IN THE HIGH COURT OF JUSTICE **Claim No. HC-2014-000197**
CHANCERY DIVISION

BETWEEN

THE LIBYAN INVESTMENT AUTHORITY
(incorporated under the laws of the State of Libya)

Claimant

-and-

GOLDMAN SACHS INTERNATIONAL

Defendant

CLAIMANT'S SKELETON ARGUMENT
for the CMC on 6 October 2014

Introduction

1. This is the first case management conference in these proceedings, which concern nine financial derivative transactions ("**the Disputed Trades**") which the Claimant ("**the LIA**") entered into with the Defendant ("**GSI**") between January and April 2008.[1] The LIA paid total up-front premiums in excess of US$1 billion to GSI to enter into the Disputed Trades, thereby generating (on the LIA's best estimate) up-front profits for GSI of US$350 million. The Disputed Trades subsequently expired worthless in 2011.

2. As explained further below, the LIA has grave concerns about how GSI procured the LIA's consent to enter into these transactions (which it has consistently protested since the summer of 2008). Put shortly, the LIA's case is that in the first 4 months of 2008 GSI took unfair advantage of the relationship of trust and confidence that had been established between the parties, and/or exploited the LIA's position of vulnerability (namely being a newly established sovereign wealth fund which lacked experience in the field of derivative instruments), in order to drive through a series of complex derivative investments which, whilst extremely profitable for GSI, were inherently unsuitable for a sovereign wealth fund like the LIA.

3. The LIA now seeks declarations that it is entitled to set aside on the grounds that the Disputed Trades were:

[1] The Disputed Trades are governed by English law, and are subject to the jurisdiction of the English Courts.

3.1 induced by GSI's undue influence over the LIA; and/or

3.2 unconscionable bargains;

together with rescission of the Disputed Trades and various other consequential relief.

4. GSI counterclaims alleging that, if the LIA's claim is successful, the LIA made various allegedly incorrect representations and warranties which entitle GSI to damages so as to extinguish the LIA's claims for circuity (as well as damages for sundry other alleged heads of loss).

5. The following issues fall to be determined at this hearing:

5.1 the LIA's application for its costs of GSI's misconceived application for summary judgment which GSI has been forced to abandon (albeit it has only done so belatedly and after the parties have incurred substantial cost and the proceedings have been substantially delayed);

5.2 the LIA's application for permission to make minor amendments to its Particulars of Claim; and

5.3 various issues relating to the directions to take this matter to trial.

Pre-reading and time estimate

6. The court is respectfully asked to pre-read the following documents in the following order:

6.1 the parties' respective skeleton arguments [**A1/7 and 8**];

6.2 the list of issues [**A1/2**] and neutral case summary [**A1/1**] (which are not yet agreed but the parties are currently in the process of trying to reach an agreement) [**E/71/225-234**];

6.3 the statements of case (namely the LIA's Particulars of Claim [**B1/10/7-34**]; GSI's Defence and Counterclaim [**B1/11/35-83**]; and the LIA's Reply and Defence to Counterclaim [**B1/12/84-111**]);

6.4 the LIA's application notice dated 16 September 2014[**C2/18/1-2**], together with Mr Twigden's second witness statement dated 16 September 2014 [**C2/20/5-19**], the draft order sought [**C2/19/3-4**] and a copy of the LIA's draft Amended Particulars of Claim [**C2/22/26-53**]. The Court should also read the statement of Mr Byrne-Hill in response [**C2/23/54-57**]; and

6.5 the draft directions order enclosed herewith at **Appendix I**.

7. The Court should also skim the following witness statements (served in connection with GSI's application for summary judgment which it has now withdrawn), in order to get a flavour of the merit / demerit in GSI's abandoned summary judgment application:

7.1 the witness statement of Andrea Vella (served on behalf of GSI) [**C1/14/5-44**];

7.2 the first witness statement of Simon Twigden in response to Mr Vella: focussing in particular on paragraphs 1 – 10 (overview of the response); 113 – 177 (the relationship of trust and confidence between the LIA and GSI); 200 – 235 (the Citigroup Trades); 274 – 293 (the basket of Further Trades); and 309 – 317 (concluding remarks) [**C1/16/60-170**];

7.3 the witness statement of Catherine McDougall in response to Mr Vella [**C1/15/45-59**];

7.4 the witness statement of Edward Allen in response to Mr Vella [**C1/17/171-187**].

8. It is anticipated that this suggested pre-reading will take in the region of 4-5 hours.

9. The CMC is listed for two days, but it is hoped that the matters to be determined can be addressed within 1 to 1½ days, particularly if the court has had an opportunity to pre-read the above materials.

Substantive background

10. The parties are in the process of agreeing a neutral case summary and a list of issues [**E/71/225-234**].

11. The LIA's claim can be summarised as follows:

    11.1 The LIA is a sovereign wealth fund, which was established during the last years of the Gaddafi era, in 2006 and following, after the lifting of economic sanctions (which had been in place for a period of over 20 years), to invest the country's oil wealth for the benefit of future generations of Libyans [**C1/16/71**]. At the relevant time, the CEO of the LIA was Mr Layas, and the deputy CEO was Mr Zarti: both of whom were also members of the LIA's board of directors [**C1/16/73**].

    11.2 In the course of 2007 and early 2008, the LIA set up two investment teams: an equity investment team, headed up by Mr Enaami; and an alternative investment team headed up by Mr Gheriani [**C1/16/73**].

    11.3 There is a dispute between the parties regarding the LIA's sophistication / lack of sophistication in the field of investment banking, and in particular financial derivative transactions, as at the start of 2008. GSI contends that the LIA was financially sophisticated at that stage. The LIA contends that it was not, and particularly when compared to GSI. (The limited extent of the experience and qualifications of Messrs Layas, Zarti, Enaami and Gheriani is set out at Schedule 1 to the Reply and Defence to Counterclaim [**B1/12/108-111**]. By contrast, the considerable experience and qualifications of the various GSI representatives in the field of derivative instruments are set out at paragraphs 72 to 89 of Mr Twigden's first witness statement [**C1/16/85-88**].)

    11.4 In 2007 it was widely reported in the press that the LIA was being set up, and had substantial liquid funds to invest [**D5/15/178-179**]. The LIA began to be heavily courted by Western banks, who were keen to win business from the Libyans.

    11.5 Initial meetings took place in late 2006 and early 2007 between the LIA and GSAM – the asset management arm of GSI [**C1/16/94-95**]. At those meetings, the LIA

emphasised that it was at an embryonic stage, and was looking for direction and guidance from a banking "*partner*" [**D2/19/378-379**]. To that end, Mr Zarti asked whether it might be possible to set up some form of "*partnership*" or "*joint venture*" between the institutions [**D1/17/373-374A**].

11.6 In August 2007, the LIA was taken on as a client of GSI, and executed various items of account opening documentation [**D2/40/679-702**]. There is a dispute between the parties as to whether or not there was anything in the account opening documentation which would preclude the LIA from advancing its present claims (as to which, see below).

11.7 In September 2007, the LIA agreed to subscribe to two managed investment funds with GSI: the Petershill Fund and the Mezzanine Fund. In doing so, it ignored the warnings of its external financial advisor, Mr Ali Baruni, and legal advisers, Slaughter & May – prompting Mr Baruni's resignation from his position [**D5/1/1-4**], [**D7/62/682-701**], [**D7/63/702**], [**D7/64/703**], [**D7/65/704-706**] and [**D7/67/709**].

11.8 In October 2007, there was a high level presentation delivered in Tripoli by two Goldman Sachs senior partners to the deputy Libyan Prime Minister, Dr Zlitni – a member of the LIA's board of secretaries (the LIA's senior governing body). In the presentation, GSI said that there was a unique opportunity to establish a GSI-LIA "*strategic partnership*", pursuant to which: (i) GSI would set up a dedicated coverage team for the LIA; (ii) the LIA would receive ad hoc and bespoke financial training from GSI; (iii) the LIA would be given access to GSI research materials; and (iv) the LIA would be given "*strategic*" and "*tactical*" investment advice by GSI [**D5/4/7-46**].

11.9 Following the presentation, these steps were then implemented. Thus a dedicated coverage team was set up for the LIA; and the LIA was given access to GSI research materials. Furthermore, the LIA officers and employees were given extensive financial training by GSI – both in the form of attendance at GSI's offices in London; and in the form of training on the ground in Libya. To that end, Mr Kabbaj of GSI was sent out to the LIA's offices in Tripoli, and began to spend extended periods of time there, to train up the LIA staff [**C1/16/64**].

11.10 In early 2008, at a time when the LIA was just finishing furnishing its offices and buying computers and desks, and before the LIA had even drawn up and approved a formal asset allocation plan, Mr Kabbaj began to encourage the LIA to enter into a series of complex long-term derivative investments using options and leverage.

11.11 By these derivative instruments, the LIA would not actually acquire any stock in the underlying companies (which were Western financial institutions, insurance companies and utilities like Citigroup, EdF, Allianz and Santander): rather the LIA would take a position as to how the share price of the underlying company would perform during a specified period in 3 years' time. If the share price performed above a certain level, then the LIA would be entitled to exercise an option to receive a payment from GSI at maturity; if it performed below a certain level, the LIA would lose the entirety of its premium.

11.12 From 24 January 2008, the LIA entered into a series of 9 derivative transactions with GSI, each of which was structured along these lines. However, the LIA's minutes of the board of directors show that the LIA fundamentally misunderstood the nature of these transactions: and show that the LIA thought that it was actually purchasing stock in the underlying companies, rather than purely betting on share price movements [**D5/9/91-120**] and [**D5/10/138-159**].

11.13 There is a dispute between the parties as to how clearly the various derivative features of the transactions were explained by GSI to the LIA (in particular whether they were to be cash-settled 'bets', as opposed to leveraged equity investments); and the extent to which the LIA was encouraged by Mr Kabbaj to enter into these transactions. In particular, there is a dispute about the extent to which Mr Kabbaj prepared presentations and memoranda for the junior employees within the LIA to present to their senior management, which appeared independently to endorse the same transactions which Mr Kabbaj was promoting to senior management.

