any credit risk at all"*; to which Firth Rixson inevitably responded that, even if the result might appear unfair, this was no reason or basis for subverting the meaning of the carefully honed wording, and that the Administrators were simply trying *"to conjure up one or more arbitrarily worded phrases and insert them into the Master Agreements."*

14. I turn to address the issues which arise under the following headings:

    (1) The undisputed background facts relating to (a) the Transactions (b) LBIE's administration (c) an application made by the Administrators in December 2010 resulting in judgments at first instance and the Court of Appeal (d) the 2018 Scheme (e) the proceedings culminating in the Chapter 15 Order and (f) the application made by the Administrators in July 2020 to approve a distribution of surplus, adjudicated by Sir Geoffrey Vos C (as he then was) in July 2020.

    (2) The nature and basis of the application.

    (3) The ISDA Master Agreements, including (a) their background (b) their overall architecture (c) the identification and proper construction of the relevant provisions.

(4) The application of the provisions to the various alleged Events of Default.

(5) My determination of the application and conclusions.

1) Factual Background

15. The factual background as summarised below is not in dispute.

The Swaps

16. LBIE entered into both Swaps on 13 November 2007. Each Swap was documented by a "Confirmation" which incorporated (by reference) the 1992 ISDA Master Agreement.[4]

17. Under the terms of each of the Swaps, the relevant Respondent (FRAC in the case of the Sterling Swap and JFB in the case of the Dollar Swap) agreed to pay a fixed rate of interest on a notional principal amount and LBIE agreed to pay a floating rate of interest on the same notional principal amount. The parties' net payment obligations were required to be settled on a quarterly basis, with the final payment date falling on 20 December 2010. The Swaps were designed to convert FRAC's floating rate obligations under those financing agreements into fixed rate obligations, and thereby to hedge Firth Rixson's interest rate risk.

18. The Sterling Swap was based on a notional amount of £95 million and provided for quarterly payments beginning on 20 March 2008 and ending on 20 December 2010. The fixed rate was 5.555% and the floating rate was three months sterling LIBOR. The Sterling Swap is governed by the 1992-form ISDA Master Agreement.

19. The Dollar Swap was based on a notional amount of US$650 million and provided for the same quarterly payment dates as the Sterling Swap. The fixed rate was 4.3655% and the floating rate was US$ LIBOR. The Dollar Swap was initially governed by the 1992-form ISDA Master Agreement. On 29 August 2008 the Dollar Swap was novated by FRAC to JFB pursuant to a novation confirmation which incorporated the 2002-form ISDA Master Agreement. Since then, the Dollar Swap has been governed by the 2002 ISDA Master Agreement.

LBIE's entry into administration

20. It is common ground that when, on 15 September 2008, LBIE entered into administration under Schedule B1 to the 1986 Act, that gave rise to Events of Default under Sections 5(a)(vii)(4)[5] and (6)[6] of the ISDA Master Agreement. It is also common

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[4] There was no Credit Support Provider in respect of the Swaps.

[5] Which provides that the following constitutes an Event of Default: "*The party…(4) institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights*".

[6] Which provides that the following constitutes an Event of Default: "*the party…(6) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all of its assets*".

ground that, given LBIE's financial position, there was an Event of Default under Section 5(a)(vii)(2)[7].

21. On 2 December 2009, the Administrators obtained an order from the Court pursuant to Rule 2.95 of the Insolvency Rules 1986, permitting a distribution to be made to unsecured creditors of LBIE. As explained by David Richards J (as he then was) in *Re Lehman Brothers International (Europe) (No 5)* [2016] B.C.C. 239 at [14][8]:

> *" "[o]nce an administrator, with permission of the court gives notice of an intention to make one or more distributions amongst creditors, the procedures in administration are very similar to those in a liquidation and it becomes what is often called a "distributing administration"".*

22. It is noted in the Administrators' supplemental position paper that the administration order was recognised pursuant to an "exequatur" order in France and Spain on 15 October 2008 and 4 June 2009 respectively (the "Spanish and French Exequaturs").

Firth Rixson's election not to terminate the Swaps

23. The existence of Events of Default with respect to LBIE meant that FRAC and JFB as "Non-defaulting Parties" were entitled (but not obliged)[9] to terminate the Transactions under Section 6(a) of the ISDA Master Agreements[10] by designating an Early Termination Date.

24. Unlike the vast majority of LBIE's counterparties to ISDA Master Agreements, Firth Rixson decided not to designate an Early Termination Date in respect of the Swaps to bring the transactions to an end upon LBIE's entry into administration. Instead, they contended that, by virtue of Section 2(a)(iii), they were entitled to suspend their payment obligations in respect of the Swaps. It is that unusual choice which has given rise to this dispute.

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[7] Which provides that the following constitutes an Event of Default: "*the party…(2) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due*".

[8] See, too *Re Kaupthing Singer & Friedlander Limited* [2010] EWHC 316 per Blair J at [24]: "*The Joint Administrators submit that the distribution which they incepted by the application…authorising them to make payments by way of interim and final distributions to creditors of KSF who are neither secured nor preferential, is in substance equivalent to a distribution made by a liquidator in the course of a winding up. I agree with this submission. As it is put by Professor Sir Roy Goode QC, "…in making distributions to creditors the administrator is performing a function similar to that of a liquidator…" (Goode, Principles of Corporate Insolvency Law, para 10-81)…In my judgment, the Joint Administrators are correct to submit that, objectively construed, the terms "winding-up" in Condition 2(a) of the Term and Conditions of the Bonds…extends not only to compulsory or voluntary liquidation but also to administration where a notice of a proposed distribution to creditors has been given in accordance with rule 2.95 of the IR 1986*".

[9] Parties to the ISDA Master Agreements can elect for "Automatic Early Termination" to apply, in which case an Early Termination Date in respect of outstanding transactions occurs immediately upon the occurrence of an Event of Default specified in Sections 5(a)(vii)(1), (3), (5),(6) or (8). No such election was made in this case.

[10] Section 6(a) provides: "*If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-Defaulting party") may, by not more than 20 days' notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions*".

Payments under the Swaps

25. Following its entry into administration, LBIE failed to make two payments under the Sterling Swap: (i) a payment of £98,474 which fell due on 22 September 2008; and (ii) a payment of £107,766 which fell due on 22 December 2008. Again, it is common ground that this gave rise to further Events of Default under Section 5(a)(i)[11] of the 1992-form ISDA Master Agreement.

26. However, in the months following these payment defaults, there was a substantial decline in the floating interest rates payable by LBIE under each Swap. This meant that LBIE was entitled to receive a net payment from FRAC (the First Respondent) under the Sterling Swap on each payment date from 20 March 2009 until the maturity of the transaction.

27. LBIE has never failed to make any payments in respect of the Dollar Swap. LBIE was entitled to receive a net payment from FRAC (until the novation referred to above) or JFB (following the novation) under the Dollar Swap on each payment date from 20 June 2008, again until the maturity of the transaction.

28. However, Firth Rixson did not make any payments to LBIE on the scheduled payment dates after LBIE entered into administration on 15 September 2008. Instead, they contended that, by virtue of Section 2(a)(iii), they were entitled to suspend their payment obligations in respect of the Swaps. This contention was founded on the proposition that various Events of Default had occurred and were continuing in respect of LBIE.

29. Section 2(a)(i) of the 1992 ISDA Master Agreement provides:

> *"Each party will make each payment or delivery specified in each Confirmation to be made by it, subject to the other provisions of this Agreement."*

30. Section 2(a)(iii) of the 1992 ISDA Master Agreement provides[12]:

> *"<u>Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing</u>, (2) the condition precedent that no Early Termination Date in respect of the relevant Transaction has occurred or been effectively designated and (3) each other applicable condition precedent specified in this Agreement."* (Emphasis added.)

[11] Which provides that the following constitutes an Event of Default: "*Failure by the party to make, when due, any payment under this Agreement or delivery under Section 2(a)(i) or 2(e) required to be made by it if such failure is not remedied on or before the third Local Business Day after notice of such failure is given to the party*".

[12] These provisions appear in the 2002 ISDA Master Agreement in a materially identical form. Unless the context requires otherwise, the quotations in this judgment from the ISDA Master Agreement are from the 1992 Form.

The 2010 Directions Application

31. Between 20 March 2009 and December 2010 (the latter being the maturity date in respect of the Transactions), a total of £8,149,086 million fell due to LBIE under the terms of the Sterling Swap. Between 22 September 2008 and December 2010, a total of US$53,629,230 fell due to LBIE under the Dollar Swap.

32. But for the suspensory effect of Section 2(a)(iii)(1), these amounts would have been immediately due and payable (and each payment represented in the accumulated net amount would have been immediately due and payable from the scheduled payment date when it arose).

33. On 20 July 2009, the Administrators wrote to FRAC demanding payment of the sums which had fallen due under the terms of the Sterling Swap. Firth Rixson denied that the sums claimed were payable on the basis that the conditions precedent in Section 2(a)(iii) of the ISDA Master Agreement to Firth Rixson's payment obligations had not been met, due to the existence of Events of Default in respect of LBIE.

34. In May 2010, the Administrators brought an application for directions concerning the meaning and effect of Section 2(a)(iii) (the "2010 Directions Application"). The Administrators contended that, as a matter of construction or implication, Section 2(a)(iii) operates only for a "reasonable period" or until such time as the Transactions had run their course, at which point any amounts due under the terms of the Transactions became immediately due and payable, notwithstanding the fact that Events of Default were continuing in respect of LBIE.

35. The 2010 Directions Application came before Briggs J (as he then was) in December 2010. In his judgment handed down on 21 December 2010, Briggs J rejected the Administrators' arguments concerning the effect of Section 2(a)(iii): *Lomas and Ors v JFB Firth Rixson and Ors*[13] [2010] EWHC 3372 (Ch) at [83(iv)]. The judge also held that the payment obligation which had been suspended by Section 2(a)(iii) did not survive as an indefinite contingent liability but existed only until the expiry of the term of the Transaction, at which point it was (effectively) extinguished: *Lomas and Ors v JFB Firth Rixson and Ors, ibid.* at [78].

36. In December 2011, the Court of Appeal upheld the decision of Briggs J rejecting the Administrators' arguments on the suspensive effect of Section 2(a)(iii) but over-ruled him on the question of whether the suspended payment obligation was extinguished at the expiry of the term of the Transaction, holding instead that it remained in suspense indefinitely. The effect of the Court of Appeal's decision is encapsulated in paragraph [62] of Longmore LJ's judgment[14] :

> *"…there is no terminus, either by way of extinction or revival to the condition precedent. It continues in force until the Event of Default is cured. If it is never cured, there continues to be no obligation on the Non-defaulting Party to make payment."*

[13] *Lomas and Ors v JFB Firth Rixson and Ors* [2010] EWHC 3372 (Ch).
[14] *Lomas v JFB Firth Rixson Inc* [2012] 1 CLC 713.

The 2018 Scheme

37. By 2018, LBIE's Administrators had formed the view that LBIE would be able to pay its unsubordinated provable debts in full and that there would remain a surplus, at that stage of uncertain amount, available in or towards payment of statutory interest, any non-provable claims and certain subordinated liabilities (the "Surplus").

38. However, LBIE remained subject to certain outstanding legal proceedings concerning, amongst other things: (a) the calculation of creditors' entitlements to statutory interest (in the proceedings often referred to as "*Waterfall II*"[15]); (b) whether the Administrators should bring about a termination of the Administration and the commencement of a liquidation (the "Lacuna Application"); and (c) a challenge by a subordinated creditor to the Administrators' decision to admit a proof of debt submitted by an ordinary unsecured creditor (the "Olivant Application").

39. Against that background, the Administrators promulgated the Scheme on behalf of LBIE. The accompanying Explanatory Statement explained that the basic purpose of the Scheme was to compromise the outstanding legal proceedings and to facilitate the distribution of the Surplus, including through the creation of a mechanism for the quantification of creditors' statutory interest entitlements.

40. The Scheme was part and parcel of the administration process and was promulgated in order to facilitate the realisation and distribution of LBIE's assets pursuant to the statutory regime applicable to a distributing administration. As explained at paragraph 16(b) of the Administrators' Supplemental Position Paper:

> *"The Scheme was an integral part of the Company's administration. It was proposed by the Administrators in the exercise of their statutory powers under section 896(2)(d) of the Companies Act 2006 and paragraph 18 of Schedule 1 to the Insolvency Act 1986. In addition, the Scheme was proposed to achieve the statutory purpose of administration and to assist in bringing the Company's administration to an end."*

41. In this context, the statutory objective, identified by the Administrators in their 19th progress report to 14 March 2018 (before the Scheme) and in their 20th progress report to 14 September 2018 (after the scheme was sanctioned) was

> "*Achieving a better result for LBIE's creditors as a whole than would be likely if LBIE were wound up (without first being in Administration)*".

42. The Scheme had three central features:

    (1) The first was a compromise of the litigation relating to the surplus in LBIE's estate. This essentially involved the dismissal of the pending appeals in the relevant litigation and allowed creditors to receive their full entitlements under the existing judgments.

[15] The *Waterfall II* proceedings were divided, for ease of management, into three tranches, *Waterfall IIA, Waterfall IIB* and *Waterfall IIC.*

(2) The second was the creation of an adjudication mechanism for the determination of disputes relating to the rate of interest applicable to creditors' claims apart from the administration. This was relevant to calculating the applicable rate of statutory interest (and, in particular, whether certain creditors were entitled to a rate higher than the statutory minimum of 8% simple per annum).

(3) The third was the imposition of a bar date for the purpose of enabling the Administrators to ascertain the universe of claims. This was designed to allow the Administrators to make distributions to creditors without holding reserves for any unknown claims which had not been notified in the first decade of the administration.

43. The Scheme Parties also undertook not to take any action or step to initiate a liquidation of LBIE until all Scheme Distributions and any other payments in respect of statutory interest had been paid in full by LBIE or some other arrangement had been made[16].

44. The Scheme was not to be limited in duration and was intended to ensure that the variations to creditors' rights would "*continue in full force and effect*" even if LBIE were to exit administration through a compulsory or voluntary winding up (which was what had been contemplated at the time the Scheme was sanctioned) [17].

45. In sanctioning the Scheme when it came before me, I described the overall objective as being to facilitate a speedy distribution of the surplus in LBIE's estate so as to avoid "*a continuing loss of the time value of money, increasing with every day that the Surplus is not distributed*".

