IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC(I) 05

Suit No 5 of 2017

Between

MACQUARIE BANK LIMITED
… Plaintiff by Original Action

And

GRACELAND INDUSTRY PTE LTD
… Defendant by Original Action

And

Between

GRACELAND INDUSTRY PTE LTD
… Plaintiff in Counterclaim

And

(1) MACQUARIE BANK LIMITED
(2) STEPHEN BECHER WOLFE
… Defendants in Counterclaim

JUDGMENT

[Contract] — [Contractual terms]

[Contract] — [Mistake]
[Contract] — [Misrepresentation]
[Equity] — [Fiduciary relationships] — [When arising]

Macquarie Bank Ltd
v
Graceland Industry Pte Ltd

[2018] SGHC(I) 05

Singapore International Commercial Court — Suit No 5 of 2017
Sir Henry Bernard Eder IJ
19–22 February; 5 March 2018

4 May 2018 Judgment reserved.

Sir Henry Bernard Eder IJ:

Introduction

1 These proceedings concern a claim by Macquarie Bank Limited ("Macquarie") for US$1.2 million (alternatively damages to be assessed) in relation to what is said to be an "over-the-counter" ("OTC") commodity swap agreement (the "Transaction") in respect of 30,000 metric tonnes ("mts") of nitrogen fertiliser (urea) at a fixed price of US$275 per mt between Macquarie and the Defendant, Graceland Industry Pte Ltd ("Graceland"), a subsidiary of Wengfu (Group) Co., Ltd ("Wengfu Group") which is a Chinese state-owned enterprise involved in the manufacture and supply of phosphate-based chemical products.

2 In summary, it is Macquarie's case that the Transaction was made in the course of certain emails in May 2014 and recorded in a Long Form

Confirmation ("LFC") dated 6 June 2014 incorporating the standard 2002 International Swaps and Derivatives Association Inc. Master Agreement (the "ISDA Form"); that Graceland wrongfully repudiated the Transaction thereby entitling Macquarie to terminate the Transaction as it did on 8 July 2014; and that the sum of US$1.2 million is recoverable by Macquarie as the "Close-out Amount" (as defined in the ISDA Form). As appears below, Graceland denies such claim and advances a counterclaim against Macquarie and also Mr Stephen Wolfe who was, at all material times, employed by Macquarie as a Senior Advisor.

3 By way of defence and counterclaim, Graceland raises a number of wide-ranging issues with regard to the proper analysis of the relationship between Macquarie/Mr Wolfe and Graceland, the nature and terms of the Transaction, the obligations of Macquarie/Mr Wolfe, alleged fraudulent misrepresentations/non-disclosures by Macquarie/Mr Wolfe and whether, as Graceland alleges, the Transaction was void *ab initio* and/or has been rescinded. In very broad terms, it was submitted on behalf of Graceland that it never thought that it was selling 30,000 mts of urea in a swap deal with Macquarie as a counterparty, but that Macquarie acted throughout as its agent, broker or fiduciary; that, in that capacity and against the background of more than 20 years of friendship and business relationship (*guanxi*) which Mr Wolfe enjoyed with Graceland's director, Mr Liu Zhongjin, and the Wengfu Group, Mr Liu reposed confidence and goodwill in Mr Wolfe; that at every juncture, Mr Liu looked to Mr Wolfe for and relied entirely on Macquarie and Mr Wolfe for their advice and recommendations; that Mr Wolfe abused that relationship by misleading Graceland and enticing it to enter into a sector which it had no experience in, *ie*, commodity derivatives; and that, unknown to Graceland, this was a "recipe for commercial disaster". As described somewhat dramatically by Mr Darrell Ingram (one of Graceland's experts) in his supplementary report, the transaction

was from both a transactional and financial point of view, simply "an off-course drone strike from the very start." In addition, there is also an issue between the parties concerning the proper calculation of Macquarie's claim for the Close-out Amount under the ISDA Form (if incorporated into the Transaction). As such, the present case involves issues which are potentially of considerable significance to the derivatives market.

4 It is important to note that, as originally pleaded in the defence, it was Graceland's primary case that there was never any binding agreement between Macquarie and Graceland because there was no offer and acceptance. However, that issue was determined at a previous hearing before Woo Bih Li J in Registrar's Appeal No 30 of 2017 before this case was transferred to the Singapore International Commercial Court ("SICC"). In particular, Woo J struck out the portion of Graceland's defence pleading that "no contract was concluded between [Macquarie] and [Graceland] as [Macquarie's] offer for a swap transaction had expired as time had lapsed before [Graceland's] purported acceptance." Graceland did not seek to appeal Woo J's decision. Thus, the present position is that Graceland accepts (as it must) that there was a binding agreement, although (as referred to below) there are important "live" issues as to (a) the precise terms of such agreement; and (b) whether such agreement was void or voidable.

5 In summary, Graceland denies the claim on four main grounds:

(a) **Unilateral mistake**: The Transaction was void *ab initio* and/or has been rescinded on the basis of Graceland's "unilateral mistake". In particular, it is Graceland's case that it did not intend to enter an OTC transaction and that it was under the mistaken belief that the Transaction was not such a transaction. Further, it is Graceland's case that Macquarie

and/or Mr Wolfe had actual and/or constructive knowledge of and/or unconscionably took advantage of such mistaken belief.

(b) **Mutual mistake**: The Transaction was void *ab initio* on the basis that the Transaction was entered into by a "mutual mistake" by Macquarie and Graceland, *viz*, Graceland had thought that Macquarie was at all material times acting as its agent or broker in the Transaction, whereas Macquarie thought Graceland wanted to transact with Macquarie as a counterparty (*ie*, principal to principal) to the Transaction.

(c) **Breach of fiduciary duties**: Macquarie and/or Mr Wolfe breached their fiduciary duties such that Graceland was entitled to and did validly elect to "reject" the Transaction.

(d) **Fraudulent misrepresentation or non-disclosure**: The Transaction has been validly rescinded by Graceland by virtue of fraudulent misrepresentations made by Macquarie and/or Mr Wolfe, alternatively, their material non-disclosure of certain matters. In the further alternative, Graceland relies upon s 2 of the Misrepresentation Act 1967 (c 7) (UK).

6 As stated above, Graceland also challenges the calculation of the amount claimed by Macquarie and advances a counterclaim for damages to be assessed against Macquarie and/or Mr Wolfe.

7 Save as set out below, it is common ground between the parties that all these issues are to be determined as a matter of English law.

The Parties

8 Macquarie is a company incorporated in Australia. It is a global provider of banking, advisory, trading, asset management and retail financial services. The second defendant in counterclaim, Mr Wolfe, was, at all material times, employed by Macquarie as a Senior Advisor.

9 Graceland is a company incorporated in Singapore. As stated above, it is a subsidiary of the Wengfu Group which is a Chinese state-owned enterprise involved in the manufacture and supply of phosphate-based chemical products. As a subsidiary of the Wengfu Group, Graceland facilitates the Wengfu Group's manufacture and supply of these products including the trading of phosphate-based chemical products. It is a very substantial trading company with paid-up capital of US$50 million and revenues in 2013 of some US$2.3 billion. However, it is an important part of Graceland's case that the vast majority of its business concerned the trading of physical products; that, so far as urea is concerned, its trading business was very limited, to perhaps about 150,000 mts of physical product per year; and that it had no prior experience of derivatives in fertilisers. Even so, Graceland cannot, in my judgment, be regarded as minnows. As Mr Liu accepted, it had its own in-house "legal guy" and had the fullest opportunity to take legal advice, if it wished. Indeed, it is noteworthy that, as appears below, Mr Wolfe recommended Graceland to take its own legal advice – which Graceland declined to do.

The Evidence

10 The vast bulk of the evidence consists of the contemporaneous email exchanges between the parties which speak for themselves. In addition, in support of its claims, Macquarie relied upon the evidence of Mr Wolfe. Graceland relied upon the evidence of two witnesses, *viz*, Ms Zhang Lin and Mr

Liu Zhongjin. All three witnesses served affidavits of evidence-in-chief ("AEICs") and were cross-examined in the course of the trial. Although Ms Zhang confirmed that she was able to and did speak English, that was not her first language and accordingly she gave evidence through an interpreter. Mr Liu understood and spoke English fluently. He gave his evidence in English although he occasionally had the assistance of the interpreter from time to time.

11 Mr Wolfe is currently the Executive Director in the Commodities and Global Markets Group of Macquarie. He first started work at Macquarie from 1984 to 1990 as a Senior Manager involved in the trade of derivatives and metals. After he left Macquarie, he worked at a number of other firms and was involved in the trade and finance of, among other things, base and precious metals, chemical fertilisers and their derivatives. In about December 2013, he re-joined Macquarie as a Senior Advisor in Macquarie's Fixed Income, Currencies and Commodities group (the "FICC Group"), which is now named the Commodities and Global Markets group (the "CGM Group"). In particular, the FICC Group was involved in, among other things, the financing, trading and pricing of commodities globally. As set out in his Consultancy Agreement dated 3 December 2013, Mr Wolfe's role as a Senior Advisor in the FICC Group included, among other things, the promotion and development of the FICC business in China. In particular, his role was to identify, promote and progress business opportunities in China with specific reference to physical commodities and their related derivative products as well as with existing and newly developed exchange-traded futures contracts. In his present role as an Executive Director in the CGM Group, he is now in charge of Macquarie's commodities businesses in China. At the relevant time, Mr Wolfe worked mainly from Macquarie's offices in Sydney, Australia but he would also travel on business to other places including China and Hong Kong. Further, as he explained in evidence, Macquarie's trading desk operations were based in New York.

12 It was submitted on behalf of Graceland that the evidence of Mr Wolfe lacked credibility and that the Court should be slow to accept his testimony. In particular, it was submitted that Mr Wolfe was evasive and that his testimony was riddled with inadmissible opinion, speculations and submissions and was inconsistent at points. It is fair to say that certain of these criticisms have some justification. However, Mr Wolfe was often simply responding to vague and confusing questions in cross-examination. At times, he appeared – perhaps unsurprisingly – to be somewhat exasperated by the line of questioning. I agree that his occasionally somewhat flippant responses were not entirely satisfactory or helpful although, in the circumstances, his reaction to the questioning was not impossible to understand. I also agree that with regard to the important meeting on 16 May 2014 (which I refer to below), Mr Wolfe's oral evidence went somewhat beyond what he had originally said in his AEICs. I consider this evidence further below. In any event, it is my conclusion that Mr Wolfe was an entirely honest witness doing his best to recollect events almost four years ago. However, I should emphasise that I approach the assessment of the evidence of Mr Wolfe (as with all oral evidence concerning events some time ago) with a proper degree of caution doing my best to carry out that task in light of the contemporaneous documents and, where appropriate, what seem to me to be the inherent probabilities.

13 For its part, Graceland relied upon the evidence of the following witnesses:

(a) Ms Zhang Lin, the Finance Manager in Wengfu Intertrade Limited ("Wengfu Intertrade"), a subsidiary of the Wengfu Group. She was the person "frontlining" the negotiations with Mr Wolfe. Prior to 2 January 2014, she was on secondment from Wengfu Intertrade to Graceland. After 2 January 2014, she was released from her secondment

and returned to China. To assist in the transition period after the release from her secondment, she continued to assist Graceland with isolated matters which she had been involved in prior to the end of her secondment, including the Transaction which is the subject matter of this action. It was the evidence of Ms Zhang that her scope of work did not require her to be familiar with derivatives or other complex financial instruments; that instead, the finance work which she was and still is involved in mainly concerns the application for banking and financing facilities from various international banks for the international sale of the physical fertilisers which the Wengfu Group manufactures and supplies; and that she had only been involved in one previous transaction involving the ISDA Form – but that concerned what she said was the preservation of the value of foreign currency and had nothing to do with derivatives. As appears further below, Ms Zhang asserted that she either had not read or not understood the contents of certain documents. I consider this evidence further below. However, at this stage, I should emphasise that I regarded Ms Zhang as a highly intelligent individual. Although she was not a trained lawyer, she occupied an important role both generally and in "frontlining" the negotiations with Mr Wolfe and appears to have carried out her work with a considerable degree of care and attention. In my view, the contemporaneous documents demonstrate that she took a keen interest in her work and that she must have read and considered the various documents as referred to below. Even if she herself did not understand fully some of the detail contained in certain of the documents, there is no doubt that she knew or, at the very least, ought reasonably to have known, the general nature of the Transaction as described more fully below. To the extent that Ms Zhang asserted otherwise, I do not accept such evidence.

(b) Mr Liu Zhongjin, the Vice-President of the Wengfu Group. He was a director of Graceland from the time it was incorporated in Singapore in 2009. He left Graceland on 4 January 2016. In my view, Mr Liu was not a satisfactory witness. He was evasive, argumentative and combative. At times, his answers were incoherent and difficult to understand; and he occasionally became very excited, angry and aggressive in the course of giving evidence. In broad terms, Mr Liu's general refrain in evidence was that Mr Wolfe was Graceland's "agent" and that he (Mr Liu) had been misled by Mr Wolfe – a man with whom he (Mr Liu) had done business over a number of years and whom he had come to trust. For reasons set out below, I do not consider that there is any proper justification for this attack on Mr Wolfe. Indeed, it is noteworthy that after Mr Wolfe confirmed the Transaction on 4 June 2014, Mr Liu replied in glowing terms: "That is very good Stepehen [*sic*]. I will ask, Zhanglin to follow up with the rest of the work. We look forward to doing even more for a small margin". As appears below, it was only about a week later, after the market started to turn, that Mr Liu began to question the swap deal. Like Ms Zhang, Mr Liu asserted that he had not read certain of the documents provided by Mr Wolfe. So far as Mr Liu is concerned, this may well be true at least in part: it may be that Mr Liu left the details to Ms Zhang. However, in my view, there is no doubt that he had the opportunity to read the relevant documents and, in truth, like Ms Zhang, he knew or at least ought reasonably to have known the general nature of the Transaction as described more fully below. To the extent that Mr Liu asserted otherwise, I do not accept that evidence.