11.14 In late January 2008, the LIA entered into two Citigroup trades worth US$200,000,002.08; in February 2008, the LIA entered into two EdF trades worth US$176,930,631; at the end of April 2008, the LIA entered into a basket of further trades (relating to Allianz, ENI, Santander and Unicredit) worth a total of €529,150,652.

11.15 Notably, the LIA made no attempt to negotiate terms with GSI in relation to any of the Disputed Trades, or to obtain competitive quotes from other financial institutions in relation to them. Nor did the LIA take any external financial or legal advice from anyone at the time when the Disputed Trades were concluded [**C1/16/64**] and [**D5/8/53-61**]. As already noted, the terms of the Disputed Trades were extremely favourable to GSI: and on the LIA's own best estimate, GSI stood to make up-front profits in the order of US$350 million, and may even have realised profits in excess of this figure.

11.16 The same day that the first Citigroup trade was executed, Mr Kabbaj sent Mr Enaami and Mr Gheriani a letter ("**the Capacity Letter**"), which was signed and returned by them within the space of around two hours [**D2/42/719-720**]. There is a dispute between the parties about the circumstances in which the Capacity Letter was signed; whether Mr Enaami and Mr Gheriani were acting outside their authority in purporting to execute this on behalf of the LIA (and whether that fact was known to GSI); and the impact, if any, of the representations and warranties made in the Capacity Letter on the LIA's present claims (as to which see below).

11.17 In early June 2008, GSI started to chase the LIA for signed copies of the trade confirmations relating to the 9 derivative transactions. These were then passed to an associate with Allen & Overy, Catherine McDougall, who was on secondment to the LIA at the time [**D10/28/4/6-41**] and [**D10/28/8/62-63**].

11.18 Ms McDougall raised various concerns within the LIA about the nature of the derivative transactions and the circumstances in which they had come to be concluded [**C1/15/47**]. A meeting then took place between representatives of the LIA and GSI in July 2008, at which point the relationship between the parties broke down [**C1/15/55-62/paras 54-62**].

11.19 Thereafter, without waiving privilege, talks took place between the parties to see if the matter could be resolved without recourse to legal proceedings. Subsequently, the Libyan revolution took place in February 2011 and following: and after a period of instability and new appointments to the LIA's board of directors, the present proceedings were issued.

Relevant procedural background

12. The LIA issued its claim on 21 January 2014 [**B1/9/1-2**] and served GSI on 28 January 2014 [**B1/10/7-34**].

13. Rather than serve a Defence, on 7 February 2014 GSI's solicitors, Herbert Smith Freehills, ("**HSF**") wrote to the LIA's solicitors, Enyo Law LLP, ("**Enyo**"), initially seeking a 28-day extension of time for the service of the Defence [**D11/4/8-9**]; and then, shortly before time for service of that Defence expired on 13 March 2014, HSF wrote to Enyo indicating that GSI intended to issue an application for summary judgment and seeking a stay of the proceedings in the interim [**D11/2/4-5**].

14. The application for summary judgment was then issued by GSI on 10 April 2014 [**C1/13/1-3**]. The chronology of events in relation to that application for summary judgment, and the circumstances in which it came to be withdrawn by GSI on 4 August 2014, are set out in detail in Mr Twigden's second witness statement at paragraphs 9 (a) to (p)[**C2/20/7-13**], and will not be repeated here: save to note that, by its letter dated 17 June 2014 which was sent alongside service of the LIA's witness statements, Enyo invited HSF to withdraw its summary judgment application before 1 July 2014, or face an application by the LIA for indemnity costs [**D11/6/12**]. In the event, HSF chose to ignore that letter; and GSI only withdrew the application for summary judgment on 4 August 2014, and officially informed the court on 8 August 2014 [**E/48/69**].

15. By its letter dated 5 August 2014 Enyo wrote to HSF, welcoming GSI's withdrawal of its summary judgment application [**D11/12/53-56**]. Enyo went on to state, however, that GSI's proposals as to costs (that they should simply be in the case) were unacceptable, given that the summary judgment application was always misconceived and had been pursued by GSI on a wholly misguided basis.

16. Thereafter the parties were unable to agree as to the costs of the summary judgment application, although it was agreed that this hearing (which was initially to consider that application over five days) should be reduced to a listing of two days for the purposes of a CMC at which the LIA would seek its costs of the application on an indemnity basis as well as permission to amend its Particulars of Claim [**E/49/70**].

17. On 15 September 2014, GSI filed and served its Defence and Counterclaim [**B1/11/35-83**]. GSI refused to plead to the LIA's draft Amended Particulars of Claim in its Defence and Counterclaim, notwithstanding the LIA's proposal that it should do so in order to avoid the costs of potentially having to amend so as to do so in due course (of which see below).

18. On 16 September 2014, the LIA issued its formal application for its costs of the abandoned summary judgment application and for permission to amend its Particulars of Claim in the form provided to GSI on 15 July 2014 [**C2/18/1-2**].

19. The parties met to discuss electronic disclosure on 17 September 2014, exchanged e-disclosure questionnaires on 19 September 2014 [**A1/5 and 6**] and exchanged directions questionnaires on 26 September 2014 [**A1/3 and 4**].

20. Despite some apparent reticence on GSI's part to be drawn on a detailed timetable to trial, the LIA understands that GSI largely accepts its proposed timetable to trial. Insofar as there is a dispute between the parties (as addressed in more detail below), then the LIA would invite the Court to adopt its proposed timetable, which the LIA believes to be realistic and workable.

Issues to be determined at this CMC

21. As noted above, the following issues fall to be determined at this hearing:

    21.1 the LIA's application for: (i) its costs of GSI's abandoned application for summary judgment; (ii) those costs to be assessed on an indemnity basis (if not agreed); and (iii) an interim payment in respect of those costs;

    21.2 the LIA's application for permission to make minor amendments to its Particulars of Claim; and

    21.3 various issues relating to the directions to take this matter to trial.

22. Each of these aspects of the CMC is addressed in Parts I to III below

PART I

The costs of GSI's abandoned summary judgment application

23. As already noted, there are three issues that fall to be determined:

    23.1 Whether GSI should pay the LIA its costs incurred in respect of GSI's abandoned summary judgment application;

    23.2 Whether those costs should be assessed on a standard or indemnity basis;

    23.3 Whether GSI should be ordered to make an interim payment on account of those costs to the LIA, and if so in what amount.

The principle that GSI should pay the LIA's costs

24. CPR r.44.2(2)(a) sets down the general rule that "*the unsuccessful party will be ordered to pay the costs of the successful party*".

25. There can be no question here that the LIA is anything other than the successful party, in relation to GSI's application for summary judgment.

    25.1 GSI chose to change direction, shortly before its Defence was due to be filed, so as to pursue an application for summary judgment without filing a Defence (despite having initially indicated that it intended to file a Defence and despite having obtained the LIA's agreement to a substantial extension of time for this purpose).

    25.2 As explained further below, that application served no proper purpose. It merely caused substantial delay to the progress of these proceedings and put the LIA to great inconvenience and expense.

    25.3 The application was subsequently withdrawn; albeit only after the LIA had begun its final preparation and incurred further financial cost for the forthcoming hearing.

25.4 GSI obtained no relief whatsoever. The application achieved nothing. GSI was entirely unsuccessful.

26. The general rule ought accordingly to apply and GSI ought to be ordered to pay the LIA's costs.

GSI should pay the LIA's costs to be assessed on the indemnity basis

27. Moreover, GSI's conduct in pursuing the summary judgment application – and in pursuing it for so long – is so highly unreasonable that it merits an order that the LIA's costs be assessed on the indemnity basis.

Principles to apply when considering whether to award indemnity costs

28. The principles to be applied in considering whether to award indemnity costs rather than standard costs were helpfully summarised by Gloster J (as she then was) in Euroption Strategic Equity Fund Ltd v Skandinaviska Enskilda Banken AB [2012] EWHC 749 (Comm) at paragraph 9 to 15. In essence:

28.1 There has to be something in the conduct of the action, or about the circumstances of the case in question, which takes it out of the norm in a way which justifies an order for indemnity costs: see paragraph 19 of Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson [2002] EWCA (Civ) 879 and paragraph 9 of Noorani v Calver [2009] EWHC 592 (QB).

28.2 The Court of Appeal, however, has declined to give guidance to judges intending to make orders for costs on the indemnity basis. There is an infinite variety of situations that might go before a court justifying the making of such an order. Issues of costs ought to be left to a judge's discretion following the rules provided in the CPR rather than supplemented by guidance notes from the Court of Appeal.

28.3 Thus in Excelsior:

28.3.1 Waller LJ found, at paragraph 39, that:

"*[t]he question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?*"; and

28.3.2 Lord Woolf CJ had previously concluded, at paragraph 32, that:

"*it is dangerous for the [Court of Appeal] to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement*".

28.4 To demonstrate that a case has gone outside the norm of behaviour, it is not necessary to show that the paying party's conduct lacked moral probity or deserved moral condemnation in order to attract recovery of costs on an indemnity basis. As Christopher Clarke J said in Balmoral Group Ltd v Borealis (UK) Ltd [2006] EWHC 2531 (Comm):

"*… The basic rule is that a successful party is entitled to his costs on the standard basis. The factors to be taken into account in deciding whether to order costs on the latter basis have been helpfully summarised by Tomlinson, J., in Three Rivers District Council v The Governor and Company of the Bank of England [2006] EWHC 816 (Comm). The discretion is a wide one to be determined in the light of all the circumstances of the case. To award costs against an unsuccessful party on an indemnity scale is a departure from the norm. There must, therefore, be something — whether it be the conduct of the claimant or the circumstances of the case — which takes the case outside the norm. It is not necessary that the claimant should be guilty of dishonesty or moral blame. Unreasonableness in the conduct of the proceedings and the raising of particular allegations, or in the manner of raising them may suffice. So may the pursuit of a speculative claim involving a high risk of failure or the making of allegations of dishonesty that turn out to be misconceived, or the conduct of an extensive publicity campaign designed to drive the other party to settlement. The making of a grossly exaggerated claim may also be a ground for indemnity costs*."