US Proceedings for recognition under Chapter 15

46. On 19 June 2018 (one day after the Scheme was sanctioned), the US Bankruptcy Court made an order recognising a "foreign main proceeding" in respect of LBIE under Chapter 15 of the US Bankruptcy Code (the "Chapter 15 Order"). The petition for Chapter 15 recognition was filed by Mr Russell Downs, one of the Administrators, in his capacity as LBIE's foreign representative.

47. The Chapter 15 Order provided for the recognition of the Scheme in the United States. To that end, the US Bankruptcy Court ordered that: (i) the Scheme be recognised, granted comity to and given full force and effect within the territorial jurisdiction of the United States; and (ii) all parties be enjoined from commencing or continuing any action or proceeding in the United States against LBIE or its assets located within the territorial jurisdiction of the United States that would be inconsistent with the Scheme.

2) The nature and basis of this Application

48. The present Application was issued on 26 June 2020.

49. Less than a month later, at a hearing before Sir Geoffrey Vos C on 15 July 2020, the Administrators sought a direction (independent of the present Application) as to the distribution of the surplus in LBIE's estate (the "Surplus Distribution Application"):

[16] Paragraph 38.1 of the Scheme.
[17] See, for example, paragraphs 38.2 and 38.3 of the Scheme.

see [2020] Bus LR 1875. The background to the Surplus Distribution Application was as follows:

(1) The Administrators had paid in full (or fully reserved for) all provable debts (including subordinated debts), statutory interest entitlements and non-provable liabilities, yet substantial assets remained available in the estate. These assets are effectively held for the benefit of LBIE's sole shareholder. The Chancellor stated at [8]-[9]:

> *"Mr Downs explains in his evidence that as at 10 June 2020 there was approximately £493m in the LBIE estate, the majority of which is held as a conservative reserve against its potential liabilities and against the future estimated costs and contingent expense claims of the administration. That figure does not include anticipated future realisations and Mr Downs says that:*
>
> > *"In some instances, if these matters are resolved in favour of LBIE, there will be a double benefit to the estate: not only will there be a recovery of further debts but also a release of the reserves currently held against the claims submitted by putative creditors."*
>
> *Of the £493m held, £29m is said to be a "true surplus" available for distribution [to LBIE's sole shareholder] now, and £145m is expected to be available for distribution [to LBIE's sole shareholder] by the end of 2020.*
>
> *Mr Downs has given the court a full account of the nature of the unresolved claims by and against LBIE's estate. It is not necessary for me to recite that account in this judgment. Suffice it to say that I accept on the evidence that the £29m is indeed a true surplus, and that there is no reasonable likelihood of those monies being needed to satisfy liabilities of LBIE at any stage."*

(2) In those circumstances, the Administrators considered that they were entitled to pursue the first objective under paragraph 3 of Schedule B1 (that was rescuing LBIE as a going concern). For the preceding 12 years, the Administrators had been pursuing the second objective (that was obtaining a better result for LBIE's creditors as a whole than would be likely if LBIE were wound up without first going into administration).

(3) The Chancellor agreed that it was, as matters had transpired, appropriate for the Administrators to pursue the first objective. He stated at [26]-[28]:

> *"The first question then is towards which statutory objective are the Administrators now obliged to perform their functions. I do not think that that question need detain me long in the unusual circumstances of this case. Whilst the administration of LBIE began with the second objective in paragraph 3,*

namely "achieving a better result for the company's creditors as a whole", that objective has clearly now been achieved. Paragraph 3(3) requires the Administrator to perform his functions with the "rescuing the company as a going concern" objective in paragraph 3(1)(a) unless he thinks that is not reasonably practicable to achieve, or the objective in paragraph 3(1)(b) would achieve a better result for the company's creditors as a whole. Quite plainly neither of those conditions is any longer satisfied, since the rescue objective is, on the evidence, reasonably practicable and the objective in paragraph 3(1)(b) would plainly not achieve a better result for the company's creditors as a whole, since they have all been or will be paid off in full with full interest.

In these circumstances, it is now clear that the only objective of LBIE's continuing administration is to rescue LBIE as a going concern. That much was effectively confirmed by the LBIE scheme of arrangement which was sanctioned by Hildyard J in July 2018 (In re Lehman Bros International (Europe) [2019] Bus LR 1012). The LBIE scheme resolved any uncertainty as to the solvency of LBIE and itself envisaged, at clause 33, the possibility of a surplus being available for LBHI2 (see also para 23 of Hildyard J's judgment).

I shall therefore view the Administrators' submissions on the basis that the relevant statutory objective is that in paragraph 3(1)(a), namely rescuing LBIE as a going concern."

(4) The Administrators exercised their power under paragraph 61(b) of Schedule B1 to appoint two directors to LBIE's board. The directors made a request to distribute part of the surplus to LBIE's sole shareholder (on the basis that all prior-ranking claims had been paid or reserved for in full). The proposed distribution procedure involved a reduction of LBIE's share capital and the payment of a dividend in respect of LBIE's preferred equity.

(5) The Chancellor was satisfied that the proposed distribution procedure was lawful and gave a direction that the Administrators be at liberty to consent to a request by the directors to exercise their powers so as to give effect to the proposed distribution to LBIE's sole shareholder (and any future distributions of surplus funds): see the Chancellor's judgment at [48].

(6) A distribution of £29 million was accordingly made to LBIE's sole shareholder on 11 August 2020. Three further distributions have been made as follows: a distribution of £100 million on 17 December 2020; a distribution of £115 million on 24 January 2021; and a distribution of £93 million on 14 October 2021.

50. The Administrators are still dealing with a small number of final matters in LBIE's administration. However, the Administrators intend that LBIE will be returned, in due course, to the control of its directors as a solvent going concern. This will involve the

termination of the Administrators' appointments under paragraph 79 of Schedule B1, which materially provides as follows:

> *"(1) On the application of the administrator of a company the court may provide for the appointment of an administrator of the company to cease to have effect from a specified time …*
>
> *(3) The administrator of a company shall make an application under this paragraph if—*
>
> *(a) the administration is pursuant to an administration order, and*
>
> *(b) the administrator thinks that the purpose of administration has been sufficiently achieved in relation to the company."*

3) The ISDA Master Agreements

Background

51. The ISDA Master Agreement is one of the most widely used standard form agreements in the financial world: see *Lomas v. JFB Firth Rixson* [2011] 2 BCLC 120 at [53] *per* Briggs J. It is the most commonly used standard agreement for over-the-counter derivative transactions and, according to ISDA, serves as the contractual foundation for more than 90% of the over-the-counter derivatives transactions globally (as noted by Briggs J in *Lomas v. JFB Firth Rixson ibid.* at [5]). According to statistics compiled by the Bank of International Settlements, as at the end of June 2020 the total notional amount of over-the-counter derivatives in existence was in excess of US$606 trillion [18].

52. Of the standard forms that are still in use and in issue in these proceedings:

    (1) The 1992 version of the ISDA Master Agreement was the first version that was designed in a form applicable to derivatives other than just swaps, including pure contracts for differences, caps and floors and to accommodate both financially and physically settled transactions.

    (2) The 2002 ISDA Master Agreement replicates most of the provisions of the 1992 version albeit with significant changes to provisions concerning the determination of amounts due on early termination.

53. As I explained in *Waterfall IIC* at [27], both forms "*share the same basic architecture*" and both "*continue to be used, depending on the parties' preference*". I added:

> *"The 2002 Form replicates, for the most part word for word, the provisions of the 1992 Form, albeit with significant changes to provisions concerning the determination of amounts due on*

[18] https://stats.bis.org/statx/srs/table/d.5.2?f=pdf

> *early termination, and a different structure in respect of provisions for interest."*

54. For the purposes of this Application there is no material distinction between the 1992 and 2002 form Master Agreements. In this judgment, the 1992 ISDA Master Agreement and the 2002 ISDA Master Agreement are together described as the "ISDA Master Agreements" (save where it is necessary to distinguish between them). Unless the context requires otherwise, capitalised terms used below and not otherwise defined have the meaning given to them in the ISDA Master Agreement.

55. ISDA has published a User's Guide for each form of the ISDA Master Agreement. See *Waterfall IIC* at [28]:

> *"These contain explanations for, and guidance on the operation of, much of the content of the relevant ISDA Master Agreements, and are, in my view, both an admissible and useful tool in the interpretation of the agreements."*

56. The ISDA Master Agreements are designed to be utilised by a variety of different parties, ranging from financial institutions and banks to non-financial corporates and public bodies, in relation to a huge range of different transactions, from straightforward standard derivatives (such as interest rate or currency swaps) to complex and bespoke transactions. In this regard, in *Lehman Brothers Finance SA v SAL Oppenheim JR & CIE. KGAA* [2014] EWHC 2627 Burton J noted (at [25(iii)]) that:

> *"the ISDA Master Agreement is intended to be normative, and to apply in as many situations and with as much straightforward application as possible."*

57. This affects the Court's approach to interpretation. Although of course the well-known principles of contractual interpretation summarised by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [10] – [13] set out the invariable objective of ascertaining "*the objective meaning of the language which the parties have chosen to express their agreement*" and what was described as the "*iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated*", in the context of a standard form developed by reference to, and to meet the needs of, disparate users in a great variety of circumstances, the process must, in seeking to achieve that objective, ascribe even more than usual deference to the words used, and take as the context not the specific position as between the parties, but its anticipated use by such a variety of intended users in such a variety of circumstances.

58. I summarised my view of the position as follows in *Re Lehman Brothers International (Europe) (Waterfall IIC)* [2017] Bus LR 1475 at [48]:

> *"In the context of the ISDA Master Agreements, and having regard to their intended and actual use as standard agreements by parties with such different characteristics in a multiplicity of*

transactions in a plethora of circumstances, the following principles are also relevant:

(1) It is "axiomatic" that the ISDA Master Agreements should, "as far as possible be interpreted in a way that achieves the objectives of clarity, certainty and predictability, so that the very large number of parties using it know where they stand": Lomas v JFB Firth Rixson [2011] 2 BCLC 120 , para 53, per Briggs J.

(2) Although the relevant background, so far as common to transactions of such a varied nature and reasonably expected to be common knowledge amongst those using the ISDA Master Agreements, is to be taken into account, a standard form is not context-specific and evidence of the particular factual background or matrix has a much more limited, if any, part to play: see AIB Group (UK) Ltd v Martin [2002] 1 WLR 94.

(3) More than ever, the focus is ultimately on the words used, which should be taken to have been selected after considerable thought and with the benefit of the input and continuing review of users of the standard forms and of knowledge of the market: see In re Lehman Bros International (Europe) (No 3) [2014] 2 BCLC 451, paras 53, 88.

(4) The drafting of the ISDA Master Agreements is aimed at ensuring, among other things, that they are sufficiently flexible to operate among a range of users in an infinitely variable combination of different circumstances: Anthracite Rated Investments (Jersey) Limited v Lehman Bros Finance SA [2011] 2 Lloyd's Rep 538 , para 115, per Briggs J: particular care is necessary not to adopt a restrictive or narrow construction which might make the form inflexible and inappropriate for parties who might commonly be expected to use it.

(5)That drafting is also aimed, to adopt what was said in an expert report submitted in a recent case (Lehman Bros Holdings Inc v Intel Corpn SDNY (unreported) 16 September 2015, "the Intel case") in the United States Bankruptcy Court for the Southern District of New York by one of the principal draftsmen of the 1992 ISDA Master Agreement (Professor Jeffrey Bruce Golden), at "mitigating the risk of fact-specific disputes and the attendant risk of protracted litigation" by providing for the parties to have considerable latitude in the exercise of contractual rights subject to "general terms of reasonableness and good faith"."

Architecture of the ISDA Master Agreement

59. The architecture of the ISDA Master Agreements is described in detail in the judgment of Longmore LJ in *Lomas v. JFB Firth Rixson* [2012] 1 CLC 713 at [12] and in the first instance judgment of Briggs J (at [9] – [27]).

60. The basic framework is as follows:

(1) The ISDA Master Agreements provide contractually agreed standard terms and conditions which are designed to form part, but not the whole, of the terms of any particular transaction. Their purpose is to set out provisions governing the parties' relationship that are not transaction-specific.

(2) A particular transaction is generally governed by the terms of a Confirmation, together with the ISDA Master Agreements and any Schedule appended to the ISDA Master Agreements. The ISDA Master Agreements and all Confirmations form a single agreement between the parties, albeit one which may govern one or more transactions. Inconsistencies are resolved by affording priority first to the Confirmation, secondly to the Schedule and lastly to the ISDA Master Agreement itself.

(3) The ISDA Master Agreements envisage that certain provisions will only become operative if the parties make an election in the Schedule and the content of other provisions may depend on what is specified there. The Schedule also gives the parties the opportunity to add to or vary any of the terms contained in the standard form. As explained in Firth: Derivatives Law and Practice at [11.003], parties "*can, and often do, include additional provisions that they consider to be appropriate to their relationship*".

(4) Every transaction will be subject to a Confirmation. For example, in relation to interest rate swaps, each Confirmation will identify a series of dates upon which the parties are or may be obliged to make payments to each other and will contain the formulae necessary to identify the amounts to be paid. Any fixed rate payable will be specified. Any floating rate will generally be identified by reference to a particular market formula, such as three months sterling LIBOR or, now, SOFR.

(5) The basic payment obligation of the parties is contained in Section 2(a)(i) of the ISDA Master Agreements, which requires each party to make the payments or delivery specified in each Confirmation. That payment obligation is subject to the conditions precedent specified in Section 2(a)(iii), which include that no Event of Default or Potential Event of Default has occurred "*and is continuing*" and that no Early Termination Date has occurred or been effectively designated.

(6) Under Section 6(a) of the ISDA Master Agreements, if an Event of Default with respect to a party (the "Defaulting Party") has occurred "*and is continuing*", the other party (the "Non-defaulting Party") may (but is not required to) designate an "Early Termination Date" in respect of all outstanding transactions. Where "Automatic Early Termination" is specified in a Schedule, an Early Termination Date will occur immediately on the occurrence of certain specified Events of Default.