14 In addition, the parties relied on expert evidence from the following individuals, all of whom served expert reports:

(a) On behalf of Macquarie:

(i) Mr Robert D. Selvaggio, an economist by profession with over 30 years of experience working in the financial derivatives industry, including as Co-Owner and Head of Analytics of Rutter Associates LLC, Senior Vice President and Head of Risk Analytics at Fidelity Investments, Managing Director of Capital Planning and Risk Analysis at Ambac Financial Group, and Managing Director at The Chase Manhattan Bank. His experience in OTC and exchange-traded derivatives is on both the buy-side and sell-side. Mr Selvaggio speaks frequently at conferences and courses for various financial organisations, and over the past ten years has published a number of articles and research papers.

(ii) Mr Joseph P. Bauman, who has over 40 years of experience in the financial services industry and over 30 years of experience in the OTC derivatives markets, including his role in managing the Global Swaps Group at Chemical Bank, as head of business development for Citibank's Global Derivatives Group and as managing director and head of Bank of America's Financial Engineering and Risk Management Group. Mr Bauman also served on the International Swaps and Derivative Association ("ISDA") board of directors from 1989 to 1999. In 2015, he was named to the Panel of Recognized International Market Experts ("P.R.I.M.E. Finance"). As a senior derivatives business manager, board member and chairman of ISDA, he has spoken at conferences on various derivatives matters and also testified before US congressional committees and various international regulatory bodies.

(b) On behalf of Graceland:

(i) Mr Darrell Dean Ingram, who has more than 30 years of experience in the fertiliser trading and derivatives industry, including about 12 years in Direct Hedge where he was a trader and broker for fertiliser swaps. He worked at Direct Hedge during the start-up of the fertiliser swaps industry, and was instrumental in the development of Direct Hedge's systems and procedures. He now provides consultancy services to clients on, among other things, matters relating to the financial derivative markets and the use of appropriate financial instruments to achieve particular objectives (*eg*, hedging). He never worked in a bank. His previous experience was negotiating physical trades on a principal to principal basis – or as a broker in derivatives swaps.

(ii) Mr Schuyler K. Henderson, a lawyer with some 40 years of experience in the OTC derivatives markets. He has served as the partner in charge of the OTC derivatives practice at four major international law firms and represented more than 60 international financial institutions and many end-users. He has been responsible for developing standard form ISDA documentation for clients (including for use for specialised counterparties and confirmation templates for many types of derivatives), negotiating ISDA documentation and representation of parties in derivatives disputes, including in litigation and acting as an expert witness. He is the author of the leading textbook, *Henderson on Derivatives* (LexisNexis, 1st Ed, 2003 and 2nd Ed, 2010). He has lectured on matters

> relating to OTC derivatives for over 30 years for academic institutions, public conferences, banks and professional groups like P.R.I.M.E. Finance.

15 In addition to their individual reports, the experts prepared a very helpful joint memorandum setting out the points of agreement and disagreement; and they all gave evidence and were cross-examined in the course of the trial. As to such expert evidence, it is convenient to make some general observations and comments at this stage:

(a) The application to adduce expert evidence was initially made by Graceland.

(b) At a case management conference ("CMC") on 13 July 2017, I indicated that, at that stage, I was not persuaded that expert evidence was necessary and directed Graceland to set out the proposed areas or issues for expert testimony ("list of expert issues").

(c) Following service by Graceland of the list of expert issues, Counsel for Macquarie and Mr Wolfe set out their objections.

(d) After the service of further (lengthy) submissions and hearing of further argument at a CMC on 4 September 2017, I directed that Graceland serve expert reports without prejudice to any question of admissibility and/or relevance.

(e) Following the service of such expert reports and further submissions from the parties, I declined to make any order excluding such expert reports without prejudice to hearing further submissions at trial with regard to admissibility and weight and laid down a timetable for the service by Macquarie of its own responsive expert report, the

preparation of a joint experts' report and further supplementary reports. This was subsequently done.

(f) At the trial, it was again submitted on behalf of Macquarie and Mr Wolfe that the expert reports of both Mr Ingram and Mr Henderson were inadmissible and/or should be excluded in whole or in part on a variety of grounds. In particular, it was submitted that Mr Ingram and Mr Henderson lacked impartiality; and that the contents of their reports were (at least in part) irrelevant to the pleaded issues and expressed views beyond the proper scope of expert evidence. For example, various views were expressed by these experts in the course of their reports as to what Ms Zhang and Mr Liu supposedly knew or believed and whether Mr Wolfe was lying. I do not consider that such matters properly fall within the scope of expert evidence; and I understood that this was accepted by Counsel on behalf of Graceland. Ultimately, it is for the Court to reach conclusions on such matters having regard to the totality of the evidence including, of course, such expert evidence as may be admissible and relevant. Be all this as it may, I did not make any formal order excluding any parts of the evidence for the simple reason that it would have been difficult to separate what was and what was not admissible and to have carried out that exercise would have required a line-by-line examination of the expert reports submitted by Graceland which would have taken up precious time in the course of the trial.

(g) It is fair to say that, as submitted by Counsel on behalf of both Macquarie and Mr Wolfe, both Mr Ingram and Mr Henderson seemed, at times, to take on the role of advocates on the part of Graceland rather than independent experts. Notwithstanding, it is important to emphasise that I fully recognise that both Mr Ingram and Mr Henderson have very

considerable experience in the derivatives market as summarised above; that certain parts of their reports and evidence were very helpful in explaining the general nature of the derivatives market with regard specifically to the particular transaction in the present case; and that I am grateful for their assistance. I should also state that, in my view, both Mr Selvaggio and Mr Bauman gave most helpful evidence as independent experts in an objective way. Again, I am grateful for their assistance. I bear all such evidence well in mind. However, for the reasons set out below, it is my view that this case turns very much on its own facts. To that extent, it does not seem to me that the expert evidence is ultimately of much, if any, assistance.

Key Terms

16 Before turning to consider the facts, it is convenient to explain certain key terms that were referred to in the course of the evidence and the parties' submissions. I set out brief explanations below although I should emphasise that they are not intended to be necessarily definitive or exhaustive.

(a) "**Forward**": A privately-negotiated transaction between two parties pursuant to which one agrees to sell and the other agrees to buy a specified amount of a particular asset or commodity at a specified price at a pre-determined future date. The terms of forwards can be tailored to the unique needs of the parties.

(b) "**Future**": A derivative that is bought and sold on an exchange. Futures are carried out in contracts of fixed terms (*eg*, dates, amounts and minimum price movements).

(c) "**Swap**": In a typical swap, one party agrees to pay the other a fixed price (or rate) for a specified amount of a financial asset or commodity while the other party agrees to pay the first party a floating price for such asset or commodity with the floating price being set by reference to actual market prices observed over a specified period of time. A swap is a privately-negotiated transaction between a bank and one of its clients and its terms can be tailored to the precise needs of the parties.

(d) "**OTC derivative**": An individually-negotiated, bilateral derivative that does not trade on an exchange. Forwards and swaps are types of OTC derivatives.

(e) "**Exchange-traded derivative**": A derivative that is traded on an exchange. The terms of an exchange-traded derivative are standardised.

The Facts

17 The relevant events begin towards the end of 2013 when Mr Wolfe approached Mr Damien Heath, who was then the CEO and a director of Graceland and who reported to Mr Liu, to suggest that he (Mr Wolfe) conduct a presentation for Graceland on the use of derivatives. In so doing, I have no doubt that (as submitted by Counsel on behalf of Graceland), Mr Wolfe was keen for Graceland to do business with Macquarie. This presentation took place in Graceland's Singapore office on 17 December 2013. Various possible transactions were discussed in the course of this meeting, following which Mr Wolfe sent an email to Mr Heath and his other colleagues at Graceland, *viz*, Mr Liu, Ms Lai Han (a director of Graceland at the material time) and Ms Zhang. The email addressed various possible transactions including what

Mr Wolfe referred to as "fertiliser forward swaps". The email ended by saying:

> Macquarie is very interested to develop some business with you and I look forward to trying to assist in that regard.
>
> If you have any questions then please let me know and I will be back to you soon re the fertiliser swaps pricing.

18 From December 2013 onwards, Mr Wolfe (on behalf of Macquarie) actively pursued business with Graceland, the Wengfu Group and the Wengfu Group's subsidiaries on several fronts, including possible fertiliser derivative transaction(s) for Graceland; metal business financing and trading for Graceland, the Wengfu Group or its subsidiaries; and inventory financing of stock belonging to Wengfu Australia, a subsidiary of Graceland.

19 In the course of 2014, there was a stream of emails between, in particular, Mr Wolfe, Ms Zhang and Mr Liu as well as various internal emails relating to what ultimately became the Transaction which lies at the heart of these proceedings. Many of these emails were referred to in the course of the trial. I do not propose to set out in full each and every email that passed between the parties. However, I set out or refer to below what I consider to be the most important emails.

20 On 9 January 2014, Mr Wolfe sent an email to Mr Heath (copying Ms Lai, Ms Zhang and Mr Liu) stating:

> My credit team are now back after a Christmas break so I just wanted to let you know that I have started the process of establishing a credit limit to allow the trading of fertiliser swaps between Graceland Industry and Macquarie.
>
> I will be in touch in due course in regard to this but just wanted to let you know that the ball is rolling.

Mr Heath replied: "Thanks, we look forward to hearing more."

21 On 7 February 2014, Mr Wolfe sent an email to Mr Heath under the subject header "Fertiliser Swaps" stating:

> The bank credit exposure associated with these sorts of swaps is quite substantial due to the volatile nature of the underlying product so I just want to make sure we can get a structure that works for everyone.

Although this email was at a relatively early stage, it is plain from its face that the type of transaction being contemplated is one which involves the bank itself having some kind of credit exposure.

22 On 27 February 2014, Mr Wolfe sent Mr Liu an email with some questions from Macquarie's credit team. On 28 February 2014, Mr Liu replied by email. The excerpt below sets out the material part of Mr Wolfe's email, with Mr Liu's responses indicated in bold.

> Dear Zhongjin
>
> I have received some final questions from my credit team in order to get the margin free limit established for Graceland for fertiliser hedging business.
>
> …
>
> Stephen
>
> ---
>
> b) Operating structure
>
> - Graceland's function and integration within Weng[f]u Group. Are there any profit share agreements or cross-company guarantees in place outside of parent guarantee for Graceland's banking facilities?
> - The terms of sales and purchases carried out by Graceland, including tenor and pricing arrangements
> - Graceland's key buyers and suppliers
> - Please provide a geographical distribution of the Company's sales.
>
> **GRACELAND IS AN OVERSEAS SUBSIDIARY COMPANY OF WENGFU GROUP LIMITED. GRACELAND DOES HAVE**

RESPONSIBILITY TO PERFORM WELL IN TERMS OF PROFIT TARGET. THE FINAL AUDITED PROFIT WILL BE INTEGRATED AS PART OF WENGFU GROUP TOTAL PROFIT. THERE IS NO PROFIT SHARING AGREEMENT BUT THEY HAVE PROFIT TARGET. ALMOST ALL THE BANK FACILITIES ARE EXTENDED FROM MAJOR CHINA FIVE BANKS UNDER THE GUARANTEE OF WENGFU GROUP TO BE USED IN SINGAPORE BY GRACELAND FOR TRADING OF VARIOUS COMMODITIES AND PRE-PAYMENT FOR WENGFU SUPPLIED PRODUCTS TO INTERNATIONAL MARKET.

TO PROVIDE SERVICES, GRACELAND TO CHARGE UNFIXED COMMISSIONS INCLUDING FINANCING COST ON HEADQUARTER, WENGFU INTERTRADE LIMITED AND OTHER RELATED COMPANIES AND ITS OWN SUBSIDIARY COMPANIES LIKE WENGFU AUSTRALIA AND WENGFU THAILAND ETC.

GRACLENAD'S KEY BUYERS:

- PT PETROKIMIA GRESIK (INDONESIA)

- BALLANCE NUTRIENT (NEW ZEALAND)

- INCITEC PIVOT (Quantum fertilizer limited)

- SOJITZ GROUP

- SUMMIT FERTILIZER

- ZENOH (Japan)

- CSBP

- MAJOR FERTILIZER IMPORTERS OF INDIA

ETC.

SUPPLIERS:

TRANSAMMONIA AG

INTERACID

SOJTZ

SAUDI INDUSTRY IMPORT AND EXPORT LIMITED

RELIANCE

ETC.

GEOGRAPHICAL DISTRIBUTION OF SALES:

SOUTH ASAIN COUNTRIES

INDIA AND PAKISTAN

SOUTH PACIFIC

SOUTH AMERICA

NORTH AMERICA

c) Risk management

- How does Graceland manage credit risk associated with its sales?

We send financial controller, the financial NC system has been integrated with Wengfu Group financial system. The credit use has to be approved by Wengfu headquarter. The sales and purchase contract has to be approved through OA system. All the operation staffs are well trained and professional.

- Are there any material concentrations within the Company's buyers and/or suppliers? Please outline the proportion of sales and purchases originating from top 3 counterparties.
- How does Graceland manage its exposure to price risk? Is there a formalised price risk management framework?