28.5 Conduct must, however, be unreasonable "*to a high degree*" to attract indemnity costs (although "*unreasonable*" in this context does not mean merely wrong or misguided in hindsight: see Kiam v MGN Limited (No 2) [2002] 1 WLR 2810). In each case, it is a fact dependent question as to whether the paying party's conduct has been unreasonable to a high degree.

29. As set out further below, the way in which GSI has conducted and pursued its summary judgment application is certainly unreasonable "*to a high degree*", and well out of the norm to be expected.

30. Indeed GSI's conduct is in many ways analogous to that of the defendant in Simmons & Simmons LLP v Hickox [2013] EWHC 2141 (QB) who, having sought extensions of time for service of a defence, proceeded to issue and pursue an application for summary judgment which was – and should have been seen to be – hopeless. Indemnity costs were awarded against that defendant.

31. At paragraphs 15 and 16 of Simmons & Simmons, Coulson J said:

> "*15. In my view, the defendant's conduct, seen in the round, was indeed out of the norm. There are a number of reasons for that: first, the defendant twice sought extensions of time for the service of a defence and then, on the very day that the final extension expired, did not serve a defence but instead issued an application for summary judgment. There is no explanation in the material before me as to how and why the defendant had such a drastic change of heart. It is said by Mr Salzedo that this was simply a delaying tactic. In the absence of any other explanation, it seems to me that that is a reasonable inference. That view is strengthened by my conclusion that the summary judgment application was (and should have been seen to have been) hopeless. I have already indicated that, in my view, Ms Egan's report was never going to justify an order for summary judgment. I have already said it was, on its face, too equivocal for that.*
>
> *16. There is no explanation in the material as to how and why an application for summary judgment was made when the defendant knew, or should have known, that the report that was provided in support of the application could not justify it. It is suggested that there may be privileged material going to this issue, but it seems to me that that is a critical point on which the burden rested with the defendant to explain how this situation had been arrived at. It is simply inappropriate in these courts to make an application for summary judgment based on an alleged point of law when the material that is available on that point of law does not support the application for summary judgment.*"

Reasons why it would be appropriate to award indemnity costs in the present case

32. There are essentially 3 reasons why it would be appropriate to award costs on an indemnity basis in the present case:

    32.1 GSI's summary judgment application has always been hopeless, as should have been obvious to GSI;

32.2 GSI's decision to pursue the summary judgment application was tactical;

32.3 There is no good reason advanced by GSI for the decision to abandon its summary judgment application.

33. Each of these three aspects is considered further below, having set out briefly (i) the law relating to summary judgment applications; (ii) the law relating to claims in undue influence and for unconscionable bargain.

Types of case susceptible to summary judgment

34. CPR r.24.2 provides, so far as material, that the court may give summary judgment on the whole of a claim if it considers that a claimant "*has no real prospect of succeeding on the claim*" and "*there is no other compelling reason why the case… should be disposed of at a trial.*"

35. In TFL Management Services v Lloyds Bank plc [2013] EWCA Civ 1415, the Court of Appeal (at paras 26 and 27 of the judgment of Floyd LJ) endorsed and expanded upon Lewison J's helpful summary of the principles that are applied by the Court on an application for summary judgment, as set out in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch). In short:

35.1 The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success. A 'realistic' claim is one that carries some degree of conviction.

35.2 In reaching its conclusion the court must not conduct a 'mini-trial'. This does not mean the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

35.3 However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

35.4 On the other hand it is not uncommon for an application under CPR Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

35.5 That said, difficult points of law, particularly those in developing areas, should not be grappled with on summary judgment applications. Such questions are better decided against actual, rather than assumed, facts.

36. In short, an application for summary judgment "*is designed to deal with cases that are not fit for trial at all*" - see Lord Hope said in Three Rivers District Council v Bank of England (No. 3) [2003] 2 AC 1 at 261B. Lord Hope gave as examples of where an application for summary judgment might be appropriate:

36.1 Where it is clear as a matter of law at the outset that even if the claimant succeeds in proving all the facts he offers to prove, that he will not be entitled to the remedy he seeks.

36.2 Alternatively, where it is possible to say with confidence that the factual basis for the claimant's claim is fanciful and entirely without substance, because (for example) it is contradicted by all the documents or other material on which it is based.

37. As explained further below, that was never the case here, because:

37.1 There was no knock-out point of law or construction, which would summarily defeat LIA's claims in undue influence and/or unconscionable bargain;

37.2 An analysis of the contemporaneous documents shows that, far from being completely inconsistent with all the contemporaneous documents, the LIA's claims are in fact extensively corroborated by a very large number of contemporaneous documents (which, as Mr Vella himself says "*speak for themselves*" [**C2/14/6/para.4**]).

The law relating to undue influence and unconscionable bargain

38. The law relating to undue influence is authoritatively set out in the speech of Lord Nicholls in Royal Bank of Scotland v Etridge (No 2) [2002] 2 AC 773, at 794ff, from which the following principles can be extracted:

38.1 Undue influence is one of the grounds of relief developed by the courts of equity as courts of conscience. The objective is to ensure that the influence of one person over another is not abused (para 6).

38.2 Equity will investigate the manner in which the intention to enter into the transaction was secured. If the intention was produced by an unacceptable means, the law will not permit the transaction to stand (para 7).

38.3 Equity identified broadly two forms of unacceptable conduct: (i) overt acts of improper pressure or coercion; (ii) a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage (para 8).

38.4 The types of relationship into which the latter principle falls cannot be listed exhaustively. The question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type. Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited (paras 10 to 11).

38.5 Whether a transaction was brought about by the exercise of undue influence is a question of fact. Generally, he who asserts a wrong has been committed must prove it (para 13).

38.6 Proof that a defendant has acquired influence over the complainant, coupled with a transaction which calls for an explanation, will normally be sufficient, failing satisfactory evidence to the contrary to discharge the burden of proof on the complainant. On proof of these two matters the stage is set for the court to infer

that, in the absence of a satisfactory explanation from the defendant, the transaction can only have been procured by undue influence (paras 14 and 21).

38.7 Generations of equity lawyers have conventionally described this situation as one in which a presumption of undue influence arises. These cases are the equitable counterpart of common law cases where the principle *res ipsa loquitur* is invoked. There is a rebuttable evidential presumption of undue influence (para 16).

38.8 It is not necessary for the complainant to establish a manifest disadvantage, as opposed to a transaction calling for an explanation (paras 21 to 31).

38.9 Undue influence has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused. Inaccurate explanations of a proposed transaction by the ascendant party may constitute abuse of the influence the ascendant party has (paras 32 to 33).

39. Furthermore, the court should note the width and flexibility of the doctrine of undue influence. In particular:

39.1 The doctrine is not limited to gifts, and can arise in the context of a commercial relationship, including in the context of a relationship between bank and customer (although such cases are likely to be exceptional): see Lord Nicholls at para 10 of RBS v Etridge (No 2) (above). It has been held on the highest authority that there is no substitute in this area of the law for a "*meticulous examination*" of the facts, to see whether the requisite degree of influence has been acquired and the line crossed by the bank: see Lloyds Bank v Bundy [1975] QB 326 at 347 per Sir Erich Sachs (where the line was held by the Court of Appeal to have been crossed by the bank); and National Westminster Bank v Morgan [1985] AC 686 at 708F per Lord Scarman (where the line was held by the House of Lords not to have been crossed by the bank).

39.2 The doctrine of undue influence can also arise in a corporate context. Thus a company can be a claimant, and can set aside a transaction for undue influence exercised over its officers or employees: see Mutual Finance v John Wetton & Sons [1937] 2 KB 389; equally, a company / unincorporated association may wield

influence over a complainant, who may legitimately complain of institutional undue influence: see Roche v Sherrington [1982] 1 WLR 599.

39.3 The doctrine of undue influence can arise even though the parties are not in a fiduciary or advisory relationship.[2] A classic example is the husband and wife relationship at play in the various cases under appeal in RBS v Etridge (No 2) (above) – those husband and wife relationships were neither fiduciary nor advisory. Another example of such a relationship is the employer and employee relationship in Credit Lyonnais v Burch [1997] 1 All ER 144 (where the employer was found to be in a position of influence vis-a-vis the employee).

39.4 The doctrine of undue influence can arise even without the need to establish the complete domination of one party over another: see Sir Erich Sachs in Lloyds Bank v Bundy (above) at page 342. All that is required to be shown is that one party has acquired a "*measure of influence, or ascendancy*" over another: see Lord Nicholls in RBS v Etridge (No 2) at para 8.

39.5 The doctrine of undue influence can arise even where the complainant has received independent advice, and even where the complainant understands fully the true nature of the transaction and is determined to proceed with it: see RBS v Etridge (No 2) at para 20; and Credit Lyonnais v Burch (above). It matters not whether the complainant understands fully what he is doing (for example making a gift), if he is acting under another's influence; and even if the complainant has received independent advice, it is a question of fact in every case whether or not the independent advice actually received has had an emancipating effect on the complainant, such that the transaction should be allowed to stand (*ibid*).

40. So far as unconscionable bargain (sometimes called unconscionable dealing) is concerned, the leading authorities are Alec Lobb (Garages Ltd) v Total Oil (Great Britain) Ltd [1983] 1 WRL 87 at 94-95; Hart v O'Connor [1985] AC 1000; Boustany v Piggott (1995) 69 P & CR 298; and Strydom v Vendside Ltd [2009] EWCHC 2130 (QB) at para 35. They show that in order for a transaction to be set aside on the ground of unconscionable bargain, three requirements must be satisfied:

[2] Indeed, if the parties are in a fiduciary relationship, a different (albeit analogous) doctrine arises, namely the doctrine of abuse of confidence: see Enonchong, *Duress, Undue Influence and Unconscionable Bargain*, (2nd ed., 2012), Chapter 14, and in particular paras 14-054 to 14-056.