(7) Various Events of Default are defined in Section 5 of the ISDA Master Agreements. They include a failure to make, when due, any payment required under Section 2(a)(i) (Section 5(a)) and certain "Bankruptcy Events" (at Section 5(a)(vii)), including where a party seeks or becomes subject to the appointment of an administrator (Section 5(a)(vii)(4)) or "*makes a general assignment arrangement or composition with or for the benefit of its creditors*" (Section 5(a)(vii)(3)).

The presently relevant provisions

61. For present purposes, the most important provisions of the ISDA Master Agreements are Sections 2, 5 and 6.

62. Section 2 contains the general obligations of the parties, including that each party will make payment or delivery in accordance with the terms of the "confirmation" in respect of the relevant transaction (see Section 2(a)(i)). Payment obligations are subject to the conditions precedent specified in Section 2(a)(iii), including that no Event of Default or Potential Event of Default has occurred and is continuing and that no Early Termination Date has occurred or been effectively designated.

63. The commercial purpose of Section 2(a)(iii) was explained by Gloster J in *Pioneer Freight Futures Co Ltd v TMT Asia Ltd* [2011] 1 CLC 885 at [69]-[70]:

> *"Commercial purpose of Section 2(a)(iii)*
>
> *… in my judgment it is obvious that the commercial function or purpose of the condition precedent to payment as set out in Section 2(a)(iii) is to mitigate counterparty credit risk during the currency of what may be numerous swap transactions under the umbrella of ISDA 92 and while they remain open. It ensures that a Non-defaulting Party does not have to pay a Defaulting Party, who may be of doubtful solvency, in circumstances where, under ongoing open swap transactions, a Defaulting Party may subsequently owe sums to the Non-defaulting Party.*
>
> *In other words, it prevents any increase in credit risk that might occur if actual payments were made. Its effect is to substitute an accounting procedure whereby debits and credits build up or accrue in an account between the parties, but suspending the obligation of the Non-defaulting Party to pay any amounts which it may for the time being owe."*

64. The same analysis was accepted by the Court of Appeal in *Lomas v Firth Rixson Inc* [2012] 1 CLC 713 at [92]:

> *"… the purpose of Section 2(a)(iii) is to protect the Non-defaulting Party from the additional credit risk involved in performing its own obligations whilst the defaulting counterparty remains unable to meet its own."*

65. Section 5 identifies a number of Events of Default and Termination Events. For present purposes, only the former are relevant. The occurrence of an Event of Default gives rise to the possibility of a suspension of payment obligations under Section 2(a)(iii) (see above), and also gives rise to the possibility of early termination under Section 6 (see below).

66. So far as material, Section 5(a) provides as follows (with bold headings as in the original):

> *"**Events of Default**. The occurrence at any time with respect to a party or, if applicable, any Credit Support Provider of such party or any Specified Entity of such party of any of the following events constitutes an event of default (an "Event of Default") with respect to such party:—*
>
> *(i) **Failure to Pay or Deliver.** Failure by the party to make, when due, any payment under this Agreement or delivery under Section 2(a)(i) or 2(e) required to be made by it if such failure is not remedied on or before the third Local Business Day after notice of such failure is given to the party …*
>
> *(vii) **Bankruptcy**. The party, any Credit Support Provider of such party or any applicable Specified Entity of such party:—*
>
> > *(1) is dissolved (other than pursuant to a consolidation, amalgamation or merger);*
> >
> > *(2) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due;*
> >
> > *(3) makes a general assignment, arrangement or composition with or for the benefit of its creditors;*
> >
> > *(4) institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation, and, in the case of any such proceeding or petition instituted or presented against it, such proceeding or petition (A) results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation or (B) is not dismissed, discharged, stayed or restrained in each case within 30 days of the institution or presentation thereof;*

> *(5) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger);*
>
> *(6) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets;*
>
> *(7) has a secured party take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within 30 days thereafter;*
>
> *(8) causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in clauses (1) to (7) (inclusive); or*
>
> *(9) takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts …"*

67. It can be seen that each of these paragraphs relates to an event or circumstance that would materially alter the balance of risk between the parties, and in particular would be likely to increase the credit risk for a Non-defaulting party: see paragraphs [63] and [64] above.

68. Section 6 provides for early termination after a continuing Event of Default or a Termination Event. Under Section 6(a), if an Event of Default with respect to a party (the "Defaulting party") has occurred and is continuing, the other party (the "Non-defaulting Party") may (but is not required to) designate an "Early Termination Date" in respect of all outstanding transactions. Section 6(e) (headed "Payments on Early Termination") provides for how the sum payable by one party to the other following early termination is to be calculated.

69. Where "Automatic Early Termination" is specified in a schedule, an Early Termination Date will occur immediately on the occurrence of certain specified Events of Default. Automatic Early Termination was not specified in the present case.

70. These provisions constitute contractual methods of calculating close-out positions on the termination of a derivative transaction or series of transactions: see *Anthracite Rated Investments (Jersey) Ltd v Lehman Bros Finance SA* [2011] EWHC 1822 (Ch) at [116] per Briggs J (as he then was). Where an Early Termination Date occurs, all transactions entered into pursuant to the ISDA Master Agreement are terminated. The Non-defaulting Parties is entitled to determine the amount to be paid on early termination, in accordance with Sections 6(d) and (e). The broad effect of the provisions is to procure, as far as possible but in an accelerated form, the same economic outcome for

the parties as if there had been neither an Event of Default nor an early termination: see *Lomas v JFB Firth Rixson Inc* [2010] EWHC 3372 (Ch) at [18] per Briggs J. Therefore, the amount calculated as due on early termination may be payable by either party, depending on which is "in the money"[19]. Unlike other Non-defaulting Parties, Firth Rixson elected not to rely on those provisions.

Concept of a "continuing" Event of Default

71. The circumstances in which Events of Default are "*continuing*", or should be treated as "*continuing*", are not expressly defined or addressed by the ISDA Master Agreements. Further, the present case appears to be the first occasion (in any jurisdiction, so far as the Administrators are aware) in which detailed consideration of the meaning of the word "*continuing*" in the context of the ISDA Master Agreement has been required for the disposition of the case.

72. The Administrators contend that, in respect of such Events of Default as have occurred, from the making of the Administration Order and thereafter, no Event of Default or Potential Event of Default will be "*continuing*" with respect to LBIE under the ISDA Master Agreements, at least once the "*Relevant Steps*" as defined[20] in the 20th Witness Statement of Mr Russell Downs have been taken and it is returned to its newly appointed directors.

73. The Administrators submit that for the purposes of Sections 5(a)(vii)(4) and (6), the relevant question is whether the Administrators' appointments are continuing; and it is not relevant whether a historical administration has any residual continuing effect on creditors' rights. Their argument is further elaborated in paragraphs [112] to [115] below.

74. As indicated in paragraph [10] above, Firth Rixson contend that the Administrators' argument is incorrect. They contend that the test is whether the Event of Default is continuing to have an effect on the relationship between the parties. They emphasise that LBIE has been a distributing administration for over ten years, and that effectively the entirety of LBIE's assets have been realised and distributed to creditors pursuant to a statutory regime involving permanent alterations of creditors' rights. As part of that process, the Scheme has been sanctioned and the Chapter 15 Order and Permanent Injunction have been obtained, in each case imposing further permanent alterations to creditors' rights, including the rights of creditors in respect of derivative transactions under ISDA Master Agreements.

75. Firth Rixson submit that it was not the intended meaning or effect of the ISDA Master Agreements that such effects of more than ten years of continuing default could be

[19] This assumes that the so-called "Second Method" is selected under the 1992 Form. Under the "First Method" contemplated by the 1992 Form (which is almost never selected in practice), the Non-defaulting Party could avoid making any payment to the Defaulting Party even if the Defaulting Party was "in the money". In the present case, the Second Method was selected by the parties under the 1992 Form. The concept of the "First Method" does not exist under the 2002 Form; the 2002 Form automatically proceeds on the basis that a payment is made to whichever party is "in the money" (that party being, in the present case, LBIE).

[20] The *"Relevant Steps"* as described by Mr Downs (in his 20th Witness Statement) are (a) the discharge of LBIE's administration and the termination of the Administration following an application pursuant to paragraph 79 of Schedule B1 to the 1986 Act; (b) the publication by the Administrators and/or LBIE of a notice stating that LBIE has a surplus of assets over liabilities and is able to pay its debts as they become due; and (c) any further steps directed by the Court.

"cured" merely by the taking of certain largely formal steps at the close of a distributing administration.

76. They submit that the correct position is that Events of Default under Sections 5(a)(vii)(3), (4), (6) and (8) of the ISDA Master Agreements were "*continuing*" as at the date of the Application and will remain "*continuing*" notwithstanding termination of the Administrators' appointment and the taking of the "Relevant Steps". Firth Rixson's argument is further elaborated below.

Administrators' general submissions as to the meaning of "continuing"

77. The Administrators made general submissions as to the meaning to be attributed to the word "*continuing*" in the ISDA Master Agreements. They elaborated their general submissions as follows:

(1) The word "*continuing*" connotes an ongoing process or subsisting state of affairs. Thus, in order to decide whether an Event of Default is continuing, it is necessary to identify the process or state of affairs which constitutes the Event of Default, and to decide whether that process or state of affairs remains in existence.

(2) To the extent possible, the relevant process or state of affairs should be capable of being identified simply by reading the plain language of the clause. This is consistent with the requirement that the ISDA Master Agreement should be construed, insofar as possible, in a way that is reasonably predictable, objective and certain. For example, under Section 5(a)(vii)(4), the relevant process or state of affairs is a "proceeding" under "insolvency law". The Administrators contend that it follows that, when the insolvency proceeding comes to an end, this Event of Default necessarily ceases to continue. Likewise, under Section 5(a)(vii)(6), the relevant process or state of affairs is the "appointment of an administrator". They contend that it follows that, when the appointment of an administrator is terminated, this Event of Default necessarily ceases to continue.

(3) The Administrators acknowledge that, in the case of certain Events of Default, it may be less straightforward to identify the relevant process or state of affairs which must exist for the Event of Default to be "*continuing*". That is particularly true in relation to Section 5(a)(vii)(3), which provides for an Event of Default where a party makes a general assignment, composition or arrangement with or for the benefit of its creditors: see below. However, they submitted that in principle, the legal analysis is the same for each Event of Default: the Court must seek to identify the relevant process or state of affairs which constitutes the Event of Default and ask whether that process or state of affairs remains in existence.

(4) There is no further or other inquiry which is required in order to decide whether an Event of Default is continuing. In particular, the Court is not required to consider whether any permanent legal effects have been triggered by the relevant Event of Default. Section 2(a)(iii)(1) does not refer to the continuing legal effects of an Event of Default: rather, it refers to the continuation of the Event of Default itself. As Mr Bayfield put it in his opening submissions [Day 1/116] "*…it's the event of default which has to be continuing, not its effects, for*

section 2(a)(iii) to continue to suspend the payment obligation of the Non-defaulting Party". The Administrators submitted that this is particularly true in circumstances where the (actual or purported) permanent legal effect is completely unrelated to the position of the Non-defaulting Parties.

(5) The Administrators reasoned that if an Event of Default "continued" for as long as the relevant event had any continuing legal effects, of any description and in respect of any matter, then the ISDA Master Agreement would become unworkable; and that an inquiry as to whether any given Event of Default is "*continuing*" would become open-ended, wide-ranging and uncertain, which would be contrary to the principles in accordance with which the ISDA Master Agreement should be construed.

78. The Administrators advanced the following by way of illustration:

(1) Suppose that one party fails to make a payment under the ISDA Master Agreement, resulting in an Event of Default under Section 5(a)(i). Such an Event of Default should be capable of being cured (and should no longer be "*continuing*") if the Defaulting Party subsequently makes the relevant payment in full, together with any interest thereon.

(2) The occurrence of the Event of Default might trigger any number of different legal effects, some of which might be permanent. For example, the Event of Default under the ISDA Master Agreement could trigger a cross-default under a separate loan facility with a third party. The third-party lender might waive the cross-default, but only on the condition that the interest rate on the loan is increased by 2%. Such an increase could be regarded as a permanent legal effect of the original Event of Default under the ISDA Master Agreement.

(3) It would be very surprising (as a matter of commercial common sense) if, as a result of a permanent legal effect of the type described above, the original Event of Default under the ISDA Master Agreement continued forever. If the Defaulting Party pays the sums owing to the Non-defaulting Party (together with interest thereon), this should be the end of the matter. The existence of a permanent legal effect arising out of the Event of Default should not be relevant to the analysis.

79. The Administrators noted that this analysis also leaves open the argument (briefly discussed by Cooke J (at [1225] to [1226]) in *Deutsche Bank v Sebastian Holdings* [2013] EWHC 3463 (Comm).) that a one-off event cannot qualify as an Event of Default because it is hard to see how it could be described as "*continuing*". In that case, Cooke J appeared to reject the argument that one-off breaches of contract which only continued for a limited period of time constituted Events of Default: and he cited the decision of Flaux J (as he then was) in *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656 (Comm.) at [58] as establishing that a Potential Event of Default must be "*continuing*" when the date that the obligation to pay fell due. (I return to this in further detail below.)

