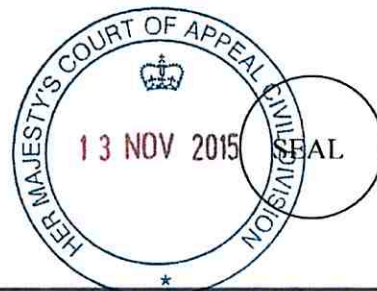


Appellant's notice

(All appeals except small claims track appeals)

For Court use only	
Appeal Court Ref. No.	2015 / 3762
Date filed	13 Nov 2015

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



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

Claim or Case no. Fee Account no.

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

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

Details of the party appealing ('The Appellant')

Name

Address (including postcode)

Tel No.	02074692000
Fax	442074692001
E-mail	kasimacopoulos@kirkland.com; PKar@kirkland.com; jifree.cader@kirkland.com

Details of the Respondent to the appeal

Name

Address (including postcode)

Tel No.	02074562000
Fax	02074562222
E-mail	tony.bugg@linklaters.com

Details of additional parties (if any) are attached Yes No

Section 2 Details of the appeal

From which court is the appeal being brought?

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

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

Mr Justice David Richards

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

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

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

9 October

~~31~~ July 2015

To which track, if any, was the claim or case allocated?

- Fast track
 Multi-track
 Not allocated to a track

Nature of the decision you wish to appeal

- Case management decision Grant or refusal of interim relief
 Final decision A previous appeal decision

Section 3 Legal representation

Are you legally represented?

Yes No

If 'Yes', please give details of your solicitor below

Name of the firm of solicitors representing you

Kirkland & Ellis International LLP

The address (including postcode) of the firm of solicitors representing you

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

Tel No.	02074692000
Fax	442074692001
E-mail	kasimacopoulos@kirkland.com; PKar@kirkland.com; jifree.cader@kirkland.com
DX	
Ref.	Kon Asimacopoulos/ Partha Kar/ Jifree Cader

Are you, the Appellant, in receipt of a Legal Aid Certificate or a Community Legal Service Fund (CLS) certificate?

Yes No

Is the respondent legally represented?

Yes No

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

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

c/o Linklaters LLP
One Silk Street, London, EC2Y 8HQ
Ref: Tony Bugg/ Euan Clarke

Tel No.	02074562000
Fax	
E-mail	tony.bugg@linklaters.com
DX	02074562222
Ref.	Tony Bugg/ Elsie Blackshaw

Section 4 Permission to appeal

Do you need permission to appeal?

Yes No

Has permission to appeal been granted?

Yes (Complete Box A)

No (Complete Box B)

Box A

Date of order granting permission
9 October 2015
Name of Judge granting permission
Mr Justice David Richards

Box B

I
the Appellant('s solicitor) seek permission to appeal.

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

Yes No

Section 5 Other information required for the appeal

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

Declarations (i), (ii) and (iv) of the Order of Mr Justice David Richards dated 9 October 2015:

(i) Neither the Claims Resolution Agreement (the "CRA") entered into between LBIE and certain of its creditors nor any of the Claims Determination Deeds (the "CDDs") entered into between LBIE and its creditors has, as a matter of construction, the effect of releasing any Currency Conversion Claims (as defined in the Part A Order).

(ii) Neither the CRA nor any of the CDDs has, as a matter of construction, the effect of releasing in whole or in part claims to statutory interest under Rule 2.88 of the Insolvency Rules 1986 (the "Rules") and, accordingly, creditors with provable debts agreed and/or admitted under such agreements are entitled to the payment of statutory interest on such debts at the higher of the rate provided for by section 17 of the Judgments Act 1838 or the rate applicable to the debt apart from the administration under Rule 2.88(9) of the Rules.

(iv) If (contrary to declaration (i) above) the CRA or any of the CDDs had, as a matter of construction, the effect of releasing any Currency Conversion Claims, the Administrators would be directed by the Court, under the principle in *ex parte James* (1874) LR 9 Ch Applicant 609 and under paragraph 74 of Schedule B1 to the Insolvency Act 1986, not to enforce such releases.

Have you lodged this notice with the court in time?
(There are different types of appeal - see Guidance Notes N161A)

Yes No

If 'No' you must complete
Part B of Section 9

Section 6 Grounds of appeal

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

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

Section 7 Arguments in support of grounds for appeal

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

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

I confirm that the arguments (known as a 'Skeleton Argument') in support of the 'Grounds of Appeal' will follow within 14 days of filing this Appellant's Notice

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

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

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

- (1) Set aside Declarations (i), (ii) and (iv).
- (2) Grant a declaration that (save in respect of creditors whose original claim was denominated in the same currency as the claim arising from each of the following agreements) the Claims Resolution Agreement (the "CRA") entered into between LBIE and certain of its creditors and each of the Claims Determination Deeds (the "CDDs") entered into between LBIE and its creditors has, as a matter of construction, the effect of releasing any Currency Conversion Claims (as defined in the Application Notice).
- (3) Grant a declaration that each of the CDDs, save those that contained express language preserving a creditor's right to claim interest pursuant to Insolvency Rule 2.88, has, as a matter of construction, the effect of releasing creditors' claims to be entitled to interest pursuant to Insolvency Rule 2.88(9) at the rate applicable to the debt apart from administration.