40.1 The party seeking relief must have been under some special disadvantage or disability (such as poverty or ignorance);

40.2 The stronger party must have acted in a way which is unconscientious in taking advantage of the weaker party's disability (that is to say there must be impropriety in the stronger party's conduct); and

40.3 There must be a significant imbalance in the substance of the transaction to the disadvantage of the weaker party.

41. In this regard, the court should note:

41.1 A special disadvantage can arise where one party is naive with respect to a particular type of transaction, even though he may be skilled in some other field: see Megarry J in Cresswell v Potter [1978] 1 WLR 255 at 258. Indeed a special disadvantage may arise where one party is "*naive, trusting and unbusinesslike and no match for an astute businessman*": see Jones v Morgan [2001] EWCA Civ 995 at 33.[3]

41.2 Relief is not limited to a particular class of complainant. A company can claim that it was the subject of an unconscionable bargain: see e.g. Alec Lobb (Garages) (above). Indeed, in his book *Duress, Undue Influence and Unconscionable Dealing*, Sweet & Maxwell, 2nd Edition (2012), Professor Enonchong has suggested that a claim for unconscionable bargain might succeed:

> "*...in the case of an international commercial transaction between a powerful multinational corporation on the one hand and a small and relatively poor developing state*."

41.3 As with undue influence, the doctrine of unconscionable bargain can arise even where the complainant has received independent advice: see Credit Lyonnais v Burch (above); and Boustany v Piggott (above).

[3] Although the first instance decision was overturned on appeal that was because of: (i) lack of unconscionability on the part of the defendant; and (ii) evidence of the actual receipt of independent advice from a suitably qualified solicitor. There was no suggestion that the special disadvantage identified by the judge could not have constituted a relevant disadvantage.

The reasons why GSI's application for summary judgment was hopeless

42. GSI's application for summary judgment was always bound to be hopeless, unless GSI could (i) point to a clear point of law which would defeat the LIA's claims in undue influence / unconscionable bargain; or (ii) unless it could demonstrate (without embarking on a mini trial) that the claims were fanciful.

43. GSI never identified any such point of law (and has still not done so, despite service of its Defence on 10 September 2014); nor did Mr Vella's witness statement come anywhere close to demonstrating that the LIA's claims were fanciful - for example by pointing to numerous inconsistent contemporaneous documents.

44. On the contrary, far from being fanciful, there already exists a considerable body of contemporaneous materials which provide good corroboration of the LIA's claims, and demonstrates that there is (to put it at its very lowest) substance to the LIA's claims. Thus (to give some examples only):

    44.1 Mr Vella's witness statement exhibited a note of a meeting between the LIA and GSAM, on 29 November 2006 [**D1/17/373-374**]. The note recorded GSAM's understanding that the LIA's needs were "*both broad ranging and fundamental*", with issues such as staffing, expertise and the LIA's business model needing to be addressed. The note also recorded that, from the outset, the LIA was looking to establish a "*joint venture*" or "*partnership*" with GSAM. This document therefore goes directly to the LIA's lack of financial sophistication; together with the extremely close and unusual nature of the banking relationship that the LIA was looking to build with GSI/GSAM from the outset.

    44.2 Mr Vella's witness statement also exhibited a note of a further meeting between the LIA and GSAM, on 22 February 2007 [**D2/19/378-379**]. That note recorded that the LIA was "*a very newly created organization*" and that it was, by its own admission "*...at an embryonic stage of their development and so looking for input and advice from all sources*". It was also noted that Mr Zarti, the LIA's deputy CEO, had explained that the LIA "*...will certainly not be a 'gambler'*". This document again went to the LIA's lack of financial sophistication, together with its stated investment

objectives and whether the leveraged derivative products which formed the subject matter of the Disputed Trades were in any way suitable for the LIA.

44.3 To give another example: in September 2007, the LIA took a decision to enter into two investments with GSI, namely: an investment in GSI's managed Petershill Investment Fund; and an investment in GSI's managed Mezzanine Investment Fund. As already noted above, the LIA did so against the advice of Mr Baruni (its external financial consultant) and Slaughter & May [**D5/1/1-4**], [**D7/62/682-701**], [**D7/63/702**], [**D7/64/703**] and [**D7/65/704-706**]. This prompted Mr Baruni's resignation [**D7/67/709**]. In his Petershill Investment Fund advice email dated 26 September 2007, Mr Baruni warned the LIA that it had "*...depended excessively on the reputation and good faith of [GSI]. [The LIA] should not depend on this...*" [**D5/1/1-4**]. This document therefore goes directly to the nature of the relationship between GSI and the LIA – and the question of whether, by September 2007, the LIA was already growing dependent on GSI and preferring to follow GSI's recommendations over and above those of its external financial advisor.

44.4 Not only that. The same day that Mr Baruni sent the above email to the LIA, Mr Zarti's assistant, Ms Sofia Wellesley, responded to him via email in order to remind him that the LIA was staffed by "*...a team of clearly naive and unqualified individuals ... doing their best in the face of extremely intelligent, ambitious and experienced individuals*" [**D5/2/5**]. Again this is a document which goes directly to the level of the LIA's financial sophistication relative to GSI's financial sophistication, at a point in time shortly before the Disputed Trades were transacted.

44.5 On 7 October 2007, the documents show that a presentation was made by two senior GSI partners to the Libyan Deputy Prime Minister, Dr Zlitni (a member of the LIA's most senior board) entitled "*Strategic Discussion*". As already noted, this appears to have been the most high-level presentation that was made between GSI and LIA. The presentation was kept carefully on the LIA's files, and appears at [**D5/4/7-46**] and the relevant detail in the presentation is identified in Mr Twigden's first witness statement at paragraphs 140 to 147 [**C1/16/103-106**]. The document goes again directly to the nature of the relationship between the parties: and demonstrates that GSI was proposing the establishment of an LIA-GSI "*strategic partnership*" (along the lines that the LIA had initially requested in the meetings with

GSAM), pursuant to which (i) a dedicated coverage team would be set up for the LIA; (ii) GSI would offer LIA staff both ad hoc and bespoke training in derivative instruments; (iii) the LIA would be given access to GSI research; and (iv) GSI would provide the LIA with "*tactical*" and "*opportunistic*" investment advice. Nor, as Mr Twigden points out in his first witness statement at paragraphs 148 – 169 [**C2/16/106-112**], was this October 2007 presentation mere puff and flannelling on the part of GSI; it was subsequently implemented as between the parties. Again, this presentation therefore goes directly to the nature of the relationship between the parties, and the question of whether it had grown beyond the more normal banker-customer relationship, into a relationship of trust and confidence.

44.6 Mr Vella's witness statement also exhibited an email which he sent to his colleagues within GSI on 18 January 2008, on the eve of the LIA's decision to enter into the first of the Disputed Trades. Notably Mr Vella stated, in the final paragraph of his email:

"*Finally, Kabbaj indeed has a very impressive grip on these people [i.e. the LIA]: I reckon that with some guidance we [i.e. GSI] can channel the energy into creating less entropy [i.e. chaotic unpredictability] and more added value.*" [**D2/31/642**]

This is therefore another contemporaneous document going directly to the question of the relationship between the parties: and whether it was the case that, by January 2008 at the very latest, GSI had acquired (through Mr Kabbaj) a measure of influence or ascendancy (Mr Kabbaj's "*very impressive grip*") such that it could influence the LIA's decision-making process if it so wanted.

44.7 Another example is the extraordinary email which Mr Kabbaj sent to his colleagues (including Mr Vella) dated 18 April 2008, on the eve of the basket of Further Trades, entitled "*Driss and myself spoke with [Mr Zarti]…*" and in the body of which he said:

"*…for almost an hour today. [Mr Zarti] has the current names in mind: barclays, santander, siemens, repsol, eni, unicredito, erste. He wants [GSI's] analysis of type of lookback etc… he said that he is open to the telecom single name or a basket if [GSI] really believe he is overexposed to financials. I told him we will meet him next wednesday in tripoli to discuss in details a structure and try to execute it. [Mr Zarti] wants to give us something. If we can have him focus, we should be in a good position. I suggest we help tomorrow w encrico and his team prepare a one pager on the name they like in word and show him a proposal that makes sense*" [**D4/83/1154-1155**].

44.8 Just six days after this email – following the short further meeting which it contemplated[4] – Mr Zarti gave the go ahead for four more of the Disputed Trades – for which it paid GSI a staggering US$820 million / €530 million [**D8/79/767-768**]. There are various striking features of this email which "*call for further explanation*" and which directly support the LIA's claims in undue influence. In particular:

44.8.1 Mr Zarti was effectively throwing out to GSI a wide ranging list of names for potential investments without having done his own financial analysis (since he was asking GSI to perform the financial analysis for him, to make recommendations on features such as lookback options, and to advise and make decisions on the LIA's asset allocation);

44.8.2 Mr Zarti was doing so not because Mr Zarti or the LIA had identified a specific opportunity which they had independently decided they wished to pursue and execute with GSI, but, rather, because Mr Zarti was in a position where "*he wants to give us something*" [**D4/83/1154**];

44.8.3 GSI was intending to present a "*one pager*" to explain complex derivative transactions costing US$820 million to Mr Zarti [**D4/83/1154**]; and

44.8.4 GSI was contemplating introducing those transactions to Mr Zarti for the first time and executing them at a single meeting, and without affording Mr Zarti any real opportunity to take independent legal or financial advice.

45. As already noted above, the authorities show that in the context of a banking relationship, undue influence may arise – and what is required in every case is a "*meticulous examination of the facts*", in order to see whether or not the line has been crossed and a relationship of influence established. Once a relationship of influence is established, one then looks to see whether in addition, there is a transaction which calls for an explanation. With those two elements established, the burden of proof then shifts to the defendant (in this case GSI) to demonstrate why the transactions were not procured as a result of undue influence.