As discussed. You can answer this questions.

d) Financial structure

- Please outline Graceland's working capital facilities including total facilities, current availability under those facilities, whether they are secured, maturity, and any covenants attached.

please request this from Zhanglin…

23 Mr Wolfe subsequently requested and obtained from Ms Zhang a summary of Graceland's working capital facilities as at that point of time, *ie*, February 2014. The evidence of Mr Liu was that Graceland would not have

provided Macquarie and Mr Wolfe with this information (in particular, Graceland's function within the Wengfu Group organisation; Graceland's key buyers; the geographical distribution of sales by Graceland; Graceland's management of credit risk; and Graceland's working capital facilities) if Graceland had known that Macquarie was the counterparty of the Transaction and/or acting independently of and/or contrary to Graceland's best interests. As stated, such evidence is tendentious and needs to be broken down. Of course, I accept that this information would, in the ordinary course, be confidential. I also accept that if Mr Liu had known that Mr Wolfe was indeed acting contrary to Graceland's best interests, he would not have provided such information. But, in the circumstances of the present case and for the reasons set out below, it is not, in my view, correct to say that Macquarie was acting contrary to Graceland's best interests. The fact that one party acts as a counterparty to another party (as, for example, in many banking transactions) does not necessarily mean that such other party is acting "contrary" to the best interests of the other party and, speaking generally, it would be misleading and wrong to characterise such relationship in such terms. Certainly, as appears further below, I have no doubt that Macquarie's intention throughout was to act as an independent counterparty in any swap deal with Graceland; and, in that capacity and in the circumstances of the present case, I see nothing extraordinary in Macquarie requesting such information nor any reason why Mr Liu or Graceland might wish to refuse to give such information particularly since the discussions between Mr Liu and Mr Wolfe covered a broad spectrum of possible business between Graceland and Macquarie. On the contrary, I can well understand why a bank in the position of Macquarie wishing to do new business with a new party like Graceland would want this information – particularly at this early stage of their discussions and in circumstances where Macquarie

would be undertaking potentially substantial exposure in its capacity as an independent counterparty in any swap deal with Graceland.

24 Mr Wolfe's evidence was that on about 4 March 2014, Mr Liu called him to say that Graceland was interested in, among other things, entering into fertiliser forward swaps with Macquarie to protect itself against price fluctuations of the fertilisers that it traded in. Mr Liu was unable to recall this specific conversation; but there is no reason to doubt what Mr Wolfe says Mr Liu told him and it fits well with the chronology as evidenced by the contemporaneous documents.

25 As to the general position at this time, Mr Liu's evidence was, in summary, as follows:

(a) He did not understand how swaps and OTC transactions operated.

(b) He remembered informing Mr Wolfe at some stage that Graceland was looking for a financial instrument which could assist Graceland to protect itself against price fluctuations of the commodity fertilisers that it traded in, in particular diammonium phosphate ("DAP") products.

(c) Graceland had never previously executed any ISDA agreement for any commodity derivative transaction and he was not familiar with the ISDA agreement.

(d) Sometime in about early March 2014, he requested Mr Wolfe to provide Graceland with some document(s) to assist its understanding of

how fertiliser derivatives operated as Graceland was not experienced in swap transactions.

(e) Graceland did not typically provide or discuss with a buyer commercially sensitive and confidential internal information; Graceland had provided this information to Macquarie (through Mr Wolfe) only because Macquarie and Mr Wolfe had voluntarily held themselves out as Graceland's agent, broker or fiduciary.

(f) Mr Wolfe explained to Mr Liu that Macquarie could assist with arranging an appropriate financial instrument for Graceland through Macquarie's New York office.

(g) Mr Wolfe did not inform Mr Liu that Macquarie would be the counterparty of this financial instrument.

(h) Consequently, Mr Liu understood that Macquarie would be acting as Graceland's agent, broker or fiduciary in respect of such a financial instrument.

26 This evidence is, again, tendentious and needs to be broken down. It is true that, at this stage, there is nothing which indicates that Mr Wolfe specifically informed Mr Liu that Macquarie would be acting as a counterparty in any swap deal – although the obvious inference from the email dated 7 February 2014 referred to above is that this would (or at least might) be so. For present purposes, the crucial point from Graceland's point of view is Mr Liu's evidence that he "understood" that Macquarie would be acting as Graceland's "agent/broker/fiduciary". As stated, it is a bald assertion which I do not accept. Moreover, Mr Liu does not say that such alleged understanding was the result of anything that Mr Wolfe might have said; and, so far as may be

necessary, I do not accept that Mr Wolfe did say anything to that effect or which might reasonably have led Mr Liu to believe that was the case either generally or with regard, in particular, to any swap transaction. In any event, as set out below, subsequent contemporaneous documents show that Mr Wolfe was careful to explain that Macquarie would act as a counterparty in any swap deal.

27 Following that telephone conversation, on 4 March 2014, Mr Wolfe sent Mr Liu a further email attaching examples of the documents that would have to be executed by Graceland in order to establish a fertiliser forwards swap trading account with Macquarie, namely: (a) the ISDA Form showing Macquarie as a named party; and (b) the ISDA Cross-Border Swaps Representation Letter, also known as the "Frank Dodd Letter". In that email, Mr Wolfe stated: "Please let me know if you have any questions in regard to these documents." Mr Liu subsequently forwarded the email and attachments on 6 March 2014 to Ms Zhang.

28 It is fair to say that the ISDA Form is a detailed document which is far from straightforward. However, it is absolutely plain from even a cursory glance of the main provisions that there is nothing in the ISDA Form to indicate that Macquarie would be acting as an "agent", "broker" or "fiduciary". On the contrary, it is plain that, as appears from Clause 2, its purpose is to create independent obligations on the contracting parties; and, in my view, this would or should have been obvious to both Mr Liu and Ms Zhang.

29 Meanwhile, Mr Wolfe sent a further email to Mr Liu on 4 March 2014 with indicative bids for DAP as follows:

> FYI - the indicative bids for forward DAP are as follows:
>
> May Settlement = $460
>
> June Settlement = $445

> July Settlement = $430
>
> On the basis that you are still keen to get some forward sales done I am pushing my credit and legal people in Singapore to finalise the limit allocation for Graceland.
>
> From your side there will be two pieces of documentation that you will need to execute in order for us to be in a position to trade.
>
> These are:
>
> 1. **An ISDA agreement** (ISDA stands for International Swaps and Derivatives Association) – this is an industry standard contract covering derivatives transactions. Graceland would have executed ISDA agreements in the past with the bank counterparties with whom you trade foreign exchange.
>
> 2. **Dodd Frank Cross Border Letter** – this document essentially confirms that Graceland is not a US entity – we require this as there are a whole raft of requirements for us to meet if we are trading with a US person/corporation.
>
> *When you start trading, you should also be prepared that we will require you to lodge some standby security* – I do not know what will be the margin free limit size that credit grants to Graceland but to be safe you should work on the basis that you will have to lodge approximately $6m standby LC for each 50,000 mt you want to trade. Also you should be aware that, in the event that DAP prices rise after you have traded, we may require you to lodge additional security (cash or Standby LC) to cover your mark to market position.
>
> Can you let me know whether the above pricing levels are potentially workable for you – if they are unacceptable then we can go a little slower on the processing of the limit but happy to push the credit if you are still keen to press on.
>
> [emphasis added in italics]

30 In my view, this is an important email. There is no doubt that Mr Liu read it; and according to his own evidence, he understood well from the penultimate paragraph that Macquarie would be requiring security or a "kind of collateral" to protect itself against the exposure of price fluctuations. In my view, the request for such security or collateral is consistent and consistent only with Macquarie acting as an independent counterparty.

31 Following receipt of that email, Mr Liu asked Mr Wolfe to provide further information with regard to the operation of a swap. Pursuant to that request, Mr Wolfe sent a set of PowerPoint slides via email dated 6 March 2014 to Mr Liu entitled "Fertiliser Swap Overview – Graceland Industry Pte Ltd and Macquarie Bank" (the "Overview"). The email and attached slides were forwarded on the same day by Mr Liu to Ms Zhang. Mr Wolfe had prepared and sent the Overview to Graceland so as to (a) provide a broad overview of Macquarie's fertiliser swap trading process; and (b) set out the issues Graceland would have to consider prior to entering into the fertiliser swap. As stated by Mr Wolfe, he had prepared the Overview because Macquarie had never done a transaction with Graceland before and Mr Wolfe wanted to make sure that Graceland was being very well taken of.

32 The Overview explained that the fertiliser swap trading process would be broadly as follows and also set out the decisions and issues which Graceland would have to consider prior to entering into a swap transaction, *viz*:

> **Documentation Stage**
>
> - Macquarie provide Graceland Industry with documentation – ISDA agreement and Dodd Frank Letter
> - Graceland execute documentation and return to Macquarie
>
> **Security Provision Stage**
>
> - Based on proposed trading volumes, Graceland open Standby LC or deposit cash (at your option) to cover trading margin exposure. Macquarie to advise regarding this requirement
>
> **Ready to Trade Stage**
>
> - Graceland is now ready to trade
>
> **Trading Stage**

- *Graceland decide they wish to enter into a fertiliser swap trade with Macquarie based on pricing provided by Macquarie.* For example – Graceland sells 25,000 metric tonnes of DAP forward for settlement against June 2014 DAP FOB Tampa settlement price @ US$445 per mt – this will be the Swap Price. All swaps transacted will be confirmed in writing to Graceland. There is an obligation on Graceland to advise of any confirmation errors.

Potential Margining Stage

- If the price of DAP rises between the time the trade was done and the settlement date it may be necessary for Graceland to lodge further security with Macquarie to cover potential losses. This will be determined based on the quantity of product sold and the prevailing market price level.

Settlement Stage (in this case end June 2014)

- The average reported price for the settlement month will be calculated by Macquarie based on reported pricing and advised to Graceland. This will be the Settlement Price

- In this case the Settlement Price will be deducted from the swap price to produce a profit or loss per metric tonne. A positive number will indicate a profit per mt whereas a negative number will indicate a loss per mt.

- The Profit or Loss per mt will be multiplied by the quantity traded (in this case sold) to determine a total profit or loss. In the event of a profit, Macquarie will remit or deal with the funds as directed by Graceland. In the event of a loss, Graceland will remit the required clear funds to Macquarie on the pre-agreed value date. This date will be soon after the end of the settlement month.

Security Return Stage

- If there are no outstanding forward swaps, Graceland may request Macquarie to return previously lodged security if required."

…

DECISIONS & CONSIDERATIONS REQUIRED BY GRACELAND

> There are a few issues that need to be considered and decided upon by Graceland prior to entering into a fertiliser swap. These issues include but are not limited to the following:
>
> - *Graceland needs to determine the quantity of swaps that it would like to do and ensure that it is in a position to provide adequate security to Macquarie prior to wanting to enter into a swap transaction.*
>
> …
>
> - Graceland needs to be aware that swap transactions could require the provision of additional security in the event that the underlying commodity price has an adverse price movement in relation to the swap price prior to the settlement date.
> - *Graceland needs to be aware that swap transactions can result in either a loss or a profit.*
> - *Macquarie will provide prices to Graceland as principle* [*sic*] *and is not providing any advice to Graceland about the likely future direction of any price movements.*
> - Graceland will have to enter into comprehensive documentation covering any swap transactions and this documentation will have to be completed prior to any transactions being entered into in regard to fertiliser swap arrangements. *The document will include enforceable legal obligations on the part of both Graceland and Macquarie – Graceland should seek their own legal advice in regard to these documents.*
>
> [emphasis added in italics]

33 In addition, one of the slides provided two worked examples of swap transactions between Macquarie and Graceland, one showing Macquarie remitting US$250,000 to Graceland (*ie*, a profit to Graceland) and the other showing Graceland remitting US$250,000 to Macquarie (*ie*, a loss to Graceland).

34 Initially, Mr Liu said in evidence that he had read the Overview "roughly" but that he "could not understand it well". However, he then stated that he had not had the time to read the document. In any event, he accepted in

cross-examination that he understood that a swap transaction could result in either a loss or a profit. Despite being told specifically by Mr Wolfe in the Overview that Graceland should get its own legal advice, it appears that Mr Liu never did so himself. Rather, his evidence was that he asked his team to follow up on the document and left the decision whether or not to get legal advice to his team. In the event, it appears that no outside legal advice was obtained.

35 In paragraph 33 of her AEIC, Ms Zhang stated that although she had read the Overview, she did not fully understand how swaps operated. In cross-examination, she said:

> This was only an attachment in the email forwarded by Mr Liu. As we were not too familiar with this business, we did not take a close look at these documents. And, also, there were so -- there are so many English words, I do not understand the professional terms, that's why I did not take a close look at it.

To my mind, that explanation is (at the very least) difficult to accept. I am not sure what Ms Zhang intends to mean by saying that the Overview was "only" an attachment to an email from Mr Liu. In any event, Ms Zhang was, as she, accepted, "frontlining" the negotiations with Mr Wolfe. Although English was not her native language and she may have had some difficulty in understanding certain specialist terminology, there is, in my view, no doubt that she was fully capable of reading and understanding the English language. The Overview was expressed in relatively simple terms. Moreover, if Ms Zhang was indeed not familiar with the business of swaps, then one would have thought that such unfamiliarity would and should have prompted Ms Zhang to pay particular attention to the information provided by Mr Wolfe. Further, there is no doubt that the information provided in the slides was clear and important; and Ms Zhang (and also Mr Liu) had ample opportunity (if they so wished and had been sufficiently bothered) to read and digest what was stated. Moreover, although the precise detailed mechanism of a swap may not be entirely

straightforward, the information contained in the slides was not difficult to understand. For present purposes, it is a crucial document because it made at least three points absolutely clear, *viz*, (a) any swap would be entered into by Macquarie and Graceland as principals, *ie*, counterparties; (b) Macquarie was not providing any advice to Graceland about the likely future direction of any price movements; and (c) depending on price fluctuations, Macquarie might end up paying Graceland money and *vice versa*.