80. Further, the Administrators relied by analogy on authorities concerning contractual provisions providing for material breaches to be capable of being remedied as shedding (albeit indirect) light on what was meant by a "*continuing*" event or breach. In addition

to cases concerning the right to remedy a breach of a lease "*if it is capable of remedy*" under section 146 of the Law of Property Act 1925, they cited in the commercial context *FL Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, in which the House of Lords considered a provision contained in a supply contract which applied to material breaches which were capable of being "remedied". Lord Reid stated at 249-250 that a breach could be "remedied" even if certain past or future effects of the breach could not be put right:

> *"The question then is what is meant in this context by the word 'remedy.' It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right for the future. I think that the latter is the more natural meaning. The word is commonly used in connection with diseases or ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect or result of the disease before the cure took place and in general it can only be in a rare case that any remedy of something that has gone wrong in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all damage past and future can be put right would leave hardly any scope at all for this clause."*

81. Likewise, section 146 of the Law of Property Act 1925 empowers a lessee to "remedy" a breach of a lease "if it is capable of remedy" in order to prevent forfeiture. The authorities on section 146 emphasise that the concept of a remediable breach should be analysed in a practical (rather than technical) manner. For example, in *Akici v LR Butlin Ltd* [2006] 1 WLR 201 at [63]-[65], Neuberger LJ (as he then was) said:

> *"… it seems to me that the proper approach to the question of whether or not a breach is capable of remedy should be practical rather than technical. In a sense it could be said that any breach of covenant is, strictly speaking, incapable of remedy. Thus, where a lessee has covenanted to paint the exterior of demised premises every five years, his failure to paint during the fifth year is incapable of remedy, because painting in the sixth year is not the same as painting in the fifth year, an argument rejected in Hoffmann v Fineberg [1949] Ch 245, 253, cited with approval by this court in Expert Clothing Service and Sales Ltd v Hillgate House Ltd [1986] Ch 340, 351c-d. Equally it might be said that where a covenant to use premises only for residential purpose is breached by use as a doctor's consulting room, there is an irremediable breach because even stopping the use will not, as it were, result in the premises having been unused as a doctor's consulting room during the period of breach. Such arguments, as I see it, are unrealistically technical.*
>
> *In principle I would have thought that the great majority of breaches of covenant should be capable of remedy …"*

82. The Administrators acknowledge that these authorities are not directly applicable to the ISDA Master Agreements. However, they submit that by analogy they suggest that the Court should not adopt an unduly technical approach when deciding whether an Event of Default is continuing and should not undertake a wide-ranging enquiry into the legal effects of an Event of Default in order to decide whether it is continuing.

83. In conclusion on this aspect of their case, the Administrators urged me to bear in mind in this context also the commercial purpose of Section 2(a)(iii) as explained by Gloster J in the *Pioneer Freight* case (see paragraph [63] above), namely, to mitigate counterparty risk; and to adopt, as a useful test of whether an Event of Default is "*continuing*", whether there is any ongoing credit risk to the Non-defaulting Party.

Firth Rixson's general submissions as to the meaning of "continuing"

84. Firth Rixson's emphasis on the words used and the necessity of interpreting them to secure the draftsmen's objective of clarity, certainty and predictability for users of ISDA Master Agreements as a whole was elaborated to the following effect:

(1) A wide variety of users in a huge range of different transactions and circumstances need to be able to know where they stand by reading the words of the provision without regard to particular commercial considerations or any specific factual matrix: the objective of the draftsmen, which should be realized, was to use language applicable and having the same meaning across that range, without regard to factors which will inevitably differ from case to case.

(2) For the same reason, apparent unfairness of outcome in the particular case should not disturb the process of interpreting the words used: the process should be rigorously textual, and an open-textured approach is likely to smudge the bright lines intended by the draftsmen and undermine certainty, clarity and predictability across the range. Thus, for example, the court should not read down a provision by reference to its court-identified purpose if the language was clear; as Mr Dicker put it by reference to the purpose of protection against credit risk "*it doesn't necessarily follow that if there isn't a credit risk in a particular case, the provision doesn't operate.*"

(3) Firth Rixson accepted that the price of this was that it could lead in some cases, and perhaps even this case, to what Mr Dicker described as a result "*that one might not want if one were simply deciding the case on its own.*"

(4) Further, this is not a case of enforced "one size fits all", and if individual users of the ISDA Master Agreement wish to depart from any of those bright lines, or to limit the scope of their application, or to replace them with arbitrary and vague concepts, it is open to them to do so by negotiating and agreeing bespoke terms. LBIE and Firth Rixson chose not to do so and entered into the Transactions on ISDA's standard terms.

(5) As such, LBIE can have no quarrel over the fact that it is bound by the bright lines and red flags that it agreed to. As noted by Judge Chapman in the New

York Bankruptcy Court in *Lehman Brothers Holding Inc v Intel Corp ibid*. at p.22:

> *"to the extent that they have adopted ISDA standard forms, it is reasonable to infer that the parties have no quarrel with ISDA's intention that "transactions that use ISDA standard form documents…are enforced so as to promote legal certainty and hence, market stability".*

85. Firth Rixson accepted that the circumstances in which it could be said of an Event of Default that it was, or should be treated as, "*continuing*" were not defined or even expressly addressed by the ISDA Master Agreements. Their position was, however, that the requirement was satisfied wherever there had been an Event of Default which continued to have effect. They submitted that the question of whether an Event of Default is "*continuing*" should be answered by reference to the particular Event of Default in question and the terms in which the ISDA draftsman has chosen to frame it. More specifically, it is necessary to construe the relevant Event of Default and identify the event, process or state of affairs to which it responds, before determining whether those things have been brought to an end.

86. Mr Dicker emphasised in oral argument that it is irrelevant whether the continuing effect was to the disadvantage of the Non-defaulting Party; it is not even relevant to consider whether and in what way the particular Non-defaulting party was affected. When I asked whether he would accept that in this case Firth Rixson were not, for example, affected any longer by the Scheme, his forthright answer was that "*the answer to that may well be yes, but it's also irrelevant. Whether an event of default occurs or not depends on the definition of the event of default. Whether it's continuing or not depends on whether the state of affairs, <u>the effects of the event of default,</u> are continuing*." [My emphasis.]

87. In their written submissions, Firth Rixson also emphasised the following three points to be kept in mind:

    (1) First, the concept of an Event of Default "*continuing*" is also used by the draftsman in the context of a Non-defaulting Party's right to terminate outstanding transactions under Section 6(a) following an Event of Default. Specifically, that right can be exercised "*if at any time an Event of Default with respect to a party…**has occurred and is then continuing***" (emphasis as added in Firth Rixson's submissions). Accordingly, any conclusion as to the circumstances in which an "Event of Default" will be "*continuing*" will have an impact on the right of the Non-defaulting Party to terminate under Section 6(a), as well as on the suspension of payments under Section 2(a)(iii). This has obvious implications for the assessment of the commercial consequences of any particular construction and also means that any judgment on this issue will therefore have yet still wider ramifications.

    (2) Second, certain Events of Default can be brought to an end more easily than others[21]. For example, the authorities indicate that an Event of Default arising

[21] See <u>Firth: Derivatives Law and Practice</u> at 11.013: "*With some of the Events of Default…it is far from clear what has to be done to [satisfy the condition precedent under Section 2(a)(iii)]."*

under Section 5(a)(i) due to a failure to make a payment when due can be remedied by late payment by the Defaulting Party: see *Barclays Bank Plc v Devonshire Trust* [2011] OJ No. 3988 per Newbould J at [259][22]. By contrast, Events of Default arising under Section 5(a)(iv) due to a representation which is proved "*to have been incorrect or misleading in any material respect when made*", or under Section 5(a)(iii) because of the termination or repudiation of a Credit Support Document, may not be capable of being remedied by steps taken by the Defaulting Party alone[23].

(3) Third, relatedly, as a matter of principle, an Event of Default may cease to be "*continuing*" on account of various different kinds of steps or actions. For example, it may cease to be "*continuing*" because it has been "cured" or "remedied" in the sense of having been "undone" by the Defaulting Party. But it may also cease to be "*continuing*" because the event of default has been waived by the Non-defaulting Party. Or (potentially) because the Non-defaulting Party is estopped from maintaining that the Event of Default is continuing. It cannot necessarily be assumed that the draftsman envisaged that all of the Events of Default would be capable of being easily "cured" or "remedied" by steps taken by the Defaulting Party.

88. Further, although Firth Rixson accepted that a limited parallel can be drawn with section 146 LPA 1925 insofar as case law in that context may support their case that in approaching the question of "remediability" it is necessary to identify the effects of a particular breach, and ask whether those effects have been brought to an end, or are capable of being brought to an end, they emphasised that the draftsmen of the ISDA Master Agreement did not use the language of "*remedy*" in Section 2(a)(iii)[24] . They used the concept of an Event of Default "*continuing*" and Firth Rixson submitted that the two concepts were not identical.

(4) Application of general approach to the specific alleged Events of Default

89. The parties then explained the application of their respective approaches to the alleged Events of Default relied on by Firth Rixson, and in particular to the questions whether (i) the event was properly characterised as an Event of Default for the purposes of one or more sub-sub-sections of Section 5(a) and (ii) if so, the Event of Default would be "*continuing*" after the termination of the Administrators' appointment and the return of control of LBIE to its directors. The Administrators considered in chronological sequence each of the six events identified. Firth Rixson focused predominantly on the LBIE Scheme and the Chapter 15 Order as (in their submission) clearly being (a) Events of Default which were (b) continuing. I follow the course adopted by the Administrators, for the sake of comprehensiveness.

Section 5(a)(i): failure to pay

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[22] Affirmed by the Ontario Court of Appeal: [2013] OJ No.3691.

[23] Accordingly, some parties to ISDA Master Agreements amend Section 5(a)(iv) to permit a cure period following notice applicable to a misrepresentation which is capable of cure; see Henderson on Derivatives, ibid. at paragraph [18.16].

[24] The concept of "remedying" a breach is, however, used elsewhere in the ISDA Master Agreement, such as in Sections 5(a)(i) and 5(a)(ii).

90. As regards Section 5(a)(i) (quoted in a footnote to paragraph [25] above), it is common ground that:

    (1) LBIE's failure post-administration to make two payments due on 22 September 2008 and 22 December 2008 under the Sterling Swap did (in each case) constitute an Event of Default.

    (2) No Event of Default occurred under Section 5(1)(a) in respect of the Dollar Swap, since LBIE had never failed to make payments under that Swap.

91. The Administrators submitted that the Events of Default under Section 5(a)(i) in respect of the Sterling Swap are no longer continuing, for the following reasons:

    (1) An Event of Default arising out of a failure to pay under Section 5(a)(i) is cured (and thereby, they contended, ceases to be "*continuing*") if the relevant payment obligation is discharged in full, together with any interest for late payment.

    (2) On 4 December 2009, the Administrators gave notice of their intention to make a distribution to unsecured creditors under rule 2.95 of the Insolvency Rules 1986 (now rule 14.29 of the Insolvency (England and Wales) Rules 2016) following an order of the High Court made on 2 December 2009.

    (3) As a result of that notice, the mandatory regime for insolvency set-off under rule 2.85 of the Insolvency Rules 1986 (now rule 14.24 of the Insolvency (England and Wales) Rules 2016) came into effect. For the purposes of this Application, the Insolvency (England and Wales) Rules 2016 are applicable: see *Re Nortel Networks UK Ltd* [2018] Bus LR 206 at [5]-[6] per Snowden J (as he then was).

    (4) So far as material, rule 14.24 provides that:

    > *"(1) This rule applies in an administration where the administrator intends to make a distribution and has delivered a notice under rule 14.29.*
    >
    > *(2) An account must be taken as at the date of the notice of what is due from the company and a creditor to each other in respect of their mutual dealings and the sums due from the one must be set off against the sums due from the other."*

    (5) As at 4 December 2009, FRAC was a net debtor of LBIE in the sum of at least £1,024,669.35. (This amount gives credit for the unpaid sums owing by LBIE under the Sterling Swap.) This is because, by 4 December 2009, there had already been three payment dates on which FRAC was required to make a net payment under the Sterling Swap.

    (6) The mandatory set-off between LBIE and FRAC operated to discharge the cross-claims owing by the parties and replace them with a single claim (by LBIE against FRAC) for the net balance: see *Stein v Blake* [1996] AC 243 at 255 per Lord Hoffmann:

> *"In my judgment the conclusion must be that the original chose in action ceases to exist and is replaced by a claim to a net balance. If the set-off is mandatory and self-executing and results, as of the bankruptcy date, in only a net balance being owing, I find it impossible to understand how the cross-claims can, as choses in action, each continue to exist."*

(7) By reason of the discharge of the amounts owing by LBIE to FRAC under the Sterling Swap, the Event of Default under Section 5(a)(i) ceased to be continuing. This is because the amounts owing by LBIE were, in effect, repaid by operation of insolvency set-off.

92. It appears also to be common ground that, as a result of insolvency set-off (which took place on or about 4 December 2009), LBIE's liability to FRAC for the unpaid amounts under the Sterling Swap was reduced or discharged up to the value of the debt owing by FRAC to LBIE. There has, however, been a dispute as to the valuation of that debt. Firth Rixson advanced the contention that this debt should be treated as a contingent debt with a nil value (such that no part of the amount owing by LBIE has in fact been discharged by insolvency set-off). Their reasoning in their Position Paper was that the debt owing by FRAC will never become payable, since the other Events of Default relied upon by FRAC will continue forever (resulting in the permanent suspension of FRAC's payment obligations under Section 2(a)(iii)(1)). That reasoning is dependent, therefore, on Firth Rixson succeeding on one or more of their other grounds. In their skeleton argument, Firth Rixson acknowledged this and submitted that it was thus unnecessary for the Court to determine separately whether any Event of Default under Section 5(a)(i) is continuing.

Section 5(a)(vii)

93. The remaining alleged Events of Defaults relied on by Firth Rixson as continuing concern Section 5(a)(vii), which is headed '*Bankruptcy*' and is divided into 9 paragraphs. The relevant paragraphs are (2), (3), (4), (6) and (8). I address these, as did the Administrators, by reference to the various events relied on in the chronological sequence.

Section 5(a)(vii)(2): insolvency

94. By Section 5(a)(vii)(2) of the ISDA Master Agreement, the following event is an Event of Default:

> *"The party, any Credit Support Provider of such party or any applicable Specified Entity of such party ... becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due."*

95. An Event of Default under Section 5(a)(vii)(2) may arise (where the party has no Credit Support Provider and there is no applicable Specified Entity) in four circumstances: (i) where a party has become insolvent; (ii) where a party is unable to pay its debts; (iii) where a party fails to pay its debts as they become due; and (iv) where a party admits in writing its inability generally to pay its debts as they become due.