[4] Which, according to two members of the LIA's Equity Team to whom Mr Twigden has spoken, lasted less than an hour: see paragraph 175 of Mr Twigden's first witness statement [**C1/16/113**].

46. Against the backdrop of that legal test, an application for summary disposal of the LIA's claims was always bound to be hopeless. However, the astonishing feature of GSI's application is that far from conducting a "*meticulous examination of the facts*" and seeking to establish that the pleaded case was "*fanciful*", Mr Vella in his witness statement simply ducked and deliberately failed to address a number of the key components to the LIA's claim, as well as the key passages in the contemporaneous documents which he exhibited to his witness statement and which have been referred to above.

47. Thus, in addition to failing to address any of the contemporaneous documentation referred to above (including the October 2007 presentation, and his own email on the eve of the first Disputed Trade, in which Mr Vella himself noted Mr Kabbaj's "*very impressive grip*" over the LIA [**D2/31/642**]), Mr Vella also notably failed to address:

    47.1 Paragraphs 22(7) and (9) of the Particulars of Claim, and the question of the arrangements which GSI had made for Mr Zarti's brother, Haitem Zarti, to be employed by GSI as an intern at both its London and Dubai offices (for an 8 month period starting from June 2008); together with the extensive corporate hospitality which GSI showered on the officers and employees of the LIA, and also Haitem Zarti, including trips to Morocco [**C1/16/150**]. Although Mr Vella chose not to address those matters in his witness evidence, notably in its Defence (served on 10 September 2014), GSI has now admitted that Haitem Zarti was given that internship (although it is suggested that this was only done after the last Disputed Trade was transacted) [**B1/11/57/para 24(k)**]; and GSI has also admitted that the trips to Morocco took place [**B1/11/56/para 24(i)(ii)**].

    47.2 Paragraph 31 of the Particulars of Claim, and the allegation that GSI made substantial and unusually high up-front profits from the premiums which the LIA paid for the Disputed Trades of around US$350 million. This is one of the features of the Disputed Trades which renders them "*overreaching and oppressive*". At paragraphs 42(4), 43(4) and 48, the LIA further contends that GSI took advantage of the LIA's position of vulnerability and dependency and/or otherwise acted unconscionably so as to make these unusually high profits. Mr Vella's statement studiously avoided addressing either what profit GSI made from the Disputed Trades or the extent to which a profit of this amount would have been unusually large even for GSI and outside market norms. Notably, in its Defence, GSI continues to refuse

to be drawn about the scale of the profits which it realised off the back of the Disputed Trades.

48. Rather than addressing any of these issues, Mr Vella's witness statement and GSI's application for summary judgment appears to have been premised upon an attempt (i) to demonstrate that the LIA was more financially sophisticated than it alleged in the Particulars of Claim; (ii) to demonstrate that the LIA in fact understood the risks and nature of the derivative transactions it had entered into, notwithstanding its assertion to the contrary in the Particulars of Claim; and/or (iii) to argue that the LIA was precluded and/or contractually estopped from asserting the present claims, based on various representations and warranties to be found either in the account opening documentation [**D2/40/679-702**] or the Capacity Letter of 24 January 2008 [**D2/42/719-720**].

49. However, these arguments were never going to succeed on a summary basis, and without a full investigation of the facts. In particular:

    49.1 The degree of the LIA's financial sophistication (and in particular its financial sophistication relative to GSI's financial sophistication) was always going to be a question of fact, and one which was highly unlikely to be capable of summary determination. In his first witness statement, at paragraphs 29 to 112, Mr Twigden has set out at some length why the LIA's representatives were at a serious / special disadvantage when compared to GSI in the context of a complex derivative transaction. The LIA's position as there set out cannot be dismissed out of hand as simply fanciful. Indeed, the imbalance between the parties is graphically brought home by Ms Catherine McDougall, who witnessed Mr Kabbaj in July 2008 trying to explain to Mr Zarti the basics of derivative instruments, such as what a "put" option was and what a "call" option was – and this several weeks <u>after</u> Mr Kabbaj had sold Mr Zarti complex derivative instruments worth in excess of US$1 billion [**C1/15/55/paras 54 -60**].

    49.2 Likewise the question of whether or not the LIA in fact understood the risks and nature of the derivative transactions was always going to involve a question of fact, and one which once again was extremely unlikely to be capable of summary determination (and in particular without the benefit of the LIA's disclosure of contemporaneous documents and witness statements). In fact, as already noted

above, the LIA's internal memoranda and board minutes relating to the Disputed Trades clearly demonstrate that the LIA had fundamentally misunderstood the true nature of the transactions – and that the LIA thought that it was actually acquiring shares in the underlying entities on a leveraged basis, rather than entering into cash-settled long-term derivative transactions: see Mr Twigden's first witness statement, at paragraphs 226 to 233 [**C1/16/132-233**]. Given the existence of those contemporaneous materials, the LIA's position cannot be dismissed as being without substance.

49.3 As for the attempts by GSI to rely on various representations and/or warranties in the contractual documentation to try to oust[5] the LIA's claims in undue influence and/or unconscionable bargain, that was always going to be an ambitious task – not least for the legal and factual reasons summarised at paragraph 308 of Mr Twigden's witness statement. In short:

49.3.1 As a matter of law, it is well established that a party cannot seek to exclude or limit his liability in respect of fraud: HIH Casualty v Chase Manhattan Bank [2003] UKHL 6. As noted below, claims in undue influence and unconscionable conduct are a species of equitable fraud, and as such cannot be excluded by ingenious drafting. Were it otherwise, the law would risk opening up a "cheat's charter", whereby unscrupulous individuals could abuse a relationship of trust and confidence, but then try to take refuge in carefully worded disclaimers and representations in order to try to refute liability. The law does not countenance such conduct.

49.3.2 Further and alternatively, even if such clauses are not struck down *in limine* as being contrary to public policy, GSI would need to be able to point to very clear language indeed in order to be able rely upon such clauses to oust claims in undue influence or unconscionable conduct. Businessmen do not contract in the expectation that their contractual counterparty will engage in unconscionable conduct or impropriety: and it would therefore be surprising (to say the least) to find a contract which permitted a counterparty to abuse a

[5] In this regard it should be noted that representations and warranties that part company with reality and/or constitute an attempt to re-write history will constitute an exclusion clause, and as a result will be subjected to scrutiny by the Court applying both common law and statutory principles: see Clarke J in Raiffeissen Centralbank v RBS [2011] 1 Lloyds Rep 123.

relationship of trust and confidence, or to take advantage of another's special disability. The position in this regard must be *a fortiori* to the principle of construction that very clear language is needed before a court will construe a contract in such a way so as to conclude that the parties intended to exclude liability for their own negligent performance: see Canada Steamship Lines v R [1952] AC 192.

49.3.3 GSI cannot point to such very clearly worded clauses here. There is no clause which, in as many words, purports to preclude claims for undue influence or unconscionable bargain. Rather, the representations and warranties which GSI seeks to rely upon are boilerplate clauses, frequently found in these types of financial contract, which are designed to oust standard mis-selling type claims (i.e. claims founded in negligent misrepresentation; mistake; breach of fiduciary duties (such as the no profit and no conflict rules)); and claims for failure to discharge advisory duties of skill and care).

49.3.4 That none of the representations and warranties would be effective to oust a claim in undue influence or unconscionable conduct can be seen not only from the fact that such claims are not specifically targeted by the language of the representations and warranties upon which GSI now seeks to rely; but also from the fact that the representations and warranties, even if established as true (which they patently were not), would not in any event be effective to preclude claims in undue influence and/or unconscionable bargain. Thus (to take some examples): (i) as already noted above, it is completely irrelevant that the relationship between the parties was characterised by them as being neither fiduciary nor advisory – the relationships in which undue influence can arise are not limited to those types of relationship; (ii) as also already noted above, it is completely irrelevant that the LIA should be deemed to have understood the true nature of the transaction, or should be deemed to have taken such independent advice as it considered necessary – undue influence and unconscionable bargain may still operate in such cases (unless the defendant can establish that the independent advice had an emancipating effect).

49.3.5 Over and above all these difficulties with GSI's attempts to rely upon these contractual disclaimers, as identified at paragraph 308 of Mr Twigden's first witness statement [**C1/16/164-166**] and paragraphs 23 to 24 of the Reply and Defence to Counterclaim [**B1/12/102-104**], real factual issues arise in relation to the circumstances in which the Capacity Letter of 24 January 2008 came to be executed: and in particular whether it was procured pursuant to undue influence, and/or in excess of authority, with the result that the representations and warranties contained within it are not binding on the LIA.

49.3.6 If the Capacity Letter (which was signed by Enaami and Gheriani the same day as the First Citigroup Trade was executed) is not binding on the LIA, either because it was executed without the LIA's authority, or because it may also be set aside for undue influence, then the representations and warranties contained within the Capacity Letter can take GSI nowhere. In those circumstances, it should have been obvious to GSI that the representations and warranties in the Capacity Letter were never going to be capable of constituting a neat and discrete knock-out blow to the LIA's claims: since it was potentially infected by the whole question of undue influence (as well as lack of authority), which could only be determined at trial (for the reasons outlined above).

50. For all these reasons, GSI should have recognised that an attempt to have the LIA's claims summarily disposed of was going to be hopeless. Beyond this, at the time that it issued the application, GSI must also have known the following matters which further show how inappropriate the LIA's claims are for summary determination.

50.1 The factual issues which fall to be determined are complex and involve substantial and dense documentation (such that, at the time that GSI abandoned the application – and before it had even served its evidence in reply – the parties were relying on witness statements running to 182 pages in total and exhibits running to more than 2,850 pages and which took up 10 lever-arch files).