- order a new trial

Section 9 Other applications

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

Part A

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

Part B

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

Part C

- I apply for an order that:

Time for filing a skeleton argument be extended until 24 December 2015

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

Section 10 Evidence in support

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

The Judgment under appeal was handed down on 31 July 2015, at the end of the legal term. Due to confidentiality restrictions, Wentworth's legal advisors had no prior opportunity to discuss the terms of the judgment with their clients. The hearing of consequential matters was then delayed until 9 October 2015, at which time the terms of the declarations were formulated and permission to appeal was granted.

The Judgment under appeal relates to the second part (Part B) of a three-part application (termed the Waterfall Application), in which a large number of questions are posed by the Joint Administrators of LBIE, so as to enable the Joint Administrators to distribute the substantial surplus of assets in the LBIE Administration estate, following the payment of all proved debts in full. The Waterfall Application is being heard in three separate stages during 2015. The trial of Part A took place in February 2015 and judgment in respect of it was handed down at the same time as the Judgment in Part B. The hearing of consequential matters relating to the Judgment in Part A also took place on 9 October 2015. As at that date, and in the weeks following, the legal advisors to both Wentworth and the Senior Creditor Group (who, between them, represent the main parties in interest in the application) were, and continue to be, heavily engaged in the preparation for the hearing of Part C, which raises issues of English law, New York law and German law.

At the hearing of the consequential matters arising from the Judgments in Part A and Part B, it was recognized by all parties and the learned Judge, that the preparation of skeleton arguments in respect of the appeal would be a time-consuming task, for which it would be appropriate to extend time given the timing of the hearing of Part C. The learned Judge did not have jurisdiction himself to extend time for the filing of skeleton arguments, but only had jurisdiction to extend time for filing of Appellants' notices. Counsel for the Joint Administrators indicated to the learned Judge that the Joint Administrators were concerned at a lengthy extension of time for filing Appellants' Notices, because that would lead to a delay in the listing of the appeal. In light of that, the course which the learned Judge adopted was to extend time for the filing of Appellants' notices, expressly to give the parties time to prepare the grounds of appeal, on the basis that an application for extension of time in relation to skeleton arguments could be made to the Court of Appeal. In so doing he said this: "I will say that I think that there are very significant pressures on the parties involved in the appeal and that unless the Court of Appeal was going to expedite the hearing of the appeal to a very early date there would be much to be said for allowing a longer time than the rules permit for the lodging of skeleton arguments by the parties." This point is to be recorded as a recital to the Judge's order.

Wentworth and the Senior Creditor Group are in agreement that the time for filing of their respective skeleton arguments should be extended.

Statement of Truth – This must be completed in support of the evidence in Section 10

The appellant believes that the facts stated in this section are true.

Full name

Name of appellant's solicitor's firm

signed 

Appellant's solicitor

position or office held

(if signing on behalf of firm or company)

Section 11 Supporting documents

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

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

In the county court or High Court:

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

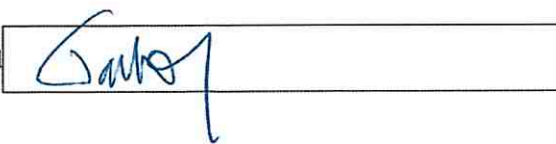
In the Court of Appeal:

- three copies of the appellant's notice and three copies of the grounds of appeal;
- one additional copy of the appellant's notice and one copy of the grounds of appeal for each of the respondent;
- one copy of the grounds of appeal on a separate sheet attached to each of the appellant's notices filed;
- one copy of the sealed (stamped by the court) order or tribunal determination being appealed;
- a copy of any order giving or refusing permission to appeal together with a copy of the judge's reasons for allowing or refusing permission to appeal;
- one copy of any witness statement or affidavit in support of any application included in the appellant's notice;
- where the decision of the lower court was itself made on appeal, a copy of the first order, the reasons given by the judge who made it and the appellant's notice of appeal against that order;
- in a claim for judicial review or a statutory appeal a copy of the original decision which was the subject of the application to the lower court;
- a copy of the order allocating the case to a track (if any)
- one copy of the skeleton arguments in support of the appeal or application for permission to appeal;
- a copy of the approved transcript of judgment; and
- a copy of the legal aid or CLSF certificate (if legally represented)