36 Shortly after Mr Wolfe sent his email, he spoke to Mr Liu over the phone. During that conversation, Mr Liu informed Mr Wolfe that Graceland was looking to trade in fertiliser forward swaps *urgently*, and asked what Macquarie could do to speed up the process. Shortly thereafter, Mr Wolfe sent a follow-up email on the same day (*ie*, 6 March 2014). In summary, Mr Wolfe informed Mr Liu that "depending on how urgent [Graceland's] requirement to trade is", Macquarie and Graceland could enter into "an interim contract" on the basis of a less detailed document known as the LFC instead of the ISDA Form. In particular, Mr Wolfe highlighted to Mr Liu in that email that (a) the LFC would essentially operate as a "mini-ISDA" and could be used for the initial transaction; and (b) using the LFC would give Macquarie's clients (like Graceland) time to get their own independent legal advice on the ISDA Form. How Mr Liu wished to proceed, Mr Wolfe stated, would depend on how keen he was in getting "some forward cover into place". In re-examination, Mr Liu said that he did not understand quite well what Mr Wolfe was trying to tell him; and that is why he asked Mr Wolfe to talk to Ms Zhang. I am prepared to accept that Mr Liu did not appreciate or at least may not have appreciated the full details of the intended transaction and that he was content to leave such details to Ms Zhang. But, in my view, there can again be no doubt that Mr Liu fully appreciated (or ought reasonably to have appreciated) by this stage at the latest that (as appears clearly from the Overview) Macquarie was not providing any

advice to Graceland about the likely future direction of any price movements; and that the proposed swaps would involve Macquarie and Graceland acting as principals (*ie*, counterparties) in circumstances where, depending on price movements in the market, Macquarie might end up paying Graceland or *vice versa*.

37 On the same day (*ie*, 6 March 2014), Mr Liu then emailed Mr Wolfe saying he wished "to consolidate this within next week so that we are able to initiate the forward cover for saying 100kts DAP as a trial". Mr Liu stated that Ms Zhang from Graceland would contact Mr Wolfe regarding the details of the LFC, explaining that Ms Zhang was (a) a manager in a department called "Commodity Trade and Financing Division" they had set up under Wengfu Intertrade; and (b) the "deputy manage [*sic*] of Finance Division of of [*sic*] Wengfu Intertrade who is in charge of international financing on behalf of Intertrade and Graceland". The email ended with Mr Liu stating that he was "looking forward to get[ting] all the facilities in place so that we are able to start some physical business with Macquarie" and that Ms Zhang would be reviewing the format of documents and will be in "constant contact" with Mr Wolfe for the operation.

38 With regard to this email, Mr Liu was at pains to emphasise in his evidence that when he used the word "forward", he was not referring to any specific type of derivatives product since he was not aware of the difference between "futures" and "forwards" but that he was simply copying Mr Wolfe's use of the term and intended it to mean that it was a "cover" for Graceland against fluctuations in the price of fertilisers moving forward.

39 More generally, it was Mr Liu's evidence that at this time, his intention was to execute a trade on the market through Macquarie as Graceland's agent,

broker or fiduciary for DAP products which was a product which he was familiar with, as Graceland facilitates the Wengfu Group's manufacture and supply of phosphate-based chemical products. In his evidence, Mr Liu was also keen to (in his words) "clarify" that he was and still is not familiar with derivatives or other complex financial instruments; that the commodities trading which the Wengfu Group and its subsidiaries and representatives were and are involved in are typically of physical products and not financial products; that the financing which Ms Zhang and Wengfu Intertrade were involved in was the application for banking and financing facilities from various international banks for the international sale of the physical fertilisers which the Wengfu Group manufactures and supplies; that he trusted that Mr Wolfe would take care of Graceland's best interests given the long-standing relationship between Mr Wolfe, Graceland, Wengfu Group and himself; that this was also because Macquarie and Mr Wolfe had voluntarily held themselves out as Graceland's agent, broker or fiduciary when they advised Graceland of (a) the indicative bids for DAP; (b) the suggested need for independent legal advice; and (c) the requirement to lodge some standby security or margin for the transaction; that it was on this basis that he decided to rely on and proceeded with (as Mr Liu described) Mr Wolfe's advice for Graceland to enter into the swap transaction for DAP through Macquarie and on the ISDA documentation or subsequently, the LFC; and that he trusted Mr Wolfe to give the most appropriate advice to Graceland so as to protect Graceland's interests and ensure that Graceland would not suffer loss in this first swap transaction which Graceland intended to enter into.

40 Once again, this evidence is tendentious and needs to be broken down. First, for reasons which I have already given and which I do not need to repeat, I do not accept that Mr Liu understood (or at least could reasonably have

understood) that Macquarie was going to act as Graceland's agent, broker or fiduciary in the proposed swap(s). On the contrary, Macquarie and/or Mr Wolfe had made it absolutely plain that Macquarie and Graceland would be acting as principals, *ie*, counterparties.

41 Second, Mr Liu's repeated mantra that he trusted Mr Wolfe to give advice is not inconsistent with this conclusion – both as a matter of fact and as a matter of law. At this stage, it is sufficient to note the example of the car salesman given by Gloster J in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm) at [449] and cited (with other authorities) by Moulder HHJ in *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB) ("*Thornbridge*") at [25]–[33]. Thus, A may buy a car from B. A may do so because he has bought many cars from B in previous years and, in a general sense, trusts B. However, those facts do not of themselves justify the conclusion that B is A's agent nor that A and B are acting other than as principals – although, of course, each case must depend on its own facts and, as is plain from the cases just cited, circumstances may exist which give rise to an "advisory relationship" with consequential duties of care and/or liability for misrepresentation.

42 Third, the suggestion that Mr Liu trusted Mr Wolfe to give the most appropriate advice to Graceland so as to protect Graceland's interests and ensure that Graceland would not suffer loss in this first swap transaction is both bizarre and factually unsustainable. It is, in my view, bizarre because it is inherently improbable that anyone in the position of Mr Wolfe could conceivably suggest or that anyone in the position of Mr Liu could conceivably believe that Mr Wolfe might be able to give advice to "ensure" that Graceland would not suffer loss in the proposed swap particularly since Mr Liu was well aware that the physical market in fertilisers was volatile. No one in Mr Liu's position could

possibly have thought that the swap market was any different. Moreover, at the risk of repetition, it is important to recall that the Overview stated in the clearest possible terms that Macquarie was not providing any advice to Graceland about the likely future direction of any price movements and that Graceland might end up losing money.

43 On 7 March 2014, Mr Wolfe then sent an email to Ms Zhang (copied to, *inter alia*, Mr Liu) stating in material part as follows:

> In the first instance I think we should focus on getting the trading limit established for fertiliser swaps for Graceland.
>
> We will also work on the financing facility but let's focus on the fertiliser line first.
>
> In order for the fertiliser swap limit to be established we will need to get the documentation side of things sorted out first.
>
> In order to establish a formal limit there are three key documentary requirements:
>
> a) An ISDA agreement
>
> b) A Dodd Frank Cross Border letter
>
> c) Confirmation of beneficial ownership of Graceland Industry
>
> **ISDA Agreement**
>
> It is our experience that the finalisation of an ISDA agreement can take a little bit of time – typically due to both approval procedures but most importantly because the client usually requires legal advice on the document. Therefore it has been proposed that, in the first instance and to allow Graceland to trade, we start off by using a Long Form Conformation (in essence a mini-ISDA) – this will allow the first transaction to be done whilst we get the formal ISDA in place.
>
> Can you please confirm that you agree to taking this route? If this is the case I will advise my team to draft a Long Form Conformation document for your review.
>
> **Dodd Frank Cross Border Letter**
>
> This is a relatively straight forward document that confirms your status as a non-US person. You can utilise the below template to meet this requirement.

> **GRACELAND INDUSTRY PTE. LTD.,**
>
> This email requests your assistance in determining whether CFTC regulations apply to over-the-counter derivatives ("swaps") that we trade with you. Macquarie is a swap dealer provisionally registered with the CFTC and the application of CFTC rules depends on whether counterparties are (i) US persons, (ii) guaranteed by US persons, or (iii) "affiliate conduits" to US persons. We, along with other swap dealers, may not have sufficient information to identify whether counterparties are US persons, US guaranteed or affiliate conduits …

44 Within less than an hour on the same day (*ie*, 7 March 2014), Ms Zhang replied to Mr Wolfe thanking him for his email explaining the procedures, agreeing with him to "start with fertilizer line first" and stating amongst other things:

> **ISDA Agreement**
>
> Please advise when we could expect to receive the SCHEDULE/CSA to the ISDA Master Agreement.
>
> Please supply Long Form Confirmation to [Graceland] as we hope we could start the first swap deal soon
>
> *By the way which branch of Macquarie Group Limited will sign all docs and deal with Graceland? …*
>
> [emphasis added in italics]

In my view, the emphasised portion above is particularly significant because it shows that Ms Zhang understood full well that the proposed swap was one in which it was contemplated that a "branch" within the Macquarie Group would "deal" with Graceland. On the same morning, Mr Liu also sent Mr Wolfe an email saying, in effect, that Mr Wolfe's proposal to use the LFC would be a "good idea" and requesting an "interim contract".

45 On 10 March 2014, Mr Wolfe received an email from Ms Zhang. She noted that it would "take a long time to keep all docs in place, but international

DAP price is declining recently". Ms Zhang asked if Graceland could perform one trial swap first, to lock in the DAP selling price in May and June. Graceland wanted to know the "easiest and simplest way soon". Mr Wolfe replied later that day to say that Graceland could not do a trial until the documents were in place and that there were a few minimum requirements that could not be skipped. Mr Wolfe also added that the fertiliser forwards swap would have to be confirmed and signed off with a LFC.

46 Over this period of time, Mr Wolfe also received a number of follow-up chasers from Graceland for the draft LFC to be provided on an urgent basis. In particular, in an email dated 11 March 2014, Ms Zhang requested that Mr Wolfe "please push [his] team to send us long form confirmation a.s.a.p."; and in an email dated 12 March 2014, Ms Zhang asked Mr Wolfe if there was "[a]ny update for long form confirmation". Various other emails were also exchanged with regard to other documentation including the Frank Dodd Letter. As Ms Zhang accepted in cross-examination, these "chasers" reflected the fact that there was urgency on the part of Graceland to do the swaps transaction. This chain of emails belies any suggestion that Mr Wolfe was "pressurising" Graceland. On the contrary, they show that it was Graceland who was keen to "push" ahead with regard, at least, to the proposed DAP swap.

47 Meanwhile, there was also a number of internal discussions and emails within Graceland concerning the proposed swaps transaction as well as what was described as a "DAP forward" between (amongst others) Ms Zhang, Mr Liu, Mr Chen Shiqing (Deputy General Manager of Wengfu Intertrade) and Mr Heath. For example, on 11 March 2014, Ms Zhang sent an email to Mr Chen stating that:

> … [T]he bank [*ie*, Macquarie] currently requires an ISDA master agreement to be signed together with the supporting documents for fertiliser hedging.
>
> Since the bank lawyer takes time to review the documents, they will first provide the "long form confirmation" (mini ISDA) for our signing. However, we are still waiting for this document from the bank.
>
> Based on my discussion with Director Wang, we suggest that Graceland be the main entity for the hedging operation! I have sent the documents as required by the bank for attestation to Ms Huang, who will arrange for attestation today before sending to the bank …

Ms Zhang also attached to her email what she described as a "schematic representation based on [her] understanding". The attachment had various boxes, lines and arrows showing (amongst other things) "swap price" and "index price" and different scenarios described as "Losses from futures" and "Profits from futures". This confirms, once again, that Ms Zhang was well aware of the possibility of losses from any swap deal with Macquarie.

48 During this period, there were other emails between the parties concerning a proposed "DAP forward". For example, on 13 March 2014, Mr Wolfe sent an email to Mr Liu stating:

> Per my e-mail yesterday the forward DAP market has experienced some selling in the past week but we have been working hard to put something together for your forward pricing at a reasonable level.
>
> One of our clients in South America has asked for your indication of where you would be willing to sell forward 25,000 mt each for May and June.
>
> Can you please let me know your indicative levels – without any commitment at this stage so we can work this forward buyer's interest and see if we can come up with something firm. FYI our model is showing a midpoint fair value of approx 445-450 for May and 435-440 for June but the levels where you are willing to offer are completely up to you.
>
> As I said yesterday given the recent sell off in forward months and the currently thin trading volume I think the best solution

> to getting you the best price is to try and work with someone showing some buying interest.
>
> Please let me know if you are willing to let me have your indicative offer levels.

49 Mr Liu replied almost immediately on the same day as follows;

> As you know, after the window is opened, the main markets for phosphate are mainly Asian and LAM markets. Supply will much more than demand. However, this year suppliers won't be crazy like last year. China producers will not export much if they lose money. Eventually, there will be in good balance. Based on the current cost, suppose sulphur price is not dropping too much, I expect FOB China should be at $470 per ton level during May and June. I worst case, if India declines to buy forecasted tons, price may drop to 430 level is unusual. This is just for your reference.
>
> However, we are looking at 460 level in comparison to China domestic price.

Mr Wolfe replied a few minutes later, stating:

> Understood – so if we could show you a bid around the 460 sort of level you may have some interest? I would like to go back with some ideas for the buyer.