50.2 GSI must also have known that its own disclosure is likely to reveal documents which further support the LIA's case. This is not only illustrated by the documents exhibited to GSI's own evidence in support of its application (as addressed in more

detail above), but also by Enyo's communications with the SEC.[6] During those communications, the SEC confirmed that they were investigating GSI's sale of complex structured products to the LIA, and that they had collected many documents from GSI which demonstrated the LIA's lack of sophistication and GSI's exploitation of this lack of sophistication.[7]

50.3 Finally, GSI must further have known that its former employees have information relevant to these proceedings which might affect the outcome of the proceedings but which could not be aired at a summary hearing. As set out in Mr Allen's first witness statement,[8] two former Goldman employees who were part of the team dealing with the LIA in 2007 and 2008 (Messrs Murgian and Jabbour) have confirmed to Enyo that they have relevant information which they are prepared to discuss with Enyo. Enyo sought confirmation that GSI did not object to Enyo speaking to the ex-employees [**D10/27/12/21-22**]**,** [**D10/27/13/26-29**], but GSI refused to allow this to happen, under the pretext of the former employees' ongoing duties of confidentiality (in respect of which GSI refused a limited waiver for entirely spurious reasons) [**D10/27/19/37**]. GSI's stance was purely tactical – most probably because it wished to prevent the LIA from adducing evidence in response to the summary judgment application which would support the LIA's claims.

51. To quote Mummery LJ in The Bolton Pharmaceutical Company 100 Ltd v Doncaster Pharmaceuticals Group Ltd [2006] EWCA Civ 66:

> "*The court should also hesitate about making a final decision without a trial where… reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case*."

52. These matters alone make it clear that GSI's application was doomed to fail not only because of the strength of the LIA's claims, but also because, as a result of the nature of the claims, to determine them summarily would have produced "*a real risk of summary injustice*" (to adopt another phrase of Mummery LJ).

[6] As set out at paragraphs 10 to 19 of Mr Allen's witness statement [**C1/17/174-176**].
[7] See, in particular, paragraphs 14 and 16 of Mr Allen's witness statement [**C1/17/174-175**].
[8] See paragraphs 7 to 9 and 28 to 40 of Mr Allen's witness statement [**C1/17/173, 179 – 185**].

GSI's pursuit of its summary judgment application was tactical

53. It is inconceivable that GSI was not aware of all of these weaknesses when it decided nevertheless to pursue summary judgment. It is therefore to be inferred that the application was instead motivated purely by inappropriate tactical considerations, being (a) to delay having to file a Defence, otherwise to delay the determination of the LIA's claim, and to seek to take advantage of the ongoing political, economic and security situation in Libya (in which regard, as noted above, GSI have in the last week demanded security for their costs of the claim – for the very first time – and in doing so have sought to rely on what it terms "*the recent worsening state of lawlessness and unrest*" in Libya) [**E/66/198**], hoping that events in Libya may undermine and/or derail the LIA's claim.

54. Such a highly unreasonable, tactical motivation is consistent with the way in which GSI prosecuted the application.

55. GSI only indicated to the LIA that it intended to make the application without filing its Defence after it had first procured the LIA's agreement to an extension of time for filing its Defence.

56. GSI adopted an obstructive and uncooperative approach to Enyo's attempts to identify and to try to narrow the issues which might be in dispute at the hearing of the summary judgment application. Mr Vella's witness statement made reference to various terms of documents alleged to form part of the contractual relationship between GSI and the LIA. It did not, however, identify conclusively exactly which terms GSI relied on and what it contended the relevance and effect of those terms to be. Accordingly, by letter dated 21 May 2014, Enyo sought further information as to (a) which terms GSI relied on, and (b) what GSI contended their relevance and effect to be [**D11/29/13/57-58**]. HSF refused to engage meaningfully with Enyo – despite further exchanges of correspondence over the following weeks – and, in relation to the relevance and effect of the terms, simply said that the LIA would have to wait until the exchange of skeleton arguments – just days before the hearing – to find out what GSI's position would be [**D11/29/13/59-73**]. They even refused to agree to a sequential exchange of skeleton arguments to allow the LIA an opportunity to respond to GSI's arguments prior to the hearing.[9]

[9] See [**D9/118/1340-1351**].

57. GSI was also unreasonable in ignoring the LIA's invitation on 17 June 2014 to withdraw the summary judgment application by 1 July 2014 [**D11/6/12**] and, in so doing, only to pay the LIA's costs on a standard basis. Instead GSI unreasonably pressed on for five weeks more – until just after the beginning of the summer vacation – causing further delay and forcing the LIA to incur further substantial costs (including some of the costs of its final preparation for the hearing due to take place at the beginning of the new legal year). GSI did so, not only in the face of the considerable body of contemporaneous documents – which far from showing the LIA's case to be fanciful, in fact corroborated it in certain key respects; GSI also did so in the face of the witness statement of Catherine McDougall, which demonstrated why (on any view) there were serious issues that needed to go to trial. In this regard, it should be noted that Catherine McDougall was, at the time, an associate solicitor with Allen & Overy and a wholly independent witness to the events which form the subject matter of this claim. She is neither an officer nor employee of the LIA; and has no axe to grind with GSI. Her evidence is, once again, highly supportive of the LIA's claims – and must have signalled to GSI that its summary judgment application was doomed to failure.

58. GSI was, nevertheless, eventually forced to abandon its application anyway. Such highly unreasonable conduct takes this matter out of the norm – particularly in respect of the period following 1 July 2014 – in a way which justifies an order that the LIA's costs should be assessed on an indemnity basis.

There is nothing in GSI's stated reasons for abandoning the summary judgment application

59. For the avoidance of doubt, there is nothing in GSI's stated reasons for abandoning the application which should affect the incidence of costs.

60. In its letter dated 4 August 2014, HSF notified Enyo that, as a result of what HSF characterised as Enyo's failure to clarify whether the LIA "*alleges that GSI's conduct was dishonest*" (in light of the suggestion that certain carefully selected statements which Mr Twigden had made in his first witness statement somehow raised a case which was said to be "quite different" from that pleaded in the Particulars of Claim), "*rather than attempt to reply to a moving target and burden the court with the prospect of considering multiple theories, our client intends to withdraw its application…*" [**D11/3/6-7**].

61. This is a spurious excuse. It is transparently little more than an attempt to cover GSI's embarrassment at having to abandon the summary judgment application.

62. It is hard to follow – and HSF have certainly never adequately explained – how GSI's objection to certain passages in a witness statement could be relevant to the merits of the summary judgment application.

63. In any event, Mr Twigden's first witness statement does not seek to advance any case in dishonesty, or other than that which is clearly pleaded in the Particulars of Claim. That is simply HSF's unwarranted characterisation of Mr Twigden's evidence. In fact, Mr Twigden simply sought to illustrate that GSI (and, in particular, Mr Kabbaj) had acted unconscionably by exploiting its influence over the LIA to direct the LIA's conduct and/or by knowingly taking advantage of the LIA's financial inexperience through entering into financial derivative instruments which were wholly unsuitable for the LIA but from which GSI stood to make enormous profits.

64. In order to make these claims the LIA does not need to go so far as to plead or establish deceit or deliberate falsehoods on the part of GSI and/or Mr Kabbaj.[10] For example, the LIA does not need to plead or prove that GSI and/or Mr Kabbaj subjectively intended the LIA to be deceived by any particular false representation (as would be necessary for a claim in deceit), in order to succeed with its claims in undue influence or unconscionable bargain. Rather all the LIA needs to plead – as it has done – is that:

    64.1 the Disputed Trades were induced by GSI's unconscionable abuse of a relationship of trust and confidence between it and the LIA (for undue influence); and

    64.2 the LIA was in a specially disadvantageous position as regards GSI by virtue of a gross disparity of financial sophistication and bargaining power, that GSI exploited this disparity in an unconscionable manner (by knowing of the LIA's disadvantageous position and entering into the Disputed Trades) and that the Disputed Trades were oppressive bargains (for unconscionable bargain).

[10] Albeit the LIA reserves its right to seek to amend its case further in due course so as to plead a case in deceit if, particularly in light of disclosure, further evidence comes to light which shows that GSI and/or the LIA set out to deliberately mislead the LIA with the requisite intention.

65. The LIA accepts that paragraph 8.1 of CPR PD 16 sets out various areas where "*[t]he claimant must specifically set out [certain listed] matters in its particulars of claim where he wishes to rely on them in support of his claim*" and that those matters include "*(1) any allegation of fraud; (2) the fact of any illegality; and (3) details of… undue influence*".

66. The LIA also accepts that, in pleading claims for undue influence and unconscionable bargain, the LIA is alleging unconscionable conduct on the part of GSI, a serious allegation for which "*particulars… which explain the basis for… [the] allegation*" must be provided.[11]

    66.1 Undue influence is a species of equitable fraud, and one which in every case necessarily involves unconscionable conduct on the part of a defendant: see Etridge (No. 2) and National Commercial Bank (Jamaica) Ltd v Hew [2003] UKPC 51. As Professor Enonchong summarises in *Duress, Undue Influence and Unconscionable Bargain*, (2nd ed., 2012), "*for relief to be granted on the ground of undue influence the conduct of the defendant must be capable of being stigmatised as unconscionable.*"[12]

    66.2 Unconscionable bargain is also a species of equitable fraud and also, self-evidently, involves unconscionable conduct on the part of the defendant. As the Lord Chancellor held in Earl of Chesterfield v Janssen [1751] 2 Ves Sen 125 (1) the unconscionability of a bargain *"may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his sense and not under a delusion would make on the one hand, and as no honest man would accept on the other, which are unequitable and unconscientious bargains,"*; and (2) such circumstances constitute *"a species of fraud". Chitty* confirms, at §7-133, that it is a requirement of the cause of action of unconscionable bargain that *"the [defendant] has acted unconscionably in the sense of having knowingly taken advantage of the complainant."*

67. The Particulars of Claim (and, equally, the draft Amended Particulars of Claim) provide full and clear particulars of the LIA's serious allegations of GSI's unconscionable conduct. If there were any question that these particulars were in some way insufficient to support the

[11] As and for the reasons set out by the House of Lords in Three Rivers District Council v Bank of England (No. 3) [2003] 2 AC 1.
[12] See §7-003 on page 143.

serious allegations which are made, then GSI would surely not have abandoned its summary judgment application.