96. It is common ground that any Event of Default under Section 5(a)(vii)(2), insofar as it relates to LBIE's solvency or its ability to pay its debts as they become due, has ceased to be "*continuing*". The Respondents acknowledged in their position paper at paragraph 23(3) that:

> *"The Respondents agree that Events of Default which occurred by virtue of LBIE "becom[ing] insolvent…unable to pay its debts or fail[ing]…to pay its debts as they become due" cannot be regarded as "continuing" if LBIE is no longer insolvent (on a cash flow and balance sheet basis), is paying its debts as they fall due, and provision has been made for the payment of all of its creditors that are not presently due. In those circumstances, the relevant state of affairs to which this Event of Default responds no longer exist."*

97. However, as regards the final part of Section 5(a)(vii)(2), which applies in circumstances where a party "*admits in writing its inability generally to pay its debts as they become due*", the Respondents have asserted that, in order to cure an Event of Default arising out of a written admission of inability to pay debts as they fall due, it is necessary for LBIE to withdraw or correct that admission. In his 20th Witness Statement, made in support of this application, Mr Downs has stated that:

> *"If and to the extent that an admission in writing is capable of continuing, the Administrators would propose to cure this Event of Default by publishing, or causing LBIE to publish, a contrary notice to the effect that LBIE has a surplus of assets over liabilities and is now able to pay its debts as they fall due. This new notice in writing would supersede any previous admission in writing."*

98. The Respondents accept that the steps proposed by Mr Downs ("the Notice Publication") would cure any Event of Default arising out of a prior written admission of LBIE's inability to pay its debts as they fall due. However, there remains a disagreement as to whether the Notice Publication is necessary, which I am asked to determine.

99. As to this disagreement:

    (1) The Administrators, though content to make the Notice Publication, if so directed, submitted that it is not necessary. They reason that an Event of Default based on insolvency could not be said to be "*continuing*" once it was clear that LBIE had enough assets to cover all its liabilities and was thus a solvent entity[25], and that any written admission (a) was a "one-off" event and not one which could be said to be "*continuing*" and (b) had in effect been nullified by the present fact of solvency and the Administrators' publication of the Chancellor's conclusions in that regard.

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[25] The conclusions reached by Sir Geoffrey Vos C have already been reported by the Administrators in their most recent progress report dated 12 October 2020, which refers to the Chancellor's conclusion that "*LBIE is now clearly solvent*".

(2) Against that, Firth Rixson submitted that the state of affairs constituting the Event of Default included LBIE's admission in writing of its inability to pay its debts as they became due and would continue unless and until formal withdrawal of that admission (a step included as one of the Relevant Steps).

100. This disagreement thus related more broadly to the issue as to whether an event is "one-off" or "*continuing*", which as regards Section 5(a)(vii)(2) can, Firth Rixson accept, be rendered moot by making the Notice Publication, but has a more intractable potential effect in the context of the Scheme and the Chapter 15 order (see below).

101. In my judgment, an admission in writing of a party's inability generally to pay its debts as they become due is not in the nature of a one-off event: the notice speaks to a continuing inability in that regard unless and until it is corrected. I would tend to accept that the Administrators' reports, and surrounding publicity in the case of the Lehman administrations, have almost certainly been sufficient to ensure that no creditor would any longer have any regard to the original notice. In other words, as a practical matter, the general perception would already be that the admission has long since been superseded.

102. Nevertheless, since the issue is agreed to be entirely mooted if, as Mr Downs has proposed, and as I consider the Administrators would be justified in doing, the Administrators publish, or cause LBIE to publish, a notice to the effect that LBIE has a surplus of assets over liabilities and is now able to pay its debts as they fall due, I propose to include a direction that that be done.

103. I should also note in passing that the Administrators also submitted that in circumstances where the Event of Default under Section 5(a)(vii)(2) had ceased to be continuing, Firth Rixson had impliedly accepted that they were no longer exposed to any material credit risk in respect of LBIE, and any contractual rationale for the continued suspension of Firth Rixson's payment obligations under Section 2(a)(iii) has effectively ceased to exist accordingly. They added that this would be true even if any future payments had been due under the Swaps (which in fact none will be). That argument obviously bears upon whether it is an overarching premise that a party no longer subject to credit risk cannot rely on the suspensory condition; or put another way that in such circumstances the period of suspension lapses once the credit risk which justified it is removed: and see paragraphs [63- 64] and [83] above. I discuss this further below.

Sections 5(a)(vii)(4) and (6): Administration

104. Section 5(a)(vii)(4) of the ISDA Master Agreements[26] provides that the occurrence of the following event constitutes an Event of Default:

> *"The party…(4) institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights…"*

[26] The drafting of Section 5(a)(vii)(4) is different in the 1992-form and the 2002-form ISDA Master Agreement. However, they are materially the same for present purposes.

105. Section 5(a)(vii)(6) of the ISDA Master Agreements provides that the occurrence of the following event constitutes an Event of Default:

> *"The party…(6) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets".*

106. It is common ground that Events of Default occurred in respect of LBIE under Sections 5(a)(vii)(4) and (6) of the Master Agreements by reason of LBIE's entry into administration on 15 September 2008 and the appointment of administrators on the same date. It is also common ground that those Events of Default are "*continuing*" as at the date of this application.

107. The disputed issue is whether (as the Administrators contend) both these Events of Default will cease to be "*continuing*" if and when their appointments are terminated under paragraph 79 of Schedule B1 to the Insolvency Act 1986.

108. The Administrators contend that as regards Section 5(a)(vii)(4), the relevant process or state of affairs constituting the "proceeding" under "insolvency law" was the appointment of Administrators, which will no longer be "*continuing*" when their appointments are terminated, and that similarly, since LBIE will no longer be seeking or subject to the appointment of an administrator, provisional liquidator etc., Section 5(a)(vii)(6) will have no continuing application either.

109. Firth Rixson, on the other hand, drew a distinction between (a) a non-distributing administration, in which case they accepted that the Event of Default under these sub-sections would cease (that is, no longer be "*continuing*") following termination of the administrators' appointment and (b) a distributing administration, such as LBIE's is now, in which case they submitted that the statutory regime for the collection and *pari passu* distribution of assets is substantially equivalent to that in a winding-up and involves an alteration of creditors' rights, the effects of which will not cease when the administrators' appointment comes to an end: the rights of creditors are, irrevocably altered, and that the effects are "*continuing*" accordingly.

110. They submitted that the position is particularly stark on the facts of this case, where LBIE's "rehabilitation" (such as it is) has only been possible through processes (the administration regime, the Scheme, the Chapter 15 Order and the Spanish and French Exequaturs) which have triggered further Events of Default, where the effect of those regimes remains largely in place, where the taking of the "Relevant Steps" will continue to leave LBIE unrecognisable from the entity which entered into administration in 2008, and where the Scheme, the Chapter 15 Order and Permanent Injunction will be left firmly in place. They submitted that it would be remarkable if the Master Agreements operated so that such effects of more than ten years of continuing default could be "cured" merely by the taking of certain largely formal steps at the close of a distributing administration.

111. Firth Rixson gave the following examples of rights which would be and remain altered, thus making it "*impossible for parties to Master Agreements with LBIE to resume their relationship by reference to their rights and obligations as they were before the relevant proceedings were instituted*":

(1) Alterations to creditors' rights to receive payments in a foreign currency: see rule 2.86 IR 1986 (rule 14.21 IR 2016), *Re Lehman Brothers International (Europe)* [2017] UKSC 38 *per* Lord Neuberger at [105]-[107].

(2) Alterations to creditors' contractual rights to interest: see rule 2.88 IR 1986 (rule 14.23 IR 2016), *Lomas and Ors v Burlington and Ors* [2016] B.C.C. 239 per David Richards J at [149].

(3) Alterations to creditors' rights to allocate incoming payments to outstanding interest, before applying them in satisfaction of principal: *Burlington Loan Management Limited and Ors v Lomas and Ors* [2017] EWCA Civ 1452.

(4) The operation of insolvency set-off, requiring creditors to (among other things) discharge future and contingent payment obligations in advance of their contractual due date: see rule 2.85 IR 1986 (rule 14.24 IR 2016).

112. In response, the Administrators accepted that the process of a distributing administration was very similar to that of a liquidation and imported substantially the same statutory scheme for proving debts and distributions. The Administrators conceded that this would have a permanent impact or effect on the legal rights of creditors. But Mr Bayfield also noted that this could also be the case in a non-distributing administration, and he gave various examples to support his submission that the distinction between a non-distributing and a distributing administration which Firth Rixson needed to draw (since they did not argue that the latter would be a continuing Event of Default once terminated) was flawed, and beside the point.

113. Mr Bayfield submitted further that what was required by the definitions of Events of Default was not to identify the effects on creditors' rights, but more simply, to identify the process or state of affairs which constitutes the Event of Default and to determine whether that process or state of affairs remains in existence.

114. Adopting that test, Mr Bayfield submitted that the Court should ask itself whether the state of affairs which triggered the Events of Default under Section 5(a)(vii)(4) and (6) will continue to exist upon the termination of the Administrators' appointments; and that the answer to that question is "no", since the relevant conditions specified by Section 5(a)(vii)(4) and (6) will not be satisfied if there is no longer any insolvency "proceeding" and the Administrators are no longer "appointed".[27]

115. He added that this answer was also consistent with the commercial purpose of Section 2(a)(iii). Once the Administrators' appointments are terminated and LBIE is returned to its directors as a solvent going concern, any increased credit risk associated with LBIE's entry into administration will no longer exist and there will cease to be any commercial justification for a continued suspension of the Respondents' payment obligations: and see also paragraph [103] above.

116. The issue is thus as to whether in Section 2(a)(iii) of the ISDA Master Agreement the condition precedent that the relevant Event of Default must have "*occurred and [be] continuing*" is satisfied only by the continuation of the circumstances which gave rise

[27] The question whether (in addition to the appointment of Administrators) the Scheme and/or the Chapter 15 proceeding and orders and/or the Spanish and French exequaturs constituted Events of Default and, if so, whether they are *"continuing"* is considered in respect of each alleged "event" below.

to the Event of Default, or whether it suffices that, having occurred, its consequences continue to affect those concerned.

117. I accept that in many ways, the role of an administrator in a distributing administration is, as Firth Rixson put it, *"functionally equivalent to a liquidation"*. I accept also, that any distributions are made to creditors in respect of their provable claims pursuant to a mandatory statutory regime, and that, for example, under that regime creditors' rights may be different (for example as regards set-off). There are plainly functional similarities between the two processes[28], though the fact remains that a distributing administration may not be a terminal insolvency proceeding: the proof and distribution regime is not confined to bringing an end to the company, and the administrators can still seek to rescue the company as a going concern (if that was one of their objectives under paragraph 3(1) of Schedule B1 to the Insolvency Act 1986). In this case, that is indeed their objective, which Sir Geoffrey Vos C has confirmed that they are entitled and bound to pursue.

118. In any event, however, I accept Mr Bayfield's submissions on behalf of the Administrators on this issue. I agree that the description of Events of Default in Section 5(a)(vii) (under the heading *'Bankruptcy'*)[29] is of factual events or states of affairs (whether immediate or consequential), and does not involve any assessment of the effect of those events on the Non-defaulting Party. Further, in Section 2(a)(iii), what is to be determined is whether the relevant Event of Default *"has occurred and is continuing"* which, to my mind, reinforces the conclusion that the focus is on whether the relevant state of affairs continues in being, rather than on any effect on creditors' rights.

119. I agree with the Administrators that the test to be adopted is whether the identified event or state of affairs which constituted the Event of Default is continuing, rather than whether creditors' rights have been significantly and permanently altered or continue to be affected by the administration. I do not agree with Firth Rixson's submission that although a non-distributing administration would cease upon the termination of the administrators' appointments, the statutory regime applicable in a distributing administration for the collection and *pari passu* distribution of assets, and the permanent alteration of creditors' right it entails, means that the Event of Default can never be treated as having come to an end. When LBIE's administration became a distributing administration there was no additional Event of Default. What has to be

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[28] As was noted in the Administrators' skeleton argument, there is an unresolved issue as to whether a statutory trust, comparable to the statutory trust that arises in a liquidation (as explained by the House of Lords in *Ayerst (Inspector of Taxes) v C&K (Construction) Ltd* [1976] AC 167), arises in a distributing administration (essentially because the assets thereafter are to be distributed in accordance with the prescribed statutory scheme). I considered, but did not determine, this issue in *In re Lehman Bros (No. 9)* [2018] Bus LR 439 at [76]–[84]. Plainly there are differences between the two processes, including, in particular, the fact that a liquidation is a terminal process, whereas a distributing administration may not be so. However, the issue was not developed in argument in this case, and given my acceptance that whether or not an Event of Default is "continuing" is to be tested, not according to its effect on creditors' rights, but according to whether the event or state of affairs which comprised or triggered it is continuing, it does not require to be determined for its resolution.

[29] Though it is to be noted that Section 9(g) expressly states that *"The headings used in this Agreement are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Agreement"*.

determined is whether the Event of Default which was constituted by the original order for the appointment of Administrators is *"continuing"*.

120. In short, the focus is on the state of coming to be and continuing to be in administration; and, in my judgment, that state of affairs will no longer be *"continuing"* when the administration terminates, whether or not the administration at some earlier point became a distributing administration.

Section 5(a)(vii)(3): issues relating to the Scheme

121. The next of the key issues relating to Section 5(a)(vii) and remaining in dispute is whether the sanctioning of the Scheme triggered an Event of Default under Section 5(a)(vii)(3) and, if so, whether that Event of Default will be *"continuing"* in the event of and notwithstanding completion of the Relevant Steps. Firth Rixson placed primary emphasis on their argument that the Scheme triggered an Event of Default which was *"continuing."*

122. Section 5(a)(vii)(3) provides that the following event is an Event of Default:

> *"The party, any Credit Support Provider of such party or any applicable Specified Entity of such party ... (3) makes a general assignment, arrangement or composition with or for the benefit of its creditors."*

123. The dispute is as to (a) whether the Scheme was an "*arrangement…with or for the benefit its creditors*" within the meaning of Section 5(a)(vii)(3) of the ISDA Master Agreement and (b) whether if it was (and would still be, notwithstanding termination of the Administrators' appointment) "*continuing*". I take it to be common ground that the Scheme did not involve a "*general assignment*" or a "*composition*" within the meaning of that sub-section. However, the Administrators submitted that it is necessary, in construing the phrase "*arrangement…with or for the benefit its creditors*", to set it in the context of the provision as a whole and to identify the reasons why the Scheme is not a "*general assignment*" nor a "*composition*" (being, in essence, that those concepts are applicable only to circumstances of, or associated with, financial distress).

124. Put shortly:

(1) Firth Rixson contended that the Scheme was (a) an "*arrangement*" for both purposes and not only triggered an Event of Default when sanctioned but also (b) was a "*continuing*" Event of Default since the Scheme involves permanent variation of creditors' rights.