Mr Liu replied: "Sure, please let me know. Pleased to discuss." Mr Wolfe then replied: "OK I will see what feedback I can get and then we can discuss from there."

50 Emails continued to be exchanged between the parties concerning a possible "DAP forward" during March and into April and May 2014. Thus, on 18 March 2014, Mr Wolfe emailed Ms Zhang a draft of the LFC requesting her to let him have her questions or comments. This draft LFC was addressed to Graceland and headed "Transaction Confirmation". At the very beginning, it expressly provided, among other things, that Macquarie and Graceland would each be acting as principals in the transaction. Thus, the opening paragraphs of the LFC stated in material part:

> *The purpose of this letter (the "**Confirmation**") is to confirm the terms and conditions of the transaction entered into between [Graceland] (the "**Counterparty**") and [Macquarie] ("**Macquarie**"), each acting as principal, on [5 June 2014] (the "**Transaction**").*
>
> This Confirmation evidences a complete binding *agreement between you and us as to the terms of the Transactions to which this Confirmation relates*. In addition, you and we agree to use all reasonable efforts promptly to negotiate, execute and deliver an agreement in the form of the 2002 ISDA Master Agreement (the "**ISDA Form**"), with such modifications as you and we will in good faith agree. Upon the execution by you and us of such an agreement, this Confirmation will supplement, form a part of, and be subject to that agreement. All provisions contained or incorporated by reference in that agreement upon its execution will govern this Confirmation except as expressly modified below.
>
> Until we execute and deliver that agreement, *this Confirmation, together with all other document referring to the ISDA Form* (each a "**Confirmation**") *confirming Transactions* (each a "**Transaction**") *entered into between us* (notwithstanding anything to the contrary in a Confirmation), *shall supplement, form a part of, and be subject to an agreement in the form of the ISDA Form, as if we had executed as agreement in such form (but without any Schedule) on the Trade Date of the first such Transaction between us. In the event of any inconsistency* between the provisions of that agreement and this Confirmation, *this Confirmation shall prevail for the purpose of this Transaction* …
>
> [emphasis added in italics]

In addition, the draft LFC extending to some 12 pages contained numerous detailed provisions setting out the terms of the proposed transaction with space at the end for the document to be signed by authorised signatories for and on behalf of the two named parties, *ie*, Macquarie and Graceland. Those terms included in Clause 3(a) certain "Additional representations" as follows:

> (i) **Non-reliance.** [Each party] is acting for its own account, and it has made its own independent decisions to enter into the Transaction and as to whether the Transaction is appropriate or proper for it based upon its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into the

> Transaction, it being understood that information and explanations related to the terms and conditions of the Transaction will not be considered investment advice or a recommendation to enter into the Transaction. No communication (written or oral) received from the other party will be deemed to be an assurance or guarantee as to the expected results of the Transaction.
>
> (ii) **Assessment and understanding**. [Each party] is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of the Transaction. It is also capable of assuming, and assumes, the risks of the Transaction.
>
> (iii) **Status of parties**. The other party is not acting as a fiduciary for or an adviser to it in respect of the Transaction.

51 On 20 March 2014, Ms Zhang circulated the draft LFC and the ISDA Form internally to Mr Liu and others within Graceland and/or the Wengfu Group requesting them to read those documents and to provide their comments. On 21 March 2014, Mr Wolfe sent a follow-up email to Ms Zhang to check if she had received the draft LFC.

52 The evidence as to what Mr Zhang actually did on receipt of the draft LFC is unclear. In paragraph 72 of her AEIC, she stated only that in relation to the draft LFC, she subsequently replied to Mr Wolfe by email on 21 March 2014 (copying Ms Lai and Mr Liu) with what she described as "largely administrative queries/clarifications which I had crafted based on Graceland's and the Wengfu Group's usual practices when trading in physical fertiliser products since Graceland was inexperienced in derivative transactions". However, her email stated in material part:

> In respect of the LFC, I've gone through it, but it do need to be checked carefully as you mentioned in the confirmation. So we still need some time to discuss some issues internally. Before that, I have a few simple questions as below …

The email then continued with four detailed points, *viz*, (a) a request to increase the "threshold" stated in Clause 11 from US$2 million to US$2.5 million; (b) a request to change the "rounding" figure from US$100,000 to US$10,000; (c) a request to delete Paragraph 11(h)(viii); and (d) a request to clarify certain of the transaction particulars in Clause 1. The precise details of these requests are not crucial. However, in my view, Ms Zhang's email is important because (a) it states, on its face, that she had "gone through" the draft LFC and she needed more time to discuss some issues (whatever they might be) internally; and (b) the four specific points raised by Ms Zhang are not merely administrative queries or clarifications, but instead show that she must have gone through the LFC with some care.

53 In the course of giving oral evidence, Ms Zhang stated that there had been an internal discussion concerning the draft LFC (although it is not clear with whom and when this might have been) and that "[they] didn't understand most of the clauses in the LFC". Even taking this evidence at face value, I do not accept that Ms Zhang (or Mr Liu) could have been in any doubt about the general nature of the Transaction, *viz*, that as stated in the opening paragraphs of the LFC, each party was acting as principal.

54 On 26 March 2014, Mr Wolfe sent an email to Ms Zhang to update her with some responses to her questions on the draft LFC. On 1 April 2014, Ms Zhang forwarded an amended marked-up version of the draft LFC (marked "Graceland Industry LFC v2.docx") to Mr Luo (a Manager of Wengfu Intertrade) asking him to review that document.

55 On 2 April 2014, Ms Zhang sent an email to Mr Wolfe attaching a marked-up version of the draft LFC ("2 April 2014 Draft LFC") with some "small amendments", as well as a list of Graceland's authorised signatories. For

present purposes, it is important to note that Graceland did *not* amend the part of the draft LFC identifying Macquarie and Graceland as principals or the confirmation that Macquarie was not acting as advisor or fiduciary to Graceland.

56 On 4 April 2014, Mr Wolfe emailed Mr Liu stating:

> Indication of the DAP June Tampa forward price is bid at 420/mt and offered at 440/mt.
>
> Let me know if you are interested in doing anything or you can leave us an order to sell at a certain level if that suited you and we can work it in the market.

In passing, I should note that the latter phraseology was heavily relied upon by Counsel on behalf of Graceland. In particular, it was submitted on behalf of Graceland that the phrase "we can work it in the market" showed that Macquarie was, in truth, acting as an agent on behalf of Graceland. In cross-examination, this was strongly disputed by Mr Wolfe. So far as relevant, I consider this phraseology below in the context of later similar emails.

57 On 4 April 2014, Mr Wolfe replied to Ms Zhang stating that Macquarie could accept most (although not all) of the changes that she had proposed in the 2 April 2014 Draft LFC. Later that day, Ms Zhang replied to Mr Wolfe stating, among other things, that she would report to Mr Liu and get back to Mr Wolfe regarding the LFC although Mr Wolfe did not in fact hear from Graceland regarding the LFC until much later, *ie*, 20 May 2014 (see further below).

58 Meanwhile, on 6 April 2014, Mr Wolfe responded saying with regard to the LFC that he would "wait to hear". That email also addressed the question of the opening of a standby letter of credit ("SBLC"). The email concluded by Mr Wolfe stating in material part:

> I really want to work this through with you to make sure we get a good result for you – I would really appreciate if you can try again with your top 5 banks. I am sure you can solve it!
>
> I can also assure you that we are progressing everything forward with you at the same time – we can absolutely progress on the nickel and fertiliser swaps at the same time as the trade facility and SBLC.
>
> My relationship with Wengfu goes back many many years so I am sure we will come up with something workable for all of us if we proceed in good faith.

59 During the rest of April and mid-May, there were no major developments between Macquarie and Graceland. However, the contemporaneous documents show that there continued to be internal activity and discussions within Graceland with regard to possible swap transactions. For example, it appears from internal emails on 14 April 2014 that Mr Heath was telling Ms Zhang that he had been in contact with another party, *ie*, FIS (a broker for, among other things, fertiliser swaps) with regard to possible swap transactions and had been making enquiries with regard to Macquarie's position in the market. Ms Zhang responded attaching a FIS presentation and saying *inter alia* that she would keep him posted. A few weeks later, on 7 May 2014, Mr Heath again emailed Ms Zhang asking: "Is anything happening with all this swaps stuff?" Ms Zhang responded saying *inter alia* that Mr Liu thought that the swap prices being quoted by Macquarie and FIS were too low to cover all their costs "so maybe it's not [a] good time to deal with them. But we will still pay close attention to the swap market". Mr Heath then responded asking whether they were going to put documentation in place with FIS or Macquarie "to allow us to move when we think [it's] the right time?" Ms Zhang then replied:

> I've sent report to Mr Liu. I need to do more work (such as translation) to let him to understand this business. He also required me to prepare more docs …

The reference to preparing more documents is somewhat unclear because no further documents have been disclosed by Graceland. Ms Zhang's evidence was that no more documents were in fact prepared and that following 7 May 2014, she reported orally to Mr Liu.

60 On 7 May 2014, Mr Wolfe emailed Mr Liu stating that Macquarie's New York desk had a client who was interested in a DAP deal. In addition, the email stated in material part:

> The current forward market for June DAP Tampa is 424 bid/434 offered.
>
> Our NYK desk has a client who is willing to bid in the middle of the spread – 429 for 10,000 mt
>
> Just letting you know in case there is any interest from your side to do anything.
>
> Please let me know.

61 In the event, the proposed DAP deal did not take place due (it would seem) to the state of the market with regard to DAP prices. However, it was Mr Liu's evidence that Mr Wolfe's (a) reference to a potential DAP buyer, (b) advice on the market conditions, and (c) assurance that he had the best solution to get Graceland the best price, are consistent with Graceland's belief that Macquarie and/or Mr Wolfe were acting as Graceland's agent, broker or fiduciary and not the buyer or counterparty in a transaction in particular because there was no necessity for Macquarie and Mr Wolfe to inform Graceland of such information if Macquarie was simply the buyer or counterparty of the transaction; and that, in light of Mr Wolfe's emails, Graceland proceeded under the impression that any deal would therefore be done through Macquarie as an agent, broker or fiduciary who would source for a buyer in the transaction with Graceland. So far as relevant, I deal with this evidence below.

62 Shortly thereafter, on 16 May 2014, Mr Wolfe had a meeting with, among others, Mr Liu, Ms Lai and Ms Zhang in Guizhou, China (the "Guizhou meeting"). This meeting is important because it is Graceland's case that it was then that the possibility of doing a urea swap was first raised and that during the Guizhou meeting and other follow-up phone conversations between Mr Wolfe and Mr Liu from 16 to 21 May 2014, Mr Wolfe made certain alleged fraudulent misrepresentations to Graceland. As pleaded in paragraph 31 of the amended defence and counterclaim, these alleged representations are as follows:

(a) Graceland should focus on entering into urea swap transactions instead of DAP swap transactions (which Graceland was originally inclined to enter into) ("Representation A");

(b) Based on the market movements of the prices of urea in or around May 2014, Graceland would not make any losses from entering into a urea swap transaction ("Representation B");

(c) Graceland would profit from the urea swap transaction if Graceland makes an order to sell urea at US$275 per mt ("Representation C");

(d) Any transaction under the Agreement would be an "Exchange-Traded Transaction" (defined by Graceland to mean "a transaction to be traded or subsequently placed on or cleared with an exchange or a transaction fundamentally similar to an exchange-traded transaction") and priced accordingly ("Representation D"); and

(e) Macquarie was acting as an agent or broker of Graceland and not as a principal or a counterparty to the Agreement ("Representation E").

I refer to the above collectively as the "Representations".

63 In advance of the Guizhou meeting on 16 May 2014, Mr Wolfe sent Mr Liu an email dated 13 May 2014 setting out a list of things to be covered at the meeting. The list included a number of possible projects. With regard to fertiliser hedging, Mr Wolfe stated: "[F]inalisation of ISDA and where to from here?". There are no minutes of the Guizhou meeting or any other detailed record of what was then discussed. However, it is common ground that the meeting lasted much of the day; and it is plain that various matters were discussed including the possibility of doing a urea swap deal.

64 The discussions in the course of that meeting were the subject of evidence by Mr Liu, Ms Zhang and Mr Wolfe in their respective AEICs and in their oral evidence. In approaching this evidence, I bear well in mind that the burden of proof lies on Graceland with regard to the alleged fraudulent misrepresentations.

65 In summary, it is my conclusion that Graceland has not shown on a balance of probabilities that Mr Wolfe made any of the alleged representations whether fraudulently or otherwise, whether at the Guizhou meeting or subsequently. Indeed, it is my conclusion that he did not. Quite apart from the evidence of Mr Wolfe (who denies making the Representations), there is no contemporaneous documentary evidence to support them; and, as submitted on behalf of Macquarie, there is overwhelming contemporaneous evidence which makes clear the nature of the Transaction and which undermines most, if not all, of the alleged misrepresentations. More specifically, with regard to the discussions during the Guizhou meeting, my comments and conclusions with regard thereto are as follows.