68. In light of the nature of the claims – and the full particulars of the serious allegations which the LIA has provided – there is accordingly no basis for, and no purpose to be served in, requiring the LIA to identify whether each such allegation is one of "*honest unconscionable conduct*" or "*dishonest unconscionable conduct*", as GSI would appear to require the LIA to plead and prove.

    68.1 Any such distinction is both irrelevant and confusing. As matters presently stand, at trial the court will be called upon to determine not whether GSI's conduct was dishonest, but rather whether it was conscionable or unconscionable. It is therefore unsurprising that the relevant precedents in *Bullen & Leake & Jacob's Precedents of Pleading* do not provide for undue influence to be pleaded as either "*dishonest*" or "*honest but unconscionable*"; nor do they require such claims to be pleaded so as to include any of the elements required to establish a claim in deceit.

    68.2 Furthermore, such a requirement would sit ill with the court's well-established approach to claims for undue influence where the defendant's undue influence is presumed. As already noted, a claimant who alleges that undue influence should be presumed, must establish (i) a relationship of influence with the defendant; and (ii) that the transaction in question "*calls for an explanation*".[13] The claimant is then entitled to rely on the presumption of undue influence, such that the burden then passes to the defendant to establish that the claimant was not induced to enter into the transaction by the defendant's undue influence. It would be curious if a claimant relying on such a presumption (as the LIA does, in part, here) were required to go further, and to plead whether the presumed unconscionable conduct was honest or dishonest.

    68.3 In this regard it should be noted that the distinction between dishonesty and unconscionable conduct is well known in other areas of the law: and that it is clear that, in order to demonstrate unconscionable conduct, it is not necessary for a claimant to go so far as to plead or prove dishonesty. Thus, whereas dishonesty must be pleaded in support of a claim for dishonest assistance in a breach of trust, a

[13] See Etridge (No. 2) (above).

claimant pursuing a claim for unconscionable receipt of property in breach of trust does not have to identify whether the receipt was honest or dishonest – rather he simply has to plead that the recipient's state of knowledge regarding the breach of trust was such as to make it unconscionable for him to retain the property received: see Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Akindele [2001] Ch 437.

69. Enyo repeatedly pressed HSF in correspondence to identify any authority or provision in the procedural rules for any such requirement [**D11/11/50**]. None was forthcoming. Nevertheless, GSI have repeatedly demanded in correspondence that the LIA specify whether its allegations are of "*honest unconscionable conduct*" or "*dishonest unconscionable conduct*" [**D11/10/47**] and [**D11/7/14**]. This is simply a fig leaf with which GSI hope to cover their embarrassment at their highly unreasonable behaviour in having pursued – and been forced to abandon – such a misconceived and tactical application.

Conclusion on indemnity costs

70. In the circumstances, GSI's highly unreasonable behaviour is out of the norm. It merits an order that GSI pays the LIA's costs of its abortive application for summary judgment, such costs to be assessed on the indemnity basis. At the very least, GSI should be ordered to pay the LIA's costs on an indemnity basis from 1 July 2014: being the date by which the LIA invited GSI to withdraw its misconceived summary judgment application, or else be met with a claim for indemnity costs (in Enyo's letter dated 17 June 2014, served alongside the LIA's evidence in response to the summary judgment application).

GSI should make a substantial payment on account of the LIA's costs

71. To the extent that GSI is ordered to pay the LIA's costs, then it ought also to be ordered to make a significant payment on account of those costs.

72. The LIA has been forced to incur substantial legal costs and disbursements currently in the total sum of at least US$1,093,768.59[14] (equivalent to £679,359.37) in defending GSI's misguided application: see the detailed costs schedule and analysis produced by Kain Knight

[14] The LIA's costs are stated in dollars because that is the currency in which Enyo invoices the LIA and in which the LIA is liable to pay Enyo: see paragraph 22 of Mr Twigden's second witness statement [**C2/20/16**].

(a firm of costs lawyers) and exhibited to Mr Twigden's second witness statement [**C2/21/20-25**](at pp.95-100).[15] Although in Mr Byrne-Hill's witness statement it is suggested that, by comparison, GSI has only incurred costs in the order of £187,000 [**C2/23/56**], that figure is not substantiated by any breakdown in costs. Further, quite regardless of the costs GSI has incurred in issuing its summary judgment application, the LIA was forced to incur substantial costs in order to resist that claim. Thus, although Mr Vella had, as noted above, failed to address various key aspects of the relationship between the parties, or to deal with a plethora of contemporaneous documents that were supportive of the LIA's claims, the LIA was required to do so: both to redress the balance; set the record straight; and to ensure that its very substantial claims, worth in excess of US$1 billion were not summarily dismissed on a false basis. In the context of that very substantial claim and faced with GSI's application for summary judgment, it was entirely proportionate for the LIA to have incurred costs of slightly more than US$1 million (or 0.1% of the value of the claims at stake).

73. The LIA should not be kept out of those monies, which will almost certainly be due to it on a detailed assessment of those costs, any longer than necessary.

74. With regard to the quantum of such an order for a payment on account, there are suggestions in the case law that support the general view that the court should be conservative in its assessment of how much will almost certainly be due on an assessment: see, in particular, Mars UK Ltd v Teknowledge Ltd (Costs) [1999] 2 Costs LR 44.

75. There is, however, no rule that a payment on account should be the irreducible minimum of what will ultimately be awarded by way of costs.

76. Rather, as held by Vos J (as he then was) on the final page of his decision in United Airlines Inc v United Airways Ltd [2011] EWHC 2411 (Ch), a better approach is to make "*a reasonable assessment of what is likely to be awarded*".

77. On this basis the LIA seeks a payment representing 50% of its costs of the application, within 14 days (i.e. by 4pm on 21 October 2014).

[15] The LIA will serve an updated costs schedule prior to the hearing.

PART II

Permission for GSI to amend the Particulars of Claim

78. By its application notice dated 16 September 2014, the LIA also seeks permission to make minor amendments to its Particulars of Claim in the form annexed to the application notice. GSI has unreasonably refused to consent to these amendments, yet there is no proper basis for it to object to them.

79. The court will be familiar with the principles underpinning the court's general approach to applications for permission to amend a statement of case. In Cobbold v Greenwich LBC (9 August 1999, unreported, CA) Peter Gibson LJ (with whom Sedley LJ concurred) stated:

"*The overriding objective (of the CPR) is that the court should deal with cases justly. That includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed.*"

80. The LIA first provided the draft Amended Particulars of Claim to GSI on 15 July 2014.

81. The purpose of the proposed amendments (each which, for ease of reference, is identified in the table attached together with a brief explanation of its purpose) was two-fold.

    81.1 First they were intended to add to the LIA's case in light of certain documents which the LIA had seen for the first time in GSI's evidence in support of its summary judgment application.

    81.2 Second – in light of the (baseless) criticism of GSI's solicitors that various statements in the LIA's evidence filed in opposition to the summary judgment application went beyond the LIA's pleaded case – they were intended to flesh out certain allegations made in the Particulars of Claim (at the risk of pleading evidence) in order to avoid any "*arid debate*" about pleading points at the anticipated hearing of GSI's application.

82. At this time, GSI was still vigorously prosecuting its application for summary judgment. It had not filed any Defence. It cannot have been preparing any Defence. Accordingly GSI

cannot be said to have suffered any prejudice if the LIA is given permission for its proposed amendments; and it has not yet been able to point to any.

83. Rather GSI's only basis for opposing the amendments, appears to be its demand that, before GSI will consent to them, the LIA must "*confirm unequivocally that no allegation is being made that GSI deliberately misled the LIA in any respect.*" For the reasons set out above, there is no proper basis for this demand and, in any event, it is hard to see what relevance it could have to the LIA's limited proposed amendments.

84. Moreover, an amendment should not be opposed on the ground of lack of particularity, provided that the other party has sufficient particulars to understand the case which it has to meet at trial: see Eurocell Profiles v Ultraframe [2004] EWHC 2800. That is patently the case here: where the LIA has set out at some length the particulars of its claim both in undue influence and unconscionable bargain, in a pleading that runs in excess of 28 pages. Anything more would render the Particulars of Claim unduly prolix, and would be considerably more detailed than the precedents to be found in *Bullen & Leake*. If GSI wishes to request further information from the LIA in respect of any particular aspect of the Particulars of Claim, it is of course free to serve a request for further information pursuant to CPR Part 18: and if the request is an appropriate one, the LIA will be obliged to address it. But that is no reason for opposing the LIA's limited amendments to its Particulars of Claim.

85. The court ought, accordingly, to grant the LIA permission to amend its Particulars of Claim, so as to ensure that the real dispute between the parties can now be adjudicated upon.

86. Moreover, given the early stage at which the LIA provided the draft Amended Particulars of Claim to GSI, there should be no order by which GSI can seek its costs of amending its Defence from the LIA.[16] The LIA invited GSI to plead to the draft Amended Particulars of Claim in its Defence – filed and served only on 15 September 2014 – but GSI unreasonably declined to do so [**D11/12/56**] and [**D11/14/75**]. Had it done so, then there would have been no need for it to file and serve an Amended Defence. The LIA should not now have to bear the costs of that process.

[16] Notwithstanding the suggestion to the contrary at paragraph 6 of the draft order accompanying the LIA's application [**C2/19/3**].

87. The LIA accordingly suggests that it should simply be directed to file and serve its Amended Particulars of Claim, verified by a statement of truth, by 4pm on 14 October 2014 and that the Defendant should be directed to file and serve any consequential amendments to its Defence, verified by a statement of truth, by 4pm on 28 October 2014.