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

Title of document and reason not supplied	Date when it will be supplied
<u>One copy of the sealed (stamped by the court) order or tribunal determination being appealed</u> The Order of Mr Justice David Richards dated 9 October 2015 has not yet been sealed.	Once sealed
<u>A copy of any order giving or refusing permission to appeal together with a copy of the judge's reasons for allowing or refusing permission to appeal</u> The draft Order of Mr Justice David Richards dated 9 October 2015 has not yet been sealed.	Once sealed

Section 12 The notice of appeal must be signed here

Signed  Appellant('s Solicitor)

1 Sections 1 and 3- Details of additional parties

Details of Second, Third and Fourth Respondents
Name

(2) Burlington Loan Management Limited; (3) CVI GVF (LUX) Master S.À R.L; (4) Hutchinson Investors, LLC

Address (including postcode)

c/o Freshfields Bruckhaus Deringer LLP
65 Fleet Street
London EC4Y 1HS
Ref: Christopher Robinson/ Ken Baird

Tel No.	44 20 7936 4000
Fax	44 20 7832 7001
E-mail	christopher.robinson@freshfields.com

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

c/o Freshfields Bruckhaus Deringer LLP
65 Fleet Street
London EC4Y 1HS
Ref: Christopher Robinson/ Ken Baird

Tel No.	44 20 7936 4000
Fax	44 20 7832 7001
E-mail	christopher.robinson@freshfields.com
DX	
Ref.	Christopher Robinson/ Ken Baird

PART B: APPELLANTS' NOTICE

GROUND OF APPEAL

Declaration (i)

Neither the Claims Resolution Agreement (the "CRA") entered into between LBIE and certain of its creditors nor any of the Claims Determination Deeds (the "CDDs") entered into between LBIE and its creditors has, as a matter of construction, the effect of releasing any Currency Conversion Claims (as defined in the Application Notice)

1. The learned Judge erred as a matter of law in concluding that the CRA and CDDs did not have the effect of releasing any Currency Conversion Claims. In particular, in relation to those CDDs where the agreed amount was denominated in sterling:
 - (1) The learned Judge failed to give proper effect to the clear wording of those CDDs where the parties expressly agreed (a) that the creditor's sole claim against LBIE would thereafter be for a specific sum designated in sterling and (b) that any and all other claims, including those arising under the underlying agreement between the creditor and LBIE, whether such claims were known or unknown and whether they existed then or only came into existence subsequently, would be released;
 - (2) The learned Judge ought to have concluded, in light of such wording, that following the entry by a creditor into such a CDD:
 - (a) the creditor had no continuing right to be paid anything other than the sterling sum identified in the CDD;
 - (b) in particular the creditor had no continuing right to be paid any amount in a foreign currency;
 - (c) the creditor therefore had no right to claim, following the payment of its proved sterling debt in full, any shortfall between the amount of its

debt in the original foreign currency and the foreign currency equivalent of the sterling dividends received by it; and thus

(d) the creditor was thereafter unable to assert a Currency Conversion Claim;

- (3) The learned Judge adopted too restrictive an approach to the purpose of the CDDs in concluding that their purpose was to accelerate the payment of dividends on proved debts without having regard to the fact that their purpose was also to achieve finality as between the creditor and the estate;
- (4) The learned Judge erred in placing reliance on the duty of the Joint Administrators to perform their duties in the interests of LBIE's creditors as a whole. The learned Judge should have concluded that the said duty of the Joint Administrators was consistent with: (a) adopting a commercial approach to negotiating, on a bilateral basis, with individual creditors to compromise disputes as to the quantum of their claims; and (b) entering into a bilateral and mutual release of all claims of whatever nature between the parties;
- (5) The learned Judge, having concluded that the CDDs would have had the effect of releasing other non-provable claims to interest (had such claims existed), ought to have concluded that the fact that a Currency Conversion Claim was not provable, such that its release was not necessary in order to speed up distributions in respect of proved debts, was irrelevant to the question whether the CDDs, on their true construction, had such effect;
- (6) The learned Judge erred in having regard to what actions the Joint Administrators would have taken, had it been their intention to waive Currency Conversion Claims. In circumstances where the possibility of Currency Conversion Claims was not contemplated at the time that CDDs were first entered into (and a large proportion of further CDDs was entered into), the learned Judge should have held that:

- (a) The actual or possible attitude of the parties to Currency Conversion Claims, when they later emerged, was irrelevant to the true construction of the CDDs, since the existence of Currency Conversion Claims formed no part of the admissible evidence of factual matrix at the time of entry into the relevant CDDs;
 - (b) A Currency Conversion Claim fell squarely within the concept of a claim that was unknown and/or not in the contemplation of the parties at the time the CDD was entered into;
 - (c) Where the parties had expressed a clear and unequivocal intention to release any and all claims, including those arising under the underlying agreement between the creditor and LBIE, whether such claims were known or unknown and whether or not in the contemplation of the parties at the time of the agreement, it was impermissible to construe the CDD by reference to what the parties would have done had they contemplated the possibility existence of Currency Conversion Claims at the time.
- (7) The learned Judge erred in relying on the supposed ‘close connection’ between a Currency Conversion Claim (which Wentworth contended had been released by the CDDs) and a claim to statutory interest (which Wentworth accepted was not released). The learned Judge should have found that:
- (a) A claim to statutory interest is an incident of the claim which was expressly permitted by the CDDs, namely a claim to prove for a specific sterling sum, the right to statutory interest being an incident of the right to prove; whereas;
 - (b) A Currency Conversion Claim, being founded on a remission to the creditor’s rights under its underlying contract (specifically, the right to be paid in the original foreign currency), is merely the unsatisfied portion of the underlying claim and thus squarely within the class of claims released.

Declaration (ii)

Neither the CRA nor any of the CDDs has, as a matter of construction, the effect of releasing in whole or in part claims to statutory interest under Rule 2.88 of the Insolvency Rules 1986 (the “Rules”) and, accordingly, creditors with provable debts agreed and/or admitted under such agreements are entitled to the payment of statutory interest on such debts at the higher of the rate provided for by section 17 of the Judgments Act 1838 or the rate applicable to the debt apart from the administration under Rule 2.88(9) of the Rules.

2. Wentworth’s appeal against Declaration (ii) is limited to the case of CDDs which did not contain express language preserving the creditor’s right to claim interest pursuant to Rule 2.88.
3. The learned Judge erred as a matter of law in concluding that the CDDs (which did not contain express language preserving the creditor’s right to claim interest pursuant to Rule 2.88) did not release the creditors’ claims to interest at the rate applicable apart from the administration, pursuant to Rule 2.88(9).
4. The learned Judge ought to have found, in light of the express release by the creditor of all claims for interest, that:
 - (1) Any right to claim interest pursuant to a right in the underlying contract with LBIE had been released; such that
 - (2) Such contractual rate could no longer be relied upon as a “rate applicable ... apart from the administration” within the meaning of Rule 2.88(9).

Declaration (iv)

*If (contrary to declaration (i) above) the CRA or any of the CDDs had, as a matter of construction, the effect of releasing any Currency Conversion Claims, the Administrators would be directed by the Court, under the principle in *ex parte James (1874) LR 9 Ch Applicant 609* and under paragraph 74 of Schedule B1 to the Insolvency Act 1986, not to enforce such releases.*

5. The learned Judge erred in law in concluding that (had the CDDs, as a matter of construction, had the effect of releasing any Currency Conversion Claims) the Administrators would be directed by the Court, under the principle in *ex parte James* and under paragraph 74 of Schedule B1 to the Insolvency Act 1986, not to enforce such releases.

6. In particular:
 - (1) The learned Judge erred in concluding that either the principle in *ex parte James* or para 74 of Schedule B1 permitted the Court to direct administrators to refuse to perform contracts into which creditors had entered freely without coercion, undue influence, mistake or misrepresentation, particularly where there was no basis for holding that the execution of that contract by the administrators fell within either the principle in *ex parte James* or paragraph 74.

 - (2) The learned judge erred in defining the principle in *ex parte James* as applying in any case where it was merely 'unfair' for any reason for the contract to be enforced. The learned judge ought to have concluded that for the principle to apply, the actual or proposed conduct of the administrators must constitute dishonourable behaviour, involving the unfair taking advantage of someone.

 - (3) The learned judge erred in characterising the release of currency conversion claims as an unintended effect of the CDDs, and/or in concluding that this was a relevant consideration to the enforcement of the CDDs. The learned judge ought to have held that there was nothing dishonourable or unfair in a manner to engage either the principle in *ex parte James* or paragraph 74 in the administrators agreeing with a creditor mutual and comprehensive releases of all claims, whether in contemplation or not, and that the enforcement of that contract did not become dishonourable or unfair in the relevant sense upon the subsequent appreciation or emergence of currency conversion claims, any more than it would upon the subsequent appreciation or emergence of any other claim that fell within the ambit of the release provisions.

- (4) The learned judge erred in concluding that there was anything dishonourable or unfair in the relevant sense in the fact that only some creditors entered into CDDs in a form which had the effect of precluding or releasing currency conversion claims. The learned judge ought to have concluded that enforcement of a bilateral contract entered into between one creditor and the administrators could not be dishonourable or unfair in the relevant sense by reference to a different agreement entered into with a different creditor.