66 At that meeting, there were discussions with regard to, among other things, forward swaps for both DAP and urea. Mr Wolfe could not recall who

brought up the idea of doing a urea swap deal. However, as I understood his evidence, he "conceded" that he probably brought it up; and that he told Graceland that Macquarie's fertiliser desk in New York was doing such swaps. However, as to Representation A, I am unpersuaded that Mr Wolfe represented to Graceland that it "should focus" on entering into urea swap transactions whether instead of DAP swap transactions, or otherwise in the sense that he was giving any advice as to what Graceland "should" do. According to the evidence of Mr Wolfe, Mr Liu informed him that Graceland and the Wengfu Group had accumulated or at least were planning to accumulate around 300,000 mts of urea, in anticipation of exporting them outside of China. Mr Liu disputed that he had ever said that Graceland or the Wengfu Group had 300,000 mts of urea. Absent proper disclosure, it is impossible to say whether Graceland or the Wengfu Group did in fact have this quantity of urea at this point of time or what plans might have been in place on the part of Graceland with regard thereto; and I find it equally impossible to reach a conclusion one way or another as to precisely what Mr Liu might or might not have said at the Guizhou meeting with regard to any specific quantity of urea which had been or might be accumulated by Graceland or the Wengfu Group. In the event, I do not find it necessary to do so. For present purposes, it is sufficient to say that I accept that Mr Liu did tell Mr Wolfe that Graceland or the Wengfu Group either had accumulated or were intending to accumulate a substantial quantity of urea.

67 At this time, *ie*, 16 May 2014, it appears that the Chinese government regulated the export of urea and other fertiliser products. To control the quantities exported, the Chinese government levied a high export tax during certain periods in the year to deter domestic producers from exporting their products. A low tax period was referred to in the industry as the "export window" because domestic producers would take advantage of the lower taxes to export their products. Understandably, a shift to the export window invariably

led to price fluctuations and the passage of time during which the export cargo was accumulated led to market price exposure for domestic producers and traders, such as Graceland. According to Mr Wolfe, Mr Liu told him at the Guizhou meeting that the accumulation of urea gave Graceland and the Wengfu Group very substantial exposure to movements in the price of urea, and they therefore wanted to hedge their price risk for a portion of the accumulated urea. I accept that evidence. For the avoidance of doubt, I should emphasise that I have borne well in mind the contrary evidence of Mr Liu and Ms Zhang. For example, in the course of cross-examination, Ms Zhang emphatically denied that the reason why Graceland subsequently entered the transaction with Macquarie was to hedge its exposure in relation to its physical quantities of urea. However, the contemporaneous correspondence shows at the very least that that was Mr Wolfe's understanding based on what he had been told by Graceland.

68 For the avoidance of doubt and in any event, there is and can be no doubt that Mr Liu told Mr Wolfe at the Guizhou meeting that Graceland would be interested in entering into a swap with Macquarie for urea at a minimum price of US$275 per mt. On the evidence, I reject the general submission made on behalf of Graceland that Mr Wolfe abused the relationship with Graceland by "enticing" it to enter into a sector which it had no experience of. Rather, it is plain from the contemporaneous documents and the evidence of Mr Liu and Ms Zhang that regardless of what Mr Wolfe allegedly said, it was Graceland's own independent decision subsequently to enter into the Transaction. Specifically, the quantity to be sold was based on instructions of Mr Liu; and it was Mr Liu who stipulated the price of US$275 per mt.

69 As to Representations B and C (it is convenient to take these together), the starting point is the inherent improbability that anyone in the position of Mr Wolfe might conceivably suggest that Graceland would not make any losses

from entering a swap transaction (by reference to historic prices or otherwise) still less that Graceland would make a profit at a selling price of US$275 per mt. In my view, these would be absurd suggestions particularly in view of the fact that (a) it must have been obvious to Graceland that the swap market in urea was volatile even if Graceland had no specific prior experience in such market; (b) Mr Wolfe had made it absolutely plain from the very start when he provided the Overview that the result of a swap may well give rise to losses on the part of Graceland; (c) that such possibility existed was also made plain by, for example, the email from Mr Wolfe dated 4 March 2014; (d) it is obvious from even a cursory reading of both the LFC and the ISDA Form that depending on market movements, one party would have to pay the other on the due date; (e) a number of Graceland's internal emails discuss the possibility of losses; and (f) on Mr Liu's own evidence, he raised the possibility of including a "cap" on the profit or loss amounts for any swap deal. This is inconsistent with any representation that Graceland would not make a loss.

70 As to Representations D and E (it is convenient to take these together), the starting point is that prior to the meeting on 16 May 2014 and at the risk of repetition, there is no doubt that the nature of the proposed swap was plain from the explanations given by Mr Wolfe in the Overview and also from even a cursory glance of both the LFC and the ISDA Form, *ie*, that Graceland and Macquarie would be acting as principals in an OTC trade. I do not accept that anything was said at the meeting on 16 May 2014 to suggest otherwise or to indicate that Macquarie would be acting as an agent or broker on behalf of Graceland. Equally, there was no discussion about the swap being an Exchange-Traded Transaction (as defined by Graceland).

71 However, I accept that there was an important discussion during the Guizhou meeting with regard to how Macquarie would make money out of the

fertiliser forward swaps. The evidence of Mr Wolfe was that Mr Liu was curious to know how this would be achieved by Macquarie and that, in response, he (Mr Wolfe) explained to Mr Liu that Macquarie would make money on margins, *ie*, after receiving an order from a customer to sell a commodity, Macquarie would look for market participants willing to enter into a back-to-back commodity swap with another buyer on largely similar terms, except that Macquarie would be selling the commodity in the second commodity swap at a *higher* fixed price than what the first party had agreed to; and that the difference in the fixed price in the back-to-back commodity swap was the margin that Macquarie would make. In the course of cross-examination, Mr Wolfe said that Macquarie was expecting to make a margin of about US$5 per mt; that he did not tell that figure to Mr Liu or the other participants in the meeting but that he would have told them if they had asked. (In passing, I should note that Mr Ingram gave evidence that this figure was "exorbitant" and that the "norm" would have been US$1 to US$2, certainly not US$5 (presumably per mt). Mr Ingram may well be right. However, (a) this did not form part of any pleaded issue; (b) such evidence was introduced on the last day of the main hearing in the course of Mr Ingram giving evidence, the latter part during his re-examination; (c) as I understood his evidence, this view related to what a broker might charge by way of commission rather than any "margin" which might be made by a principal on back-to-back deals; and (d) it had not been considered by the other experts. For these reasons, I say no more about this point.)

72 In the course of his oral evidence, Mr Wolfe expanded and to a certain extent qualified his evidence with regard to the proposed back-to-back arrangement referred to in the previous paragraph. As I understood his evidence, the intention on the part of Macquarie was that the first swap (*ie*, the swap between Macquarie and Graceland) would not be finalised until the second swap (*ie*, the swap between Macquarie and a third party at a higher price) was done,

or that at least the two different swaps would be done simultaneously. As stated by Mr Wolfe in evidence, this was subject to a further qualification that Macquarie's trader was always able to take a risk, *ie*, the trader might not sell everything back-to-back. In particular, according to Mr Wolfe, the traders have to manage their risk profile within agreed limits and that therefore it "[did] not necessarily mean that they [*ie*, the traders] have to enter into another transaction for the whole transaction. I would expect that they would not run completely unhedged risk and that they would sell the majority of it".

73 It is fair to say that these further explanations and qualifications referred to in the above paragraph were not set out in Mr Wolfe's AEICs. In any event, I did not understand Mr Wolfe to suggest that he had specifically told Mr Liu or the other Graceland representatives at the Guizhou meeting such further explanations and qualifications and, so far as may be necessary, I do not find that he did. However, it is my conclusion that he certainly did explain to them at that meeting that Macquarie was intending to enter a back-to-back swap as described above and that Macquarie would therefore be making a margin in the way described above.

74 I reach this conclusion not only because my assessment was that Mr Wolfe was an honest witness but also because it is consistent with, and indeed supported by, the contemporaneous documents – both positively and negatively. For example, as I have already noted, following Mr Wolfe's confirmation of the swap with Graceland in early June 2014, Mr Liu replied by email: "That is very good Stepehen [*sic*]. I will ask, Zhanglin to follow up with the rest of the work. We look forward to doing even more for a small margin". The reference to doing even more "for a small margin" is and, in my view, can only be a reference to Macquarie's own margin. By contrast, there is nothing in the documents to suggest any possibility that Graceland would pay any

commission to Macquarie – which would certainly have been the case if it had been intended that Macquarie would simply be Graceland's agent or broker. In the course of cross-examination of Mr Wolfe, Counsel on behalf of Graceland did put to Mr Wolfe that he had said at the Guizhou meeting that Macquarie would charge a commission for arranging the deal. But this was emphatically denied by Mr Wolfe. I accept Mr Wolfe's evidence without hesitation. For the sake of completeness, I should also mention that in the course of cross-examination, various questions were put to Mr Wolfe as to what else was allegedly said at the Guizhou meeting. I do not propose to examine each and every question so put. For present purposes, it is sufficient to state that I accept Mr Wolfe's evidence in that regard; and that my conclusions with regard to the main points as to what was said at that meeting are as summarised above.

75 A few days after the meeting, on 19 May 2014, Ms Zhang sent Mr Wolfe an email setting out some of the matters arising from the Guizhou meeting. In particular, Ms Zhang asked for the swap prices for (a) DAP in the months of June, July and August; and (b) urea for the months of July, August and September. Mr Wolfe sent a holding response later that same day saying *inter alia* that he was waiting for some further information from his fertiliser desk. In addition, he sent a further email responding to certain other points raised in Ms Zhang's email – in particular with regard to a "futures account" and a prepayment guarantee and SBLC. It was the evidence of both Mr Liu and Ms Zhang that the contents of this latter email were consistent with their belief that Macquarie and/or Mr Wolfe would act as Graceland's agent, broker or fiduciary in an Exchange-Traded Transaction through which Macquarie and/or Mr Wolfe would earn a brokerage commission; and that it was clear from the way Mr Wolfe was pressing Graceland on the SBLC issue that Graceland did not have an equal bargaining position *vis-à-vis* Macquarie. I do not consider that it is necessary to set out this email. The contents speak for themselves. For

present purposes, it is sufficient to say that I do not accept the premise underlying these assertions nor the gloss placed on this email.

76 On 20 May 2014, Mr Wolfe sent another email to Mr Liu stating in material part as follows:

> DAP – I received some DAP swap and option prices back overnight but I am not yet happy with them – I think option prices are too wide. So I will continue to work with New York.
>
> Urea – I think this looks more interesting for you right now so I want to focus on this. Uzhny urea swap for June was trading at 275 to 280 level last night – note that it trades at different prices each day.
>
> From our discussion *I think this should be an interesting price level for you*.
>
> I have asked my legal team in Singapore to produce the ISDA document for you and they will push this through the system as soon as possible.
>
> If you just want to do a Swap on the urea as the first business (not the options as well for the first trade) then we should be able to use the Long Form Confirmation document that Zhang Lin has in her hands.
>
> If you confirm back to me the following *then I can get to work*:
>
> a) You accept the LFC document and are ready to sign
>
> *b)* Please let me know your lower price limit level, swap month and volume that you would like to be able to sell forward – *probably best result will be if we can work an order for you and give you the best outcome*. If you ask the desk for a big quote all at once then they will give you a worse price – *I would prefer to work it carefully*. For example you will need to advise me: I want to sell up to 50,000 mt June Yuzhny urea swap at minimum limit of $275 per mt.
>
> Once I know your price level, swap month and volume I can get credit to assess exactly how much volume we can do under your approved margin free limit. If you want to more volume than that then we would need some cash margin to be lodged.
>
> Please revert to me at your earliest.
>
> [emphasis added]

77 Again, this email was relied on heavily by Graceland in support of its case. In particular, it was submitted on behalf of Graceland that it showed Mr Wolfe giving advice *qua* agent with regard to price levels for a swap and his references to "best result" and "best outcome". I do not accept that submission. In my view, it is important to bear in mind that Mr Liu had already indicated only a few days previously at the Guizhou meeting on 16 May 2014 that he was looking to do a deal at US$275 mt. On that basis, it is hardly surprising that when Mr Wolfe found that Yuzhny urea swap for June was trading at US$275 to US$280 he said that this should be an interesting price for Graceland; and that Mr Wolfe was keen to know what was Graceland's lower price limit. In that context, the references to "best result" and "best outcome" are, in my view, simply to be regarded as part of a negotiation process in which Mr Wolfe was trying to conclude a deal.

78 It was also strongly submitted on behalf of Graceland that the further wording as emphasised above in this email (in particular the reference to Macquarie being able to "work an order") is again consistent with Mr Wolfe acting as an agent going out into the market to conclude a swap deal in the nature of an Exchange-Traded Transaction (as defined in Graceland's pleading) on behalf of Graceland. On this point there was divergent expert evidence as to what such wording would reasonably be understood to mean. I bear such evidence well in mind. However, in my view, it is unnecessary to consider such evidence in any detail because what seems to me important is to recognise the specific context in which this email was sent. In particular, as I have found, Mr Wolfe had previously explained to Mr Liu at the Guizhou meeting on 16 May 2014 the intended back-to-back arrangement as I have described above. In that context, the reference in this email dated 20 May 2014 to being able to "work an order" makes sense, *ie*, Macquarie would receive an "order" for a swap from Graceland but no swap deal would be concluded between Graceland

and Macquarie until (a) Macquarie had itself gone out into the market and secured a back-to-back swap for its own account at a higher price (*ie*, Macquarie's margin) or Macquarie's traders had decided to take part of that risk for Macquarie's own account and (b) Macquarie then confirmed the swap deal between itself and Graceland. For these reasons, I do not accept that this email supports the case advanced by Graceland; and similar reasoning applies to various emails referred to above and below where Mr Wolfe used similar language.

79 Later that same day (*ie*, 20 May 2014), Ms Zhang responded by email to Mr Wolfe saying:

> Thanks for your email.
>
> As discussed, we'd like to sign LFC to do Swap on the urea as the first business as per attached format I sent to you last time [*ie*, the 2 April 2014 Draft LFC] (I just changed the commodity and quantity).
>
> We want to sell up to 50,000mt July and 50,000mt August urea swap at minimum limit of $275 per mt, please quote us both Yuzhny and AG price.
>
> Please let us know your swap price soon. Thanks.