(2) The Administrators contended that this was not correct: they submitted that (a) the Scheme, though obviously it was a scheme of arrangement for the purposes of Part 26 of the Companies Act 2006, was not an "*arrangement*" in the sense intended by the ISDA Master Agreements, and did not trigger an Event of Default, and (b) in any event, even if it did, that Event of Default will no longer be continuing if and when the Administrators' appointments are terminated.

125. I turn to address the Administrators' submissions in greater detail. The Administrators contend that the term *"arrangement"* in the Section would otherwise be so general in

its application that to avoid commercially absurd potential application it must be "read down". They submitted that on the true interpretation of Section 5(a)(vii)(3) the term must be read in the context of the overall purpose of the Section and restricted to a transaction entered into by a debtor in circumstances of financial distress. They submitted that just as the phrases "*general assignment*" and "*composition*" in each case "*with or for the benefit of its creditors*" are, on their true construction, restricted to transactions entered in the context of financial distress as an alternative to bankruptcy or an individual voluntary arrangement under Part VIII of the Insolvency Act 1986. The underlying premise or governing genus is of a transaction or procedure designed to avoid insolvency in circumstances of financial distress. The phrase "*arrangement ... for the benefit of its creditors*" must be read *ejusdem generis* and by reference to historical antecedents showing that it too is likewise restricted.

126. On that interpretation, the Administrators submitted, the Scheme was and is not an *"arrangement"* for the purposes of Section 5(a)(vii)(3): rather it was and is a commercial compromise designed to bring an end to litigation, and not an attempt to reduce or defer any indebtedness in circumstances of financial distress. The Scheme was fundamentally no different from any other settlement of complex commercial litigation; it was essentially a commercial compromise of disputed claims to statutory interest in the context of a (by then) solvent company; and such a compromise would not trigger an Event of Default.

127. In support of this restricted meaning the Administrators relied further on:

(1) Christopher Clarke LJ's recognition, in *Black Diamond Offshore Ltd v Fomento de Construcciones y Contratas SA* [2016] EWCA Civ 1141 at [32] in relation to a very similar Event of Default in a loan note, which included a near-identical reference to "*a general assignment or an arrangement or composition with or for the benefit of the relevant creditors*", that the relevant Event of Default is "*addressed to insolvency or insolvency type arrangements*".

(2) Passages in the User's Guides published by ISDA for the 1992 Form and the 2002 Form of the ISDA Master Agreement, both of which include the following paragraph which appears to confirm that the Bankruptcy Event of Default under Section 5(a)(vii) is only triggered by "bankruptcy or insolvency proceedings":

> *"**Bankruptcy.** Section 5(a)(vii) applies to each party, any Credit Support Provider of a party and any applicable Specified Entity of a party. It is drafted so as to be triggered by a variety of events associated with bankruptcy or insolvency proceedings under United States or English law but recognises that market participants will be located in and organised under the laws of different countries around the world. Accordingly, the Bankruptcy Event of Default has been drafted with the intention that it be broad enough to be triggered by analogous proceedings or events under any bankruptcy or insolvency laws pertaining to a particular party."*

(3) What they presented as the overarching commercial purpose of Section 2(a)(iii), as explained by Gloster J in *Pioneer Freight Futures Co Ltd v TMT Asia Ltd* (see paragraphs [63] and [83] above), drawing from this that a deal with creditors which does not pose any counterparty credit risk should not trigger an Event of Default under the ISDA Master Agreement.

128. The Administrators supported their case that the phrase should, in the context in which it appeared, be given a restricted meaning with a number of examples of the difficulties and incongruities, amounting to commercial absurdity, that would result if the phrase was given the very broad meaning urged by Firth Rixson. They posited the following:

(1) Suppose that a successful, solvent company wishes to refinance a loan with a syndicate of lenders. (To the extent necessary, it can be assumed that the lenders represent a substantial proportion of the company's creditors.) The company could repay the loan at maturity but wishes to roll over the loan for a few more years to provide a continuing line of credit. The lenders agree to roll over the loan. This is a perfectly normal transaction which occurs every day in the financial markets.

On Firth Rixson's case, the roll-over is an "arrangement" and triggers an incurable Event of Default under Section 5(a)(vii)(3). The Administrators submitted that this result is commercially absurd.

(2) Suppose that a successful, solvent company agrees with its struggling landlords that, for a small reduction in the rent payable, it will pay rent in advance rather than in arrear during a period of economic stress for the landlords, to assist the landlords with their cashflow and to ensure that the landlords are able to continue to comply with their covenants under the leases.

On Firth Rixson's case, such an agreement is an "arrangement" and triggers an incurable Event of Default under Section 5(a)(vii)(3). (It certainly falls within the broad concept of an "arrangement" in the authorities relied upon by the Respondents.) Again, the Administrators submitted that this result is commercially absurd.

(3) Suppose that a successful, solvent company is sued by a group of tort claimants. (To the extent necessary, it can be assumed that the tort claimants represent a substantial proportion of the company's creditors.) The company disputes the quantum of the claims and defends the litigation. In order to avoid endless litigation and avoid incurring irrecoverable costs, the company enters into a compromise agreement in full and final settlement of the dispute. The settlement does not affect the company's solvency in any way – if anything, it strengthens the company's position by bringing an end to the litigation. The compromise is not designed to impose a "haircut" on any undisputed debt, but simply involves a negotiated commercial settlement of tort claims which are subject to a legitimate dispute. Had the tort claimants succeeded at trial, the company would have been able to pay any award of damages in full.

On Firth Rixson's case, the compromise agreement is an "arrangement" and triggers an incurable Event of Default under Section 5(a)(vii)(3). (It certainly falls within the broad concept of an "arrangement" in the authorities relied upon

by the Respondents.) Again, The Administrators submitted that this result is commercially absurd.

129. Anticipating that Firth Rixson would seek to distinguish these examples on that score, the Administrators acknowledged that none involved any scheme of arrangement under Part 26 of the Companies Act 2006. However, they submitted that this was beside the point: Section 5(a)(vii)(3) does not require a legal proceeding to take place under any particular English statute, or indeed any legal proceeding at all.

130. Further, and in any event, they submitted that even if Section 5(a)(vii)(3) could be construed so as to require an actual scheme of arrangement under Part 26, absurd results would still arise. For instance, the third example given above (involving the tort claimants) could easily be recast as an example involving a scheme of arrangement if it was postulated that one of the tort claimants refused to consent to the settlement and the company launched a scheme to bind that claimant. The Administrators suggested that the triggering of an Event of Default would be equally absurd in those circumstances. Moreover, they suggested that it would be possible to imagine a whole host of solvent schemes which would, on the Respondents' case, trigger an Event of Default. To take two examples (both of which involve commercially absurd outcomes):

(1) Suppose that a successful, solvent company seeks the consent of its lenders to borrow new money from a third party to fund a research and development project. (Such consent may be required under the terms of the finance documents.) One lender fails to respond to the consent request. The company proposes a scheme of arrangement to bind all lenders. On the Respondents' case, this would trigger an Event of Default as an "arrangement".

(2) Suppose that a successful, solvent company wishes to amend the terms of a note indenture in order to ensure that the indenture complies with a new statute in Luxembourg relating to the Clearstream clearing system. A small number of noteholders fail to respond to the consent request. The company proposes a scheme of arrangement to bind all noteholders. On the Respondents' case, this would trigger an Event of Default as an *"arrangement"*.

131. The Administrators addressed, and rejected as misplaced, any argument that their approach and the interpretation they put forward limiting an "*arrangement*" to the context of financial distress would lack sufficient certainty. Mr Bayfield submitted that it was "*highly likely*" that it would be clear from the arrangement proposed, its terms and its context, whether it was to be entered into in a situation of financial distress or not. In the case of a scheme of arrangement, for example, he submitted that "*it would be clear from the outset, and set out in the practice statement letter and the explanatory statement, whether or not what is proposed is being proposed in a situation of financial distress and to avoid…administration or liquidation…*"

132. In this case, he continued, the Scheme was not promoted in a situation of financial distress, nor to avoid liquidation. He summarised the aim and purpose of the Scheme as follows in his oral submissions:

> *"…the surplus scheme was promoted in the context of an existing administration where a substantial surplus had been built up and the scheme was designed to allow that surplus to be distributed*

> *in circumstances in which the Waterfall and other litigation was threatening to hold up the distribution for many more years. The scheme achieved this by bringing the relevant litigation to an end, putting in place a dispute resolution mechanism for statutory interest in excess of 8% and imposing a bar date for the submission of claims to enable the administrators to check that they had the entire universe of claims made against the estate….*
>
> *…And the comparator to it was not a liquidation: it was the continuation in the administration of that litigation…"*

133. In such circumstances, and given also that, as made clear in the judgment of Sir Geoffrey Vos C in *Re Lehman Brothers International (Europe)* [2020] Bus LR 1875 giving directions as the distribution of surplus, LBIE is clearly solvent and "*the only objective of LBIE's continuing administration is to rescue LBIE as a going concern*", the Administrators submitted there is no basis for treating the scheme as an arrangement of the same or analogous nature to a composition with creditors or a general assignment for the benefit of creditors or otherwise as posing any credit risk to Firth Rixson.

134. In the alternative, the Administrators submitted that Section 5(a)(vii)(3) does not apply to a scheme proposed by the Administrators (acting in their own names) in the exercise of their statutory powers as Administrators under section 896 and 899 of the Companies Act 2006. Such a scheme cannot be characterised as an arrangement "made" by a "party" to the ISDA Master Agreement.

135. Firth Rixson rejected these arguments. They dismissed both the Administrators' basic premise that the literal words must be "read down" to achieve a sensible meaning and their suggested restriction of the application of the phrase the Administrators then suggested. They submitted that the interpretation put forward by the Administrators was unsupported by the words used in the ISDA Master Agreements and based on a process of interpretation which was illegitimate in the context of any commercial agreement and "*anathema in the particular context of the ISDA Master Agreements*."

136. Firth Rixson supported their argument by reference to the particular importance of not departing from the ordinary sense of carefully crafted wording in a standard and much-used form. They submitted that the draftsman has plainly intended to use well-established concepts and precise hard-edged categories of events to provide the "bright lines" which were necessary. The meaning of the phrase should not be bent by a process of "reading down". The phrase plainly applied to the use of formal public statutory procedures such as schemes of arrangement or CVAs involving some sort of compulsory power to alter creditors' rights. Firth Rixson characterised the use of such procedures as outside the ordinary course of a company's business, which was understandably "*treated as a red flag under the standard terms of the Master Agreements, giving rise to an Event of Default and a right to terminate*."

137. They emphasised in this context that a scheme of arrangement inherently entails a modification or variation of creditors' rights. They cited, for example, *Re Lehman Brothers International (Europe)* [2010] BCC 272 *per* Patten LJ at [65]) and quoted Bowen LJ's statement in *Re Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573 at 583, that in sanctioning a scheme of arrangement the Court "*exercises a most*

formidable compulsion upon dissentient or would be dissentient creditors". They contended that the Event of Default under Section 5(a)(vii)(3) exists in response to that "*formidable compulsion*" and forced modification or variation of rights. A Defaulting Party who utilises a procedure which alters or varies creditors' rights in that way should not be entitled to require the Non-defaulting Party to perform its obligations.

138. Firth Rixson accepted, but dismissed as "*nothing to the point*", that there may be cases in which a party to an ISDA Master Agreement has resorted to exerting a compulsory power over creditors when the difficulties it is facing do not have a bearing on its ability to continue as a going concern. They submitted that there is nothing in the language in Section 5(a)(vii)(3) suggesting that one is required to draw a distinction between "distressed" or "non-distressed" arrangements or compositions with or for the benefit of creditors ("*or whatever other bifurcation the Administrators might posit*") [30].

139. Firth Rixson further submitted that in any event, even if some form of additional "insolvency-type" qualification could be read into the language of Section 5(a)(vii)(3), the circumstances in which the Scheme was promulgated and then recognised in the United States mean that the requirement would be satisfied on the facts of this case. They relied in respect of this further submission on the following.

140. First, this is not a case in which a scheme of arrangement has been used by a company as part of its activities as a going concern. It is common ground that the Scheme was promulgated by a company in administration under Schedule B1 of the IA 1986 pursuant to obligations and responsibilities owed by the Administrators as insolvency officeholders appointed under the IA 1986. It was, moreover, part and parcel of an insolvency process which, following the notice of intention to distribute, has required the Administrators to liquidate assets, ascertain claims and make distributions to creditors, in a manner functionally equivalent to a liquidation.

141. Secondly, the "Advantages of the Scheme", as represented by the Administrators to creditors in the Explanatory Statement, included that it involved a "*reduced risk of there being insufficient funds to make a full payment of Statutory Interest at the Statutory Minimum on Admitted Claims*" and "*avoidance of the risk of Scheme Creditors' Statutory Interest entitlements potentially being extinguished in the event that they are not paid prior to the Company going into liquidation*". As such, creditors were being asked to give up existing rights in order to receive statutory entitlements to interest and were being told that they might not receive their full entitlements and that LBIE might go into liquidation if the Scheme were not sanctioned. As a matter of substance, this entailed one or more creditors "*giving something up in a distressed situation*", an arrangement "*in respect of debts which the debtor would otherwise be unable to pay*" and an arrangement which was "*an alternative to a bankruptcy or liquidation*".

142. Thirdly, at the time, Firth Rixson pointed out that the Administrators evidently considered the Scheme sufficiently "insolvency-like" for them to apply for it to be

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[30] Firth Rixson submitted that other Events of Default in Section 5(a)(vii) are not tied exclusively to insolvency or a "distressed" situation. For example, Section 5(vii)(5) applies where a person *"has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger)"*. As explained in Firth: Derivatives Law and Practice: "*this would include a voluntary winding-up resolution passed under s.84 of the Insolvency Act 1986"*. No distinction is drawn in that provision between solvent and insolvent voluntary liquidations, and there is no basis for construing the provision as if such a distinction had been drawn: see *Re Horsey Estates* [1899] 2 QB 79 at 88.

recognised as a "foreign proceeding" under the US Bankruptcy Code ("Chapter 15"), an insolvency law (and see further as to this, paragraphs [151]-[161] below). Firth Rixson relied in this context on the requirements of Chapter 15, and what the Administrators had said about the Scheme to obtain its recognition. In particular:

(1) "Foreign proceeding" is defined in section 101(23) of the Bankruptcy Code as a "*collective judicial or administrative proceeding in a foreign country under a law relating to insolvency or the adjustment of debt in which the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purposes of reorganisation or liquidation*" (emphasis added).