88. A summary of the proposed amendments to the Particulars of Claim are enclosed herewith at **Appendix II**.

PART III

Directions and timetabling to trial

89. The parties exchanged directions questionnaires on Friday 26 September 2014 [**A1/3**] and [**A1/4**]. The LIA's directions questionnaire was accompanied by detailed draft directions setting out the dates by which the LIA contemplated that the parties could complete each stage of trial preparation. Unhelpfully, however, GSI did not suggest any dates for its proposed directions. Instead its draft directions simply suggested that each stage be completed by "***[x]***" or "***[x] 2015***" and it gave no indication of how long it considered its preparation for each stage might take. This is consistent with neither the terms nor the spirit of paragraph 3.5 of the Chancery Guide.

90. Accordingly, on Monday 29 and Tuesday 30 September 2014, the LIA unsuccessfully sought to identify, through counsel, whether GSI agreed to the LIA's proposed directions and, if not, what the issues between the parties might be. No substantive response was forthcoming, however, until HSF sent a letter to Enyo at 5:42pm on 30 September 2014 providing various comments on the LIA's proposal [**E/69/207-216**].

91. It appears, despite the somewhat equivocal wording of HSF's letter, that GSI agrees much of the LIA's proposed directions.

92. There remain, however, various points of dispute, mainly as regards the timetable to trial, but also as regards sundry additional directions sought by GSI.

Timetable

93. The parties broadly agree on a time estimate for trial. The LIA suggested 25 days. GSI suggested 25 to 30 days.

94. The LIA's enquiries of the Listing Office had indicated that a trial of this length could be accommodated so as to begin in a window between January and March 2016.

95. The LIA accordingly proposed directions which it hoped and anticipated would be eminently achievable by the parties, whilst also ensuring that the case would be ready for trial by the beginning of that window.

96. The LIA's proposed directions provided for a short buffer of time at the end of the timetable, after the date on which the experts should have filed joint statements setting out areas of agreement and disagreement. This was intended (a) to offer scope for slippage (if necessary – and in this regard it is noted that HSF's letter dated 30 September 2014 expressly "*reserve[d] GSI's right to request a longer period [for disclosure] should GSI be required to conduct a disclosure exercise which is more extensive than that which we have proposed*"), and (b) to afford the parties an opportunity, prior to trial, to explore the possibility of resolving the dispute by means of alternative dispute resolution (if considered appropriate) [**E/69/207**].

97. The table below summarises the LIA's proposed directions and GSI's counter-directions. The shaded entries indicate where there is no dispute as to the time required for that step. GSI's counter-directions would cause yet further substantial delay to these proceedings and either cast doubt on the viability of the LIA's proposed trial window or provide no buffer at the end of the timetable.

Procedural step	**LIA's proposal**	**GSI's counter proposal**[17]
Standard disclosure	19 December 2014 (*11 weeks*)	20 February 2015 (*18 weeks*)
Inspection	19 December 2014	27 February 2015 (*1 week*)
Witness statements	23 April 2015 (*17½ weeks*)	19 June 2015 (*17½ weeks*)
LIA's experts' reports	11 June 2015 (*7 weeks*)	6 August 2015 (*7 weeks*)
GSI's experts' reports	9 July 2015 (*4 weeks*)	1 October 2015 (*8 weeks*)
LIA's supplementary reports (if any)	30 July 2015 (*3 weeks*)	22 October 2015 (*3 weeks*)
Experts to have met and filed joint statements	11 September 2015 (*6 weeks*)	3 December 2015 (*6 weeks*)
Pre-trial review	To be fixed	To be fixed

[17] These specific dates have had to be inferred from HSF's letter dated 30 September 2014 which did not propose any specific dates for any of the deadlines.

Trial window	4 January 2016 to 25 March 2016	None

98. In essence, however, there are just two issues between the parties: (1) how long should be allowed for disclosure and inspection; and (2) how much longer should be allowed for GSI's expert evidence than for the LIA's expert evidence.

(1) Disclosure and inspection

99. The parties are presently engaged in a constructive dialogue regarding what each party expects of the other party's disclosure exercise. It is hoped that a consensus will be reached as to, at least, the scope of the disclosure exercise which each party will carry out at this stage – even if applications for specific disclosure might prove necessary in due course.

100. The LIA proposed that each party should give standard disclosure by 19 December 2014, and that inspection of documents to be disclosed should be provided by electronic means at the same time. Particularly in light of how long these proceedings have already been on foot, this was a reasonable proposal.

101. GSI, however, suggests that: (a) it will require 4½ months – until the end of February 2015 – to carry out the narrowest disclosure exercise that it has contemplated; (b) (as noted above) it reserves the right to seek even longer than this if it is to carry out a more extensive exercise; and (c) it requires an extra 7 working days after disclosure "*to conduct any necessary redactions*" to its disclosed documents before it will provide them.

102. GSI's proposal is a transparent attempt to delay these proceedings even further, which lacks credibility.

102.1 Unlike the LIA – which, weeks ago, set out clearly, in a witness statement, precisely how the LIA holds its electronic and physical documents, how they had been and/or were to be extracted and precisely what reviews had been undertaken of those documents to date – GSI has provided the LIA with scant detail of how GSI holds its

data, how (and how much of) that data has been extracted already – or how it might be extracted in future, and what reviews have already been undertaken.

102.2 It is, however, to be inferred that GSI has already carried out a relatively extensive document extraction and review process. Mr Vella's witness statement exhibited over 1,300 pages of documents. HSF recently suggested[18] that data had already been extracted "*for most of the agreed custodians*", that they had already carried out a de-duplication exercise in respect of that data, and that they had already run searches on the data for dozens of key words.

102.3 HSF's bald assertion, in their letter dated 30 September 2014, that "*it will take at least 2 to 4 weeks just to extract the raw data for all of [GSI's] custodians*" rings hollow [**E/69/207-208**]. In any event, this could not explain why it will take GSI nearly 5 months before it can provide its relevant documents to the LIA.

103. In circumstances where GSI has provided no credible or substantive justification for taking nearly 5 months to carry out its disclosure obligations, and no need for the parties to have a further 7 working days to "*conduct any necessary redactions*" the LIA's proposed timetable for disclosure should be preferred.

104. Standard disclosure should therefore take place on 19 December 2014, with copies of documents disclosed delivered by electronic means on the same day.

(2) Time for GSI's expert evidence

105. Both parties agree that there is a need for expert evidence.[19]

106. The LIA has suggested that there should be expert evidence in the fields of (a) the sale of derivatives by financial institutions and (b) the pricing of derivatives. It seeks permission to advance evidence from up to two experts (one in each of these fields), although hopes that it may be the case that on expert will be able to cover both fields of expertise.

[18] In its second letter dated 29 September 2014 [**E/68/204-206**].
[19] See the LIA's directions questionnaire at [**A1/3/4**] and GSI's directions questionnaire at [**A1/4/4**].

107. GSI has also suggested similar expert evidence, albeit its directions questionnaire was more vague, suggesting only that it would seek to advance "*expert evidence concerning equity derivative transactions*".

108. The LIA's proposed directions contemplated a sequential exchange of experts' reports so as to ensure that the expert evidence was as focussed and as useful for the court as possible. To this end they suggested that the LIA's experts would serve their reports 7 weeks after the exchange of witness statements; GSI's experts would serve their reports 4 weeks later; and the LIA's experts would then have 3 weeks to serve any supplementary reports.

109. GSI has suggested, however, that "*[g]iven the substantial time the LIA has to prepare its own report*" GSI's experts should be allowed a further 8 weeks.

110. It is striking that GSI is suggesting that its experts should have longer to consider the LIA's experts' reports than the 7 weeks which the LIA is proposing that its experts have to consider the witness statements of fact. This cannot be right.

111. Again it is submitted that the LIA's proposed timetable for expert evidence should be preferred.

Sundry directions

112. HSF's letter dated 30 September 2014 pressed for the inclusion in the draft order of sundry minor directions. These can be addressed briefly.

113. HSF insisted that various – unusual – directions should be given in the form annexed to GSI's directions questionnaire[**A1/4**], namely that:

> "7. By [**x**] 2015, the Claimant shall prepare a list of issues in the Claim including the experts' reports and witness statements in an attempt to define and narrow the issues including those issues which are to be the subject of discussion by experts.
>
> 8. By [**x**] 2015, the parties will have agreed to a list of issues in the Claim including witness statements. By this date the parties will also have agreed to the issues which will be the subject of discussion by the experts.
>
> 9. In the event that an agreement to the issues listed in paragraph 10 (sic.) cannot be reached, the parties have permission to apply to the Court for Directions by [**x**] 2015,

which (sic.) is to be heard no later than [**x**] working days after the filing of the application."[20]

114. The parties are in the process of agreeing a list of principal issues prior to the CMC [**E/71/225-234**]. They will, of course, continue to update that list of issues on a consensual basis in the usual way: and if there is a dispute between the parties in relation to that list of issues, then there is liberty to both parties to apply to convene a further case management conference to resolve that dispute (as to which see below). It is doubtful that a complicated and unorthodox process going beyond this, such as that proposed by GSI, is likely to assist the parties or the court in a cost-effective manner. Rather it has the scope to lead to costly, unnecessary and distracting interlocutory disputes. These unorthodox directions should not be given.

115. Finally HSF insisted that an express direction be given that the parties should have liberty to apply. Such a direction would be otiose. All orders of the court carry with them an implicit liberty to apply: see the decision of Chitty J in Penrice v Williams (1883) 23 Ch D 353. However, to avoid taking up unnecessary court time in relation to this, the LIA is prepared to include an express provision to this effect in the order for directions.

Conclusion

116. The LIA accordingly respectfully seeks an order:

116.1 that GSI pays the LIA's costs of its abandoned summary judgment application, such costs to be subject to detailed assessment on the indemnity basis if not agreed;

116.2 that GSI pay 50% of the LIA's costs to the LIA by 4pm on 21 October 2014 by way of payment on account of its costs liability in respect of the summary judgment application;

116.3 that the LIA have permission to amend its Particulars of Claim in the form annexed to its application notice dated 16 September 2014[21]; and

[20] See the back of [**A1/4**].
[21] See [**C2/20/26-53**].

116.4 otherwise giving directions in the terms set out in the draft order enclosed at **Appendix I**.

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1 October 2014