At the risk of repetition, it is important to emphasise that the decision to sell this quantity of urea at this price on the terms of the LFC was taken by Mr Liu on behalf of Graceland and not based on any advice of Macquarie or Mr Wolfe. As explained by Mr Liu in evidence, he regarded the stated quantity (*ie*, 50,000 mt) as being "an economic size of shipment to everywhere" and that "the idea of this forward swap was to hedge against price volatility".

80 Mr Wolfe responded by email initially requesting the 2013 accounts for Graceland and the Wengfu Group. These were duly provided. Mr Wolfe then raised certain queries which Ms Zhang answered.

81 On 21 May 2014, Mr Wolfe sent a further important email to Ms Zhang as follows:

> Please see attached LFC in final form for your acceptance.
>
> On current credit limit we can do 30,000 mt [o]f swaps without the need for you to lodge any initial margin. We also have allocated a USD1 million margin free limit to Graceland so you will not need to lodge any variation margin until the mark to market loss reaches that amount.
>
> I suggest we do the first 30,000 mt and then if you want to do further volume I will advise you of the required security that we will need you to lodge in order for us to do more volume.
>
> In order to do the first urea swap trade we need the following from you:
>
> 1) An email response from you confirming that you accept the wording of the LFC form
>
> 2) An email from one of the directors of Graceland (either Zhongjin or Lai Han preferably) placing the swap order eg sell 30,000 mt June Yuzhny urea swaps at $275 per mt.
>
> With those two things we can then go into the market and start to fill the swap order.
>
> If I get this later today I will start to try and fill tonight.

82 The LFC as attached to this email (the "Revised LFC") provided, in material part, as follows:

(a) The opening paragraphs provided, among other things, that the terms of the ISDA Form were incorporated into the Revised LFC;

(b) Clause 1 set out the commercial terms of the Transaction, including, among other things, the following "Settlement Terms":

> If the Fixed Price exceeds the Floating Price, the [Macquarie] shall pay the [Graceland] the difference between the two such amounts multiplied by the relevant Notional Quantity for such Calculation Period.
>
> If the Floating Price exceeds the Fixed Price, the [Graceland] shall pay the [Macquarie] the difference

> between the two such amounts multiplied by the relevant Notional Quantity for such Calculation Period.
>
> If the Floating Price is equal to the Fixed Price, then no payment shall be made for such Calculation Period.

(c) Clause 3 contained certain "Additional representations" as already referred to above.

(d) Clause 9(B) provided that: "It shall be an Additional Termination Event with [Graceland] as the Affected Party if and [*sic*] ISDA Master Agreement is not executed between [Macquarie] and [Graceland] on or before the date falling 30 days from the Trade Date."

83 The ISDA Form contained detailed provisions which I do not propose to set out in full. For present purposes, it is sufficient to note the following:

(a) Clause 3 set out certain "Representations" including Clause 3(g) which stated "**No Agency.** [Each party] is entering into this Agreement, including each Transaction, as principal and not as agent of any person or entity." This was relied upon by Macquarie but, in my view, by virtue of the opening part of Clause 3, Clause 3(g) only applies when it is "specified" in the Schedule to the ISDA Form which was not the case here.

(b) Clause 6(b)(iv) provided that if an Additional Termination Event occurred, the "Non-affected party" (*ie*, Macquarie) may, "if the relevant Termination Event is then continuing, by not more than 20 days notice to the other party, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all Affected Transactions."

(c) Clause 6(e) provided that an "Early Termination Amount" would be payable if an Early Termination Date occurred, and that the "Early Termination Amount" would be "an amount equal to (1) the sum of (A) the Termination Currency Equivalent of the Close-out Amount or Close-out Amounts (whether positive or negative) determined by the Non-defaulting Party for each Termination Transaction or group of Termination Transactions and (B) the Termination Currency Equivalent of the Unpaid Amounts owing to the Non-defaulting party less (2) the Termination Currency Equivalent of the Unpaid Amounts owing to the Defaulting Party."

(d) Clause 9(a) provided: "**Entire Agreement**. This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter. Each of the parties acknowledges that in entering into this Agreement it has not relied on any oral or written representation, warranty or other assurance (except as provided for or referred to in this Agreement) and waives all rights and remedies which might otherwise be available to it in respect thereof, except that nothing in this Agreement will limit or exclude any liability of a party for fraud."

(e) Clause 14 provided that the "Close-out Amount" means "the amount of the losses or costs of the Determining Party that are or would be incurred under then prevailing circumstances … in replacing, or in providing for the Determining Party the economic equivalent of, (a) the material terms of that Terminated Transaction or group of Terminated Transactions, including the payments and deliveries by the parties under Clause 2(a)(i) in respect of that Terminated Transaction or group of Terminated Transactions that would, but for

the occurrence of the relevant Early Termination Date, have been required after that date …"

84 Later that evening, Mr Liu responded by email stating:

> Dear Stephen,
>
> Thanks for your efforts and email confirming that Macquarie Bank accept the offer of US$275FOB AG to be settled during July instead of June after China opens the low tax window from July 15, 2014 for 30kts plus or minus 10 pct prilled urea at our option. We would like to reconfirm the swap deals on be half [*sic*] of Graceland. Zhanglin and Laihan will follow up required procedures and documents tomorrow. Trust this confirmation will enable you to fix the deal with your fertilizer desk in New York.
>
> If you need clarification, please let me know.

85 Shortly thereafter, Mr Wolfe responded by email to Mr Liu (copying Ms Zhang) seeking clarification of certain matters as follows:

> I need to clarify a couple of things in regard to your e-mail below and receive your confirmation by return:
>
> 1) The swap is basis FOB Yuzhny urea price – there is no AG prill index available only MEGU which is not a good hedge for you as it is granular urea
>
> 2) I note you want to do the swap basis July average settlement
>
> 3) For swaps there is no optional plus or minus 10 pct. The swaps need to be traded in multiples of 5000 mt and the quantity agreed will be the final quantity without any tolerance plus or minus
>
> 4) I confirm that any swap transaction will be booked in the name of Graceland and covered by the LFC documentation that has been provided to you
>
> 5) You wish to place an order to sell at US$275 per mt basis July Yuzhny settlement. Volume required by you is up to 30,000 metric tonnes – note that at this time you are placing an order with us – we have not yet confirmed that the order is filled. I will need to check the market price with the fertiliser traders and I will advise you of any competed [*sic*] swaps. This will be followed by a Long Form Confirmation in the agreed format for execution by Graceland.

> If you want me to proceed to try and place these swaps in the market I will need another e-mail from you confirming your agreement to the above as we need to be 100% clear that everything is agreed and understood before we try and do the trade.
>
> I understand that you are travelling so it is OK for you to just simply send me an e-mail stating that you agree to my e-mail and I will take that as you agreeing to the 5 above points.
>
> I look forward to received your e-mail.

As stated in this email, Mr Liu was indeed travelling at this time. His evidence was that he was tired and Mr Wolfe kept phoning him and that he did not check this email carefully. Meanwhile, on 22 May 2014, Ms Zhang raised a query with regard to the Revised LFC saying that Mr Wolfe had sent both a "Final" and "Clean" version to Graceland and sought clarification that the "Clean" version was the one which Graceland needed to confirm. Mr Wolfe responded by email saying: "Yes – the Clean version will be the version that you will sign once we have executed some swaps for you in the market." At about the same time as this email (*ie*, seemingly just after midnight), Mr Liu sent an email to Mr Wolfe stating:

> Thanks for the clarification, hence agree with your points listed in your email and please proceed to place the swaps in the market and looking forward to receiving further development.

There was much discussion by the experts as to the effect and proper characterisation of this email. In my view, it is properly regarded as an "open order" or a "good-til-cancelled" order at a certain quantity and a fixed price of US$275 per mt. In legal terms, it was an "offer" which could be withdrawn at any time prior to "acceptance" by Macquarie. It follows that there was no binding swap at this stage.

86 Shortly thereafter, Ms Zhang sent a further email to Mr Wolfe raising a question about amending the settlement date in the Revised LFC to 31 July 2014

instead of 31 August 2014 adding: "I understand that we just placed an order of 30,000 Mt to be settled in July." Mr Wolfe replied saying that the Revised LFC was "just the format that will be sent to confirm any trades that are done". Mr Wolfe also added that Mr Liu had placed "an order for July Yuzhny urea which will be settled against the average FOB price for July" and that "this detail will be contained in the confirmation for any transactions that are done for you". Ms Zhang then replied to Mr Wolfe to thank him for the clarification, and added that once Macquarie "filled the order, [Graceland would] arrange to sign the confirmation accordingly."

87 Later on that same day (*ie*, 22 May 2014), Mr Wolfe sent an email to Ms Zhang stating:

> Just to confirm no fill overnight – most of the action for Yuzhny is in European timezone and by the time everything was sorted out it was a bit late.
>
> We are working the order and will provide feedback on market levels later today.

Ms Zhang responded to Mr Wolfe stating: "Well noted, thanks."

88 The phraseology of these further emails (in particular, the references in (a) the email from Mr Wolfe to Ms Zhang referred to at [81] above stating that with the two things requested, Macquarie would "go into the market and start to fill the swap order"; and (b) the email from Mr Wolfe to Mr Liu referred to at [85] above stating that he required a response if Mr Liu wanted Mr Wolfe "to proceed to try and place these swaps in the market") was again relied upon strongly by Graceland in support of its case that Macquarie was acting as Graceland's broker or agent. In this context, I bear well in mind the forceful evidence of Mr Henderson that based on his experience, he had never seen the terms "order" and "fill" used in the OTC derivatives market (although Mr

Bauman's evidence was that these terms are used in both the exchange-traded and OTC derivatives markets); and also the evidence of Mr Ingram that when used on someone with no or little relevant knowledge or experience, these terms (and also the phrases "place in the market" and "go into the market") could lead that person to the mistaken belief that the transaction would be exchange-cleared. I agree that in the abstract and taken in isolation, such phraseology would or at least might be understood in that way. However, in my view, and for reasons similar to those stated in [78] above, the wording of these emails must be read and understood in their proper context and, in particular, against the background of the other documents provided by Macquarie and Mr Wolfe (including the Overview and the LFC) as well as the discussion at the Guizhou meeting as referred to above. When that is done and proper account is taken of the entirety of the evidence, I do not consider that the phraseology of these emails assists Graceland. For the avoidance of doubt, I remain unpersuaded that, on the basis of these emails (or otherwise), Mr Liu or Ms Zhang (or anyone else at Graceland) actually thought or believed that the swap would be effected by Macquarie as agent or broker on behalf of Graceland with some third party in what Counsel on behalf of Graceland submitted would be an Exchange-Traded Transaction (as defined by Graceland) or otherwise. On the contrary, consistent with, in particular, the explanation provided by Mr Wolfe in the Overview, the discussion at the Guizhou meeting, the express terms of the LFC, the absence of any agreement by Graceland to pay commission to Macquarie and Mr Liu's email dated 5 June 2014 when he referred to doing more with Macquarie for a "small margin" (see [74] above and [95] below), it is my conclusion that Graceland (including Mr Liu and Ms Zhang) was well aware that the swap would be between Macquarie and Graceland as principals in what would, in effect, be an OTC transaction.

89 In the days that followed (*ie*, from 22 May 2014 to 4 June 2014), there were various internal exchanges between Mr Wolfe and Macquarie's traders in New York. During this period, it was Mr Wolfe's evidence that Macquarie tried to "fill" Graceland's order, *ie*, to look for market participants who were willing to enter into back-to-back swaps with Macquarie for the urea which Graceland was offering to sell at US$275 per mt; and that Macquarie was unable to fill Graceland's order. As explained by Mr Wolfe, the market for urea swaps was very quiet, and the market price for Yuzhny urea swaps to be settled in July was trading at below Graceland's price.

90 On 23 May 2014, Mr Wolfe sent an email to Mr Liu (copied to Ms Zhang) as follows:

> A quick update for you – the urea swap market has drifted a bit lower and so far we have not been able to fill your order at $275.
>
> Mkt level at the moment is about $265 - $275 with the market being very quiet at the moment.
>
> Our fertilizer desk is seeing some buying interest for NOLA urea at current market levels and they are working on a cross market spread (between NOLA and Yuzhny) which may be able to be translated into a decent bid for Yuzhny.
>
> I suggest we watch with the order in place for a few days to see if we can get you filled.
>
> If there is any change from our side I will let you know.
>
> If you do want to adjust the limit of your order then please let me know.
>
> I will be in touch.