(2) Accordingly, in order to obtain recognition of the Scheme in the United States, the Administrators needed to satisfy the US Bankruptcy Court that the Scheme was a proceeding "*for the purposes of reorganisation*[31] *or liquidation*".

(3) While Firth Rixson acknowledged that the evidence filed by the Administrators in support of the US recognition application stated that it was not the Administrators' current expectation and intention that LBIE would go into insolvent liquidation, they noted that none of the evidence filed on behalf of the Administrators suggested that the purpose of the Scheme was to enable LBIE to be "*restored to financial health*" and handed back to newly appointed directors. The Scheme documentation appears to have contemplated that LBIE would eventually exit administration through a compulsory or voluntary winding-up and specifically provided that the Scheme "*shall continue in full force and effect*" in those circumstances [32].

(4) Further, the evidence described the nature of a scheme of arrangement to the US Bankruptcy Court in the following terms (with emphasis added):

> *"A scheme of arrangement is a proceeding under the laws of England and Wales (part 26 of the Companies Act) that allows a company to effect compromises or arrangements, including by way of restructuring debt liabilities with their members (i.e. shareholders) or creditors (or any class of them).* ***One of the uses for schemes of arrangement is the restructuring of debts of companies that are in financial distress.*** *Schemes of arrangement are particularly useful because they enable companies and their creditors in certain instances to obtain court sanction to effect restructuring measures without having to obtain approval from 100%*

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[31] The concept of "*reorganisation*" is not defined in the Bankruptcy Code. Notably, however, that part of the definition of "foreign proceeding" is taken from UNCITRAL Model Law on Cross-Border Insolvency, which was adopted into US law pursuant to Chapter 15 of the US Bankruptcy Code. The notion of a "reorganisation or liquidation" is a central concept in the UNCITRAL Model Law and is used repeatedly in the Guide to Enactment. So far as the former expression is concerned, the UNCITRAL Legislative Guide on the Model Law defines "Reorganisation" as "*the process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possible including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern".* (emphasis added)

[32] See, for example, sections 38.1, 38.2 and 38.3 of the Scheme.

of affected creditors. Such schemes of arrangement are often referred to as "creditor schemes" to distinguish them from Schemes of arrangement relating to shareholders ("member schemes")."

(5) Firth Rixson also noted that none of the evidence filed on behalf of the Administrators stated that the LBIE Scheme was not, in fact, being used in respect of a company "*in financial distress*". Nor they submitted, did it seek to identify or explain any use for creditors' schemes of arrangement other than for the restructuring of debts of companies "*that are in financial distress*" which was how the Scheme was being characterised before the US court[33].

143. In my judgment, and in substantive agreement with the Administrators:

(1) The word "*arrangement*" is not a term of art. It is capable of application, as a word, more diversely than can have been intended. It must be interpreted according to its context. Its immediate context is the phrase "*general assignment, arrangement or composition with or for the benefit of [the party's] creditors*". Its more general context is a clause identifying a variety of events, the premise of or trigger for each of which is financial distress. Its overall context is a model agreement setting out terms of credit risk. The word should be confined to arrangements having a like or similar premise or trigger as the other events identified, and not given a meaning such as to extend to circumstances and events having a wholly different character than the other events described in the phrase and Section of which it forms a part.

(2) The phrase "*general assignment, arrangement or composition with or for the benefit of [a party's] creditors*" in Section 5(a)(vii)(3) of the ISDA Master Agreement must be read as descriptive of processes entered into by a debtor in circumstances of financial distress, or which involve a fundamental change in the status of the relevant entity (such as by dissolution or winding-up), such as materially to affect the counterparty's credit risk. In such cases the counterparty may justifiably consider that this was not the risk to which it agreed. I do not consider that this was the effect of the scheme.

(3) The Scheme did not affect, let alone alter adversely, the credit risk to which any creditor agreed. Its purpose and effect related only to surplus. A creditor has no provable entitlement to surplus, and there is no question of any "credit risk" in respect of it. As a matter of law, statutory interest is automatically limited to the amount of the surplus, and there is no obligation to make any or any further payment beyond that amount: a creditor has only a residual right to *pari passu* recovery in respect of statutory interest and other non-provable debts out of surplus (if any) remaining after payment of the debts proved before any distribution to shareholders (and see *per* Lord Neuberger of Abbotsbury PSC in *In re Lehman Bros International (Europe) (No. 4) SC(E)E* (often referred to as

[33] Firth Rixson emphasised that, to the contrary, the petition for Chapter 15 relief stated at paragraph [34] that "*The imposition of the Bar Date is key to establishing the universe of creditors entitled to share in the Surplus … In the absence of the Bar Date, Scheme Creditors would be exposed to the risk of new claims being admitted which could decrease the amount payable to them*". Mr Downs made the same point in his Declaration.

"*Waterfall I*") [2018] AC 465 at [139] to [147] and *per* Lord Sumption, *ibid*. at [193] to [194]).

(4) The fact that the Scheme was proposed in the context of an ongoing administration is nothing to the point. LBIE was at the time of the Scheme and is now solvent. The only objective of its continuing administration is to rescue the company as a going concern. There is no question of any deficit. Firth Rixson's submission that "*one of the advantages of the Scheme was stated to be reducing the risk of there being insufficient funds to make full payment of Statutory Interest*" is misconceived for the reason given in (3) above by reference to *Waterfall I*: statutory interest is automatically limited to the amount of the surplus, and there is no obligation to make any or any further payment beyond that amount. I accept the Administrators' description of the purpose of the Scheme as being to maximise the value of the surplus (by avoiding costly litigation) and to resolve issues regarding entitlements to that surplus – not to prevent a situation in which LBIE had insufficient assets to pay statutory interest (which is legally impossible).

(5) In summary, the Scheme was and is not an "*arrangement*" made by LBIE "*with or for the benefit of its creditors*" within the meaning of Section 5(a)(vii)(3). It did not trigger a fresh Event of Default. That is so even though I accept, of course, that for the purposes and in the context of the Companies Act it undoubtedly comprised a "*compromise or arrangement*".

144. In light of that determination, it is not necessary for me to decide the further argument advanced by the Administrators in support of their position that the Scheme did not trigger an Event of Default: this was that Section 5(a)(vii)(3) does not apply in circumstances where a scheme of arrangement is proposed by an administrator (rather than the company) in the exercise of the administrator's statutory powers because (a) no administrator was a "party" to the ISDA Master Agreement and (b) although a scheme proposed by an administrator pursuant to section 899(2)(d) of the Companies Act 2006 will bind the company and the scheme creditors, such a scheme should not be regarded as an arrangement "made" by the company.

145. All I would say is that I have not been persuaded by and do not accept the argument. It seems to me that even though the Administrators correctly made the application for the Court's sanction of the Scheme, the Scheme when sanctioned took effect, and was made, between LBIE (in Administration) and its creditors. The Administrators' submissions confuse the question of what is necessary in order for a scheme to be sanctioned and take effect with the question as to the parties as between whom the scheme is proposed and when sanctioned, takes effect. Section 895 of the Companies Act 2006 expressly states that the provisions of Part 26 apply "*where a compromise or arrangement is proposed between a company and (a) its creditors, or any class of them, or (b) its members, or any class of them.*" Administrators are given standing (a) under section 896(2)(d), to apply for the requisite Court order for class meetings to consider and if thought fit approve the Scheme on behalf of the relevant class and (b) under section 899(2)(d), to apply for the requisite sanction of the Court; but the Scheme is proposed and takes effect between the company and the creditors or members concerned.

146. Also, in light of my principal determination that the Scheme did not constitute an arrangement for the purposes of Section 5(a)(vii)(3) of the ISDA Master Agreement, it is not necessary for me to determine the Administrators' alternative argument that even if (contrary to their principal argument and my determination) the Scheme did trigger an Event of Default, that Event of Default was not "*continuing*" and in any event would cease to be so after termination of the Administrators' appointments. However, since the meaning of "*continuing*" is also relevant in other contexts, I briefly set out my views below.

147. I would accept in this context, as in the context of the other alleged Events of Default, that the proper enquiry is not as to the effect of the relevant Event of Default, but as to whether the event or state of affairs which triggered that Event of Default still subsists. I would accept also, and for the same reason, that a "one-off" event, even if an Event of Default, is not continuing even if its effects cannot be undone. In *Deutsche Bank AG v Sebastian Holdings Inc*. at [1225-1226] Cooke J gave as examples permitting an unauthorised trade in breach of trade type or trading limits, and failure to do something stipulated to be done on a particular day which would ordinarily not be a continuing breach beyond the end of that day.

148. However, as it seems to me, if I am wrong as to my principal determination and, contrary to my view, the Scheme was an *"arrangement"* within the meaning of Section 5(a)(vii)(3) of the ISDA Master Agreement such as to constitute an Event of Default, the state of affairs brought about by the Scheme in question has continued and will be continuing for so long as the Scheme has effect, irrespective of the continuation or cessation of the administration.

149. I do not accept the Administrators' argument that the Scheme, even if it comprised or triggered an Event of Default, should be characterised as a "one-off" Event of Default, which ceased to be *"continuing"* once there no longer remain any steps to be done to give it effect. If the Scheme triggered an Event of Default that would be because (contrary to my view) it introduced an *"arrangement"* such as to fall within Section 5(a)(vii)(3). That *"arrangement"* will continue to subsist even when all steps necessary to accomplish it have been taken. Albeit in effect only as regards surplus, the new state of affairs which the Scheme proposed and has taken place with permanent effect, is a state of affairs which is subsisting and will continue to subsist after the Administrators' appointment is terminated.

150. That is so even though (a) it was accepted that the Scheme never affected and will never affect the rights of Firth Rixson and (b) the evidence was that all disputes as to individual claims to receive interest at more than 8% have been resolved through the Scheme's adjudication mechanism, statutory interest has been fully paid or reserved for, all the litigation that was intended to be brought to an end under the Scheme has been discontinued or otherwise brought to an end, and there are no longer any steps to be taken or things to be done under the Scheme.

The Chapter 15 Order

151. Sections 5(a)(vii)(4) and (8) of the ISDA Master Agreements provide that the occurrence of the following events constitute Events of Default:

> *"The party…(4) had instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights…"*
>
> *"The party…(8) causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction has an analogous effect to any of the events specified in clauses (1) to (7) above (inclusive)."*

152. As already mentioned, Firth Rixson contend that the making of the Chapter 15 Order and the granting of ancillary relief (including a permanent injunction) gave rise to permanent and incurable Events of Default under Sections 5(a)(vii)(4) and 5(a)(vii)(8) and are "*continuing*".

153. Firth Rixson emphasised that the Chapter 15 Order was granted had, including by way of the Permanent Injunction, a considerable effect on creditors' rights. They relied in this regard on the Administrators' declared reasons for seeking the Chapter 15 Order and Permanent Injunction as follows:

> *"Recognition of the English Proceeding, enforcement of the Scheme and the Sanction Order within the territorial jurisdiction of the United States and approval of the Injunction are critical components in a series of steps required to implement the Scheme without disruption or the threat of adverse actions by dissenting creditors against the Debtor or its assets in the United States. Without assistance from this Court, the Scheme and the Sanction Order could be fundamentally undermined to the detriment of all parties in interest…"*

154. On 23 March 2020, the US Bankruptcy Court granted an Order closing the Chapter 15 Proceedings (the "March 2020 Order"). It is now apparent that the March 2020 Order had no effect on the Chapter 15 Order or Permanent Injunction. While the March 2020 Order formally closed the Chapter 15 proceedings in respect of LBIE and released and discharged Mr Downs from his duties and obligations as foreign representative, it preserved the other effects of the Chapter 15 Order, including the Permanent Injunction. As such, the Scheme and associated variations of creditors' rights continue to be recognised and enforced in the United States.

155. On 3 November 2020, LBIE filed a motion to re-open the Chapter 15 Proceedings. According to Linklaters' letter of 25 November 2020 this has been done "*solely in order to provide a forum for the timely resolution of litigation between LBIE and AG Financial Products Inc*". Firth Rixson recorded their understanding that the motion is pending before the US Bankruptcy Court.

156. Firth Rixson submitted that:

    (1) by virtue of the making of the Chapter 15 Order and Permanent Injunction, LBIE had "*instituted against it a proceeding seeking a judgment or insolvency or bankruptcy or any other relief under any bankruptcy of insolvency law or*

other similar law affecting creditors' rights" within the meaning of Section 5(a)(vii)(4) of the ISDA Master Agreements.

(2) Further, or alternatively, if the sanctioning of the Scheme gave rise to an Event of Default under Section 5(a)(vii)(3) then it follows that the making of the Chapter 15 Order and granting of ancillary relief, including the Permanent Injunction, were events having an "*analogous effect*" to the Scheme under New York Law.

(3) The effect of the Chapter 15 Order and Permanent Injunction was to recognise, grant comity to and give full force and effect in the United States to the Scheme and the associated releases and to permanently enjoin any "Affected Entity" from asserting any debt, claim or interest affected by the Scheme, except as expressly permitted by the Scheme (paragraphs 5 and 6 of the Chapter 15 Order). Accordingly, an Event of Default occurred under Section 5(a)(vii)(8) upon the making of the Chapter 15 Order on 19 June 2018 and is "*continuing*".

(4) Furthermore, it would remain so unless and until the Chapter 15 Order and the Permanent Injunction were discharged by separate order of the US Bankruptcy Court: although an Order had been made in March 2020 closing the Chapter 15 proceedings, that Order expressly provided that the closure would not affect any prior orders made, including the Permanent Injunction.

157. The Administrators disputed this analysis. They observed that if Firth Rixson's earlier submission that LBIE's distributing administration and/or the Scheme has (or have) triggered an Event of Default which will continue forever succeeds, Firth Rixson would have no need to rely on their argument with respect to Chapter 15; whereas if it failed, then the argument would add nothing to those earlier submissions. They submitted further, however, that neither the Chapter 15 order nor the relief granted under it (including by way of the Permanent Injunction) triggered an Event of Default because none could properly be characterised as "*a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights*", and nor did any have an "*analogous effect*" to the Scheme under New York law.

158. The Administrators elaborated their position as follows:

(1) It is simplistic and wrong to characterise the Chapter 15 proceedings as seeking relief under "*any bankruptcy or insolvency law or other similar law affecting creditors' rights*" within the meaning of Section 5(a)(vii)(4) of the ISDA Master Agreements. Although Chapter 15 is largely based on the UNCITRAL Model Law on Cross Border Insolvency (and thus carries a connotation of insolvency or bankruptcy), it has been modified so that it applies beyond the realm of insolvency proceedings. The definition of a foreign proceeding under Chapter 15 states that the relevant proceeding must be commenced "*under a law relating to insolvency or adjustment of debt*" (emphasis added). The underlined words are apt to include schemes of arrangement: see *In re Avanti Communications Group plc* 582 BR 603 at [614], where the US Bankruptcy Court held that Part 26 of the Companies Act 2006 was a "*law relating to ... adjustment of debt*". Notably, the reference to an adjustment of debt cannot be found in the Model Law. The mere fact that a proceeding has been commenced under a law with

"bankruptcy" in the title is insufficient, since the proceeding may be a solvent one and the company may not be in any financial distress.

(2) For the same reasons as given in their submissions on Section 5(a)(vii)(3), the Administrators submitted that Section 5(a)(vii)(4) is plainly restricted to proceedings in respect of companies in financial distress.

(3) Also, for the same reasons, the Chapter 15 Order did not have an "*analogous effect*" to a proceeding that would constitute an Event of Default under Section 5(a)(vii)(4).

(4) It follows that the Chapter 15 Order did not constitute an Event of Default under Section 5(a)(vii)(8).

(5) If the Scheme was not a "*continuing*" Event of Default, then neither was or could be the Chapter 15 Order, which is parasitic on the Scheme and does not enlarge its effect; conversely, if the Scheme was a "*continuing*" Event of Default, the argument as to whether the Chapter 15 Order was "*continuing*" was superfluous. In any event, the closure of the Chapter 15 proceedings in March 2020 had brought an end to the proceeding (the Chapter 15 Order) which Firth Rixson had relied on as constituting an Event of Default; and that alleged Event of Default could not continue after that. The provision for continuation of prior orders such as the Permanent Injunction reflected only the fact that the Scheme continued to be recognised and given effect and does not entail that the relevant Event of Default continues forever.

159. In my view, the Chapter 15 order was not a separate Event of Default. This is essentially for the reasons given by the Administrators and summarised above. I accept in particular that:

(1) Viewed in context, Section 5(a)(vii)(4) should be read as being restricted to proceedings in respect of companies in financial distress, as should Section 5(a)(vii)(3), for the reasons given previously.

(2) The Scheme is properly characterised as a solvent scheme, albeit that it was proposed and promulgated in the context of LBIE's distributing administration and (in some senses) as an alternative to a solvent liquidation which a substantial creditor (Wentworth) had threatened as a means of bringing to an end any entitlement asserted by other creditors to statutory interest and forcing a commercial settlement of its claims. The claims of creditors in respect of statutory interest are, as Mr Bayfield put it, "limited recourse" because they can never exceed the surplus available, as clarified by Lord Neuberger in the Supreme Court in *Waterfall I*. When the Scheme was proposed LBIE was solvent and has remained so; and the only remaining purpose of its administration, as identified by Sir Geoffrey Vos C in *In re Lehman Bros International (Europe) (in administration)* [2020] Bus LR 1875, is to rescue the company as a going concern. The real purpose of the Scheme was to put in place compromises of outstanding litigation which were impeding distribution of surplus. It was not a scheme proposed in circumstances of financial distress and should not be likened to one. It was not an "*arrangement*" in the sense intended in Section 5(vii)(a)(3) because it was not proposed in circumstances of financial

distress nor to avoid an insolvent process. To the extent that it is "*ultimately a matter of impression*", as Mr Dicker suggested it was, that analysis conforms with the overall impression I have formed.

(3) There is no inconsistency between the Administrators having sought recognition pursuant to Chapter 15 and their argument in this case that the recognition they obtained for the Scheme was not itself an Event of Default. I acknowledge, of course, that Chapter 15 is a part of the US Federal Bankruptcy Code: but its provisions can extend to arrangements which do not connote bankruptcy. In particular, it extends to "*law relating to insolvency or adjustment of debt*" (my emphasis), which has been held by US Bankruptcy Courts to be capable of extending to solvent Schemes of Arrangement under Part 26 of the Companies Act 2006, as being *"foreign main proceedings"* involving a court-approved *"adjustment of debt"*.[34]

(4) The conclusion appears to me to be unsurprising. It would be odd in light of my determination that the Scheme itself was not an Event of Default if a recognition proceeding in respect of the Scheme was an Event of Default. In my judgment, if what is to be accorded recognition is not an Event of Default, it is unlikely that it was intended that an order for its recognition should, without more, constitute an Event of Default. In this case, at least, I do not consider there to be any proper basis for treating the ancillary proceeding as triggering an Event of Default.

160. The question whether the Chapter 15 order constituted a "*continuing*" Event of Default only arises if I am wrong in my determination that it did not constitute an Event of Default at all. Furthermore, it will only have real practical significance if I am not only wrong that the Scheme itself was not an Event of Default but yet also wrong in determining that if it was, it is "*continuing*". That may be an unlikely concatenation; and the possibility that the Chapter 15 Order constituted a "*continuing*" Event of Default, whereas the Scheme itself did not, seems to me illogical. In other words, this question seems to me to be unlikely to be anything other than academic.

161. In those circumstances, and given also that the answer depends upon a series of hypotheses contrary to my determinations, I will indicate only that I consider that the same answer should follow in the case of the Chapter 15 Order as in the case of the Scheme.

The Spanish and French Exequaturs

162. In their Supplemental Position Paper (dated 23 December 2020) Firth Rixson put forward a further argument (which had been canvassed in an earlier letter from their Solicitors) to the effect that orders made in France and Spain on 15 October 2008 and 4 June 2009 respectively (the "Spanish and French Exequaturs") giving recognition and effect in France and Spain to the English administration order also gave rise to Events

[34] I was not taken to any examples: but I also note that in *Sompo Japan Insurance Inc v Transfercom Limited* [2007] EWHC 146 (Ch), which concerned an insurance business transfer between two undoubtedly solvent entities (Sompo being Japan's second largest non-life insurer, and Transfercom being a sub-subsidiary ultimately owned by Berkshire Hathaway Inc.) and no question of insolvency, David Richards J (as he then was) considered that the expert evidence of US law provided *"a proper basis for concluding"* that recognition would be granted *"under federal law"*, which I take to be a reference to Chapter 15.

of Default under Section 5(a)(vii)(4) because they constituted proceedings *"seeking…relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights"* within the meaning of that Section.

163. Further or alternatively, Firth Rixson submitted that the making of the Spanish and French Exequaturs constituted Events of Default because, within the meaning of Section 5(a)(vii)(8), they had an *"analogous effect to"* the Events of Default under Section 5(a)(vii)(4) and (6).

164. As to Section 2(a)(iii), Firth Rixson submitted that the Events of Default under Section 5(a)(vii)(4) would be *"continuing"* for as long as the orders giving effect to the Spanish and French Exequaturs remain in force and effect, or at least as long as alleged Events of Default under Sections 5(a)(vii)(4) and (6) are continuing.

165. Mr Dicker did not address these arguments further in his oral submissions to me. That may well be because any issue as to the Exequaturs is ultimately academic. As the Administrators pointed out, it appears to be common ground that the Spanish and French Exequaturs, being orders recognising the appointment of the Administrators and their entitlement to exercise their powers under the Insolvency Act 1986 in Spain and France, must cease to have any effect once those appointments have come to an end. Once the Administrators' appointments are terminated, there will no longer be any Administrators whose appointments can be recognised in Spain or France, and the Spanish and French Exequaturs will fall away and cease to have any effect.

166. As to the prior, but in those circumstances, academic question whether the Spanish and French Exequaturs were, when the orders were made, further Events of Default as Firth Rixson submitted, my view in summary is that they were not. I agree with the Administrators that the recognition of the English Administration order in Spain and France did not constitute additional or free-standing Events of Default.

167. In my view, Section 5(a)(vii)(4) is not directed towards and, on its true construction, does not extend to a proceeding simply intended to recognise and give effect to an earlier proceeding which itself was an Event of Default (as the English Administration order plainly was). Nor, in my view, did such recognition of the English Administration have *"analogous effect"* within the meaning of Section 5(a)(vii)(8).

(5) Summary of conclusions and determination of issues

168. For the reasons I have given, in my judgment the answers to the questions in the 'Revised Agreed List of Issues' prepared by the parties are (adopting the sequence in that List) as follows (all references to Sections being to Sections in the ISDA Master Agreements unless otherwise stated):

(1) As to whether the Event of Default which it is common ground LBIE's failure to make, when due, a payment under the Sterling Swap occasioned, ceased to be "*continuing*" on 2 December 2009 as a result of the operation of the insolvency set-off provisions in rule 14.24 of the Insolvency (England and Wales) Rules 2016: my answer is that it did so cease, and that Event of Default was not thereafter "*continuing*". In light of that answer, the further issues identified in relation to Section 5(a)(i), raising questions as to whether, and if so how, an Event of Default could be "cured", do not arise.

(2) As to whether the Event of Default which it is common ground occurred under Section 5(a)(vii)(2) when LBIE made admissions in writing of its inability to pay debts as they fell due, was a "one-off" event incapable of "*continuing*": I do not consider it was: the notice speaks to a continuing inability in that regard unless and until it is corrected. As to the further question as to what form or mode of correction is required, I consider that even though as a practical matter the general perception would already be that the admission has long since been superseded, any doubt in that regard is easily removed. As Mr Downs has proposed, and as I consider the Administrators would be justified in doing, I propose to direct the Administrators to publish, or cause LBIE to publish, a notice to the effect that LBIE has a surplus of assets over liabilities and is now able to pay its debts as they fall due. It is common ground that this will suffice to remove any doubt.

(3) As to whether LBIE's Scheme was an "*arrangement*" or "*composition*" within the meaning of Section 5(a)(vii)(3) so as to give rise to an Event of Default: my answer is that it was not because the Scheme was not, principally because it was not proposed or intended to operate in circumstances of financial distress. On that basis, the further issue as to whether, if it was an Event of Default, it would be "*continuing*", does not arise. If, however, I am wrong in that determination, it seems to me that the state of affairs would be "*continuing*" and I would not accept the Administrators' arguments to the contrary.

(4) As to whether the Events of Default which (it is common ground) occurred under Section 5(a)(vii)(4) when LBIE entered administration on 15 September 2008 and Administrators were appointed and which is (it is likewise common ground) is "*continuing*" can be cured: my answer is that it can be 'cured' in the sense that in my judgment the state of affairs constituting the Event of Default can be brought to an end and will be so when LBIE exits administration under paragraph 79 of Schedule B1 to the Insolvency Act 1986. I do not accept Firth Rixson's contention that the conversion of LBIE's administration to a distributing administration on 2 December 2009 meant that the Event of Default could never be cured. Nor do I accept Firth Rixson's contention that an Event of Default cannot be cured unless and until the entire bundle of legal effects consequential upon the Administrators' appointment has been brought to an end.

(5) As to whether the Spanish and French Exequaturs gave rise to Events of Default under any of subsections (4), (6) or (8) of Section 5(a)(vii) and, if so, whether they are *"continuing"*, my answer is that neither did under any of those subsections, and in any event, none will be *"continuing"*. Once the Administrators' appointments are terminated, there will no longer be any Administrators whose appointments can be recognised in Spain or France, and the Spanish and French Exequaturs will fall away and cease to have any effect.

(6) As to whether the Chapter 15 proceedings or the making of the Chapter 15 Order (including the Permanent Injunction) triggered an Event of Default under Section 5(a)(vii)(4) or (8), my answer is that neither the Chapter 15 Proceedings nor the Chapter 15 Order constituted an Event of Default if (as I have held) the Scheme did not.

169. In the result, in my judgment, if and when all the Relevant Steps have been taken, (a) no Event of Default will be continuing under Section 2(a)(iii) of the ISDA Master Agreements and so (b) Firth Rixson will have a contractual obligation to pay the sums owing to LBIE under the Swaps.

170. Although I have reached that result by the process of contextual interpretation of the words of the ISDA Master Agreements which I have sought to set out, that result accords, in my view, with the overall purpose of the relevant provisions. Firth Rixson made their election not to rely on the termination provisions: that was their (unusual) choice. As Mr Bayfield submitted in opening, none of the Events of Default or alleged Events of Default on which Firth Rixson relied is such that it any has a substantive adverse effect on Firth Rixson or its rights in relation to the Swaps, and their credit risk is not increased or adversely affected by any of them, nor will it be. The Swaps came to an end more than a decade ago. In the events that happened, Firth Rixson is the debtor. Firth Rixson is not exposed to any risk of LBIE failing to perform its obligations: LBIE has no such obligations to Firth Rixson. Once the Relevant Steps have been taken (at latest), there will be no reason any longer for the protection which Gloster J in *Pioneer Freight Futures Co Ltd v TMT Asia* Ltd) and the Court of Appeal in *Lomas v Firth Rixson Inc* conceived to be the purpose of Section 2(a)(iii); and see paragraphs [63] and [64] above.

171. I have noted the point made in Firth Rixson's skeleton argument that this *"application, although made by the Administrators, is, in substance, being brought for the benefit of LBIE's shareholders."* I accept that LBIE's only shareholder (LB Holdings Intermediate 2 Limited, which is also in administration) will be the beneficiary: but that does not seem to me to be a consideration which should have any bearing on the interpretation of the ISDA Master Agreements; it is the consequence of LBIE's solvency.

172. I invite Counsel to prepare an agreed form of order for approval when this judgment is formally handed down. Any other outstanding issues, including as to costs, may have to be resolved at a later date.

One final matter

173. In addition to thanking all concerned for their conspicuously efficient and helpful presentations, and for their patience, one final and profoundly sad matter remains for me to record. The sharp-eyed will have noted that in the title page of this judgment, leading counsel for Firth Rixson is described as a QC, as he was when the matter was heard. In November 2021, Mr Robin Dicker QC died of cancer, aged just 60. He was truly exceptional. Dedicated, insightful and crystal clear in his thinking and presentation, he was entirely straightforward, fair and reliable, with a refreshingly dry sense of humour. He is a great loss to the law, as well as to his family and his friends.