91 Thereafter, there was little, if any, communication between Mr Wolfe and Mr Liu or Ms Zhang and, in the event, it was not until 4 June 2014 that the Transaction in the present case between Graceland and Macquarie was confirmed. This delay was the subject of considerable and indeed virulent criticism by Mr Ingram and Mr Henderson and generally by Counsel on behalf

of Graceland. In the abstract, I agree that this delay was extraordinary. According to Mr Bauman, the longest open order he ever dealt with (which was in the rubber market) was two days. However, it seems to me important to bear in mind the following. First, although the delay extended in total to some 13 or 14 days, the period in question covered a holiday weekend (three days) and a further weekend (two days). Thus, the delay was about eight or nine working days. Even so, I agree that on the evidence, this period of delay is, in the abstract, extraordinary. Second, although what might be described as a "pure vanilla swap" or a "straight swap" could no doubt be finalised and executed between two counterparties in the ordinary course within a very short time, the back-to-back arrangement contemplated by Macquarie as described above necessarily meant that the execution of the swap between Macquarie and Graceland was dependent on Macquarie finding a suitable counterparty for its own back-to-back swap on appropriate terms allowing Macquarie's desired margin (unless Macquarie's traders decided to take on any part of the risk themselves). In other words, this was not a "pure vanilla swap" or a "straight swap". Third, there is no doubt that the market for urea swaps (particularly over that holiday period) was very quiet at that time. In my view, these points sufficiently explain the delay. In any event and for the avoidance of doubt, I do not consider that this delay in executing the swap is of any particular significance in the circumstances of the present case given, in particular, that the "order" by Graceland was, as stated above, for a certain quantity at a fixed price, *ie*, US$275 per mt which was the price subsequently confirmed by Macquarie (see further below). Further, it does not appear that there were any significant price movements during this period. At most, it would appear that the market moved up by about US$5 per mt (*ie*, less than 2%) during this period but only very shortly before 4 June 2014. By contrast, it is fair to say that the market did move up significantly immediately *after* 4 June 2014 as appears from Table 2 of Mr

Selvaggio's expert report. For present purposes, it is sufficient to note a peak of some US$310 per mt between about 13–19 June 2014 and, after a slight fall, a further peak of US$310 per mt on 9 July 2014 – although the volumes were all relatively small.

92 In addition, I should mention that Mr Wolfe's conduct in failing to keep Mr Liu and Ms Zhang properly informed as to what was happening with regard to the urea swap during this period, *ie*, between 23 May and 4 June 2014 was the subject of strong criticism in the course of the trial. In my view, there is some justification for this criticism. In particular, it is noteworthy that although Mr Wolfe said at the end of the email quoted above at [90] that he would be in touch, it does not appear that he ever did get back to Mr Liu or Ms Zhang until 4 June 2014. However, it is fair to say that neither Mr Liu nor Ms Zhang chased Mr Wolfe for a response as they might have done during this period. In any event, I do not consider that this criticism is of particular significance in the circumstances of the present case.

93 More fundamentally, perhaps, the general nature of the back-to-back arrangement described above was also the focus of a virulent attack by, in particular, Mr Ingram. In very broad summary, the basis of such attack was, as I understood, that following Mr Liu's email on 22 May 2014, Macquarie was, in effect, in the unbelievably fortunate position of sitting on an open order from Graceland at a certain quantity and price and that Macquarie's traders could then wait for the market to rise and, in effect, make a certain profit for themselves – even perhaps a huge profit – by making a back-to-back swap at a higher (perhaps very considerably so) price; and that this was, in effect, a win-win situation for Macquarie because it provided Macquarie with the opportunity to make a substantial profit for itself if the market rose and, if the market did not rise, Macquarie would be able to simply decline the order from Graceland.

In the abstract, I see considerable force and justification in that attack – although it does not seem to me that it is one which falls properly within the scope of Graceland's pleaded case. Be that as it may, I do not consider that the attack is properly justified in the circumstances of the present case in particular because the intended back-to-back arrangement was, as I have found, disclosed by Mr Wolfe at the Guizhou meeting, including Macquarie's intention to make a margin although it is fair to say (as I have already noted) that the amount of such intended margin was not disclosed. (For the sake of completeness, I should mention that, on the evidence, I do not know and it is impossible to say what margin (if any) was or may have been made by Macquarie in the present case. However, given the market, it seems highly unlikely that it was more than US$5 per mt at most.)

94 Be all this as it may, on 4 June 2014, Mr Wolfe sent an email confirming the order as follows:

> I am pleased to advise that we have completed your order to sell 30,000 mt of July Yuzhny urea swaps at $275 per mt.
>
> The Long Form Confirmation will be sent to you tomorrow for execution and return to us.

95 On 5 June 2014, Mr Liu replied to Mr Wolfe in an email already quoted above:

> That is very good, Stepehen [*sic*], I will ask, Zhanglin to follow up with you for the rest of the work. We look forward to doing even more for small margin.

96 Similarly, Ms Zhang also replied to Mr Wolfe on the same day stating: "Thanks [*sic*] you for the good news. We'll wait for your final LFC for execution."

97 On the same day (*ie*, 5 June 2014), there was a further exchange of emails between Mr Wolfe, Mr Liu and Ms Zhang regarding a possible change of the index against which the settlement price would be obtained. First, Mr Wolfe sent an email to Mr Liu suggesting that Graceland might wish to consider changing the index from the one set out in the Revised LFC to one known as the "CME Index". Mr Wolfe explained that his trader believed that the CME Index was "slightly preferred" but said that "you [*ie*, Graceland] can choose which one you prefer." Following receipt of that email, it appears that Ms Zhang contacted Mr Heath confirming that Graceland "had just filled a sale of 30,000 mt of July Yuzhny urea swaps with Macquarie bank" and asking his opinion with regard to a possible change to the CME Index. Mr Heath's response was that he did not have any data to confirm whether the CME Index was best. Ms Zhang then replied to Mr Wolfe to ask for information regarding the "CME Index". Mr Wolfe replied to Ms Zhang saying that he could arrange for the information to be sent, but that in the meantime Macquarie would issue the LFC as agreed. Mr Wolfe added that the index could be amended at a later stage if and when both Macquarie and Graceland agreed to the amendment. Ms Zhang then replied to Mr Wolfe saying that after Graceland had discussed the matter, they wanted to change the existing index to the CME Index. Ms Zhang also asked Mr Wolfe to "send the final LFC to [Graceland]".

98 On or around 6 June 2014, Macquarie provided the LFC to Graceland for Graceland's execution (the "Execution LFC"). The Execution LFC was materially similar to the earlier Revised LFC with full details of the particular swap deal inserted as follows:

> **General Terms:**
>
> The terms of the particular Transaction to which this Confirmation relates are as follows:
>
> Trade Date: 05 June 2014

Effective Date:	01 July 2014
Termination Date:	31 July 2014
Commodity/Commodities:	Nitrogen fertilizer (Urea (prilled)) fob Yuzhnyy
Unit(s):	Metric Tonnes ("MT")
Total Notional Quantity:	30,000 MT
…	
Fixed Amount Details:	
Fixed Price Payer:	MACQUARIE
Fixed Price:	USD 275.00 per MT
Floating Amount Details:	
Floating Price Payer:	COUNTERPARTY
Commodity Reference Price(s):	Nitrogen fertilizer (Urea (prilled) fob Yuzhnyy
Specified Price:	"Nitrogen fertilizer (Urea (prilled)) fob Yuzhnyy" means that the price for a Pricing Date will be that day's Specified Price per MT on the Fertilizer Index, under the heading "UREA: Urea (Prill) fob Yuzhnyy (metric tonne)" or any successor headings as published by the CME Group
Pricing Date(s):	Each Thursday during the relevant Calculation Period
…	

99 On 10 June 2014, Mr Wolfe sent an email to Ms Zhang to set out more information regarding the CME Index. Ms Zhang replied to Mr Wolfe that day to thank him for the information, and to ask when Graceland could expect to receive the final LFC for this first deal. Mr Wolfe subsequently informed her that it would have been sent by Macquarie's Market Operations team the day

before. Ms Zhang then replied to Mr Wolfe later that day to say that Graceland would "check and arrange to sign back [the LFC]".

100 On 12 and 13 June 2014, Mr Wolfe sent two email chasers to Ms Zhang asking for Graceland to send the Execution LFC. The latter email (copied to Mr Liu) stated that Macquarie's Market Operations Group had not yet received back the Execution LFC from Graceland and requested Ms Zhang to advise the status of this by return. Ms Zhang responded later that day saying that she would follow this up and additionally asked: "Could we request to cancel swap deal after done? Or some other opposite ways to offset it just like Futures?" Mr Wolfe's evidence (which I accept) was that he was surprised by Ms Zhang's email; that he did not understand why she was suddenly asking questions about cancelling the Transaction, especially because she had been asking Mr Wolfe to send the LFC just three days before, *ie*, 10 June 2014. So far as relevant, it is my view that the reason for the request to cancel was simply that the market had turned against Graceland (see [91] above).

101 In any event, Mr Wolfe replied to her by email saying, among other things, that Graceland could not cancel the Transaction but could buy the swap back. Ms Zhang then replied by email to ask Mr Wolfe if Graceland would be able to buy back the same amount of Yuzhny urea at the same price that very day. Mr Wolfe's evidence (which I again accept) was that he was again quite surprised by Ms Zhang's email because the price levels of the urea market had moved higher than US$275, and it would have been clear that Graceland could only buy back the urea at such higher price. Mr Wolfe therefore sent an email to Ms Zhang saying that she would not be able to buy back the urea forward at US$275. Mr Wolfe also highlighted that:

> The point of doing the hedge was twofold – to lock in some margin and to protect [Graceland] against a downside

> movement in the price – any loss on the swap will be largely offset against profit on the price for the physical urea upward price movement. So even if [Graceland ended] up losing money on the swap [it would] make money on the physical.

Ms Zhang then replied by email to Mr Wolfe saying that Graceland had placed its order in the morning of 22 May 2014, and that the order was only filled two weeks later. She stated that because the transaction took so long, "it's away from our original intention (risk hedge) based on the market situation at that time". She then repeated Graceland's desire to, among other things, cancel the Transaction.

102 After Ms Zhang sent this email, Mr Wolfe called Mr Liu to try and understand what was going on. According to Mr Wolfe, Mr Liu told Mr Wolfe over the phone that things were fine; that it was actually good that the price of urea had gone up, because that meant that Graceland would be able to get more for its physical stock of urea; that contrary to what Ms Zhang had been saying, he would get the LFC executed; and that Mr Liu said Graceland was considering doing more hedging by selling more urea forwards at the higher market price. In evidence, Mr Liu did not accept this version of the call. His evidence was that he was very upset at the time because he felt he had been fooled and cheated by Mr Wolfe. In the event, it is, in my view, unnecessary to seek to resolve this particular dispute. For present purposes, it is sufficient to note that, after his call with Mr Liu, Mr Wolfe sent an email to Ms Zhang with a copy to Mr Liu summarising what, according to Mr Wolfe, Mr Liu had told him. Shortly thereafter, Mr Liu replied as follows:

> The LFC contract was presented 20 days after my confirmation when market price has gone to a very high level which is beyond our expectation. I feel a kind being fooled by Macquarie Bank. We don't think that offer is still a valid one since your email giving to me has not confirmed you have reconfirmed the deal. Please understand this is not a normal practice as you know every deal has to be confirmed in short time lead and not 20

> days when you guys have seen a very high price jump and want to take a position. Remember in our office, we have agreed a cap of max 10 dollars cap up side or down for win and loss and you confirmed. And you said Macquarie will authorize 5 million dollars credit to Graceland for Swap business and you failed.
>
> I feel sorry that this deal has not been established according to our understanding. Please feel free to talk further solution.

103 Thereafter, there was a series of emails exchanged between Mr Wolfe and Mr Liu during the rest of June and early July which is unnecessary to set out in detail. For present purposes, it is sufficient to note that Graceland refused to execute the documents. Eventually, on 7 July 2014, Mr Wolfe sent an email to Mr Liu to let him know that because Graceland did not execute the relevant documentation there would be some unavoidable processes in motion. In particular, Mr Wolfe highlighted that Macquarie's credit department would be communicating with Graceland directly. Following a further email exchange, Macquarie sent a formal letter to Graceland dated 8 July 2014 which stated in material part as follows:

> On 7 July 2014, an ISDA Master Agreement had not been executed between Macquarie and you within 30 days from the Trade Date. This constitutes an Additional Termination Event under paragraph 9(B) of the [Execution LFC], in respect of which, you are the Affected Party.
>
> Accordingly, pursuant to Section 6(b)(vi) of the ISDA Form, incorporated by reference into the terms of the [Execution LFC], by this notice we hereby designate 8 July 2014 as the Early Termination Date in respect of the Transaction under the [Execution LFC].

104 Following a further exchange of emails, Graceland sent a letter to Macquarie dated 10 July 2014 stating, among other things, that: (a) Graceland did not execute the ISDA Form or the LFC because "there was no instruction from person in charge" and that there were no plans to execute those documents; (b) Mr Luo and Ms Zhang (to whom Macquarie's letter of 8 July 2014 was addressed) were not "authorised persons of Graceland, and thus they are unable

to act on behalf of Graceland in any correspondence or signed documents". Graceland also stated that it did not "accept" Macquarie's letter of 8 July 2014 notifying Graceland of the Additional Termination Event.

105 On 11 July 2014, Macquarie sent a letter to Graceland stating, among other things, that the Early Termination Amount payable by Graceland to Macquarie was US$1.2 million. The Early Termination Amount was calculated by Macquarie as follows:

(a) On 8 July 2014, Macquarie went into the market in order to determine the cost of obtaining the economic equivalent of the material terms of the Transaction. It was Mr Wolfe's evidence (which I accept) that he understood that in so doing, Macquarie's traders were also looking to close out Macquarie's positions in respect of the back-to-back swaps that had been entered into with third parties. In the event, on 8 July 2014, Macquarie bought 20,000 mts of urea at US$310 per mt and obtained a further quote for the balance of 10,000 mts of urea at US$320 per mt.

(b) As a matter of arithmetic, this produced an average figure of US$313.34 per mt. After taking into account the brokerage cost of US$0.50 per mt and Macquarie's operations costs of US$1.00 per mt, the average cost amounted to US$314.84 per mt of urea. For the purposes of calculating the Close-out Amount, this figure was rounded up to US$315 per mt of urea.

(c) Accordingly, the Close-out Amount was US$1.2 million, being the difference between US$315 and US$275 (*ie*, US$40) multiplied by 30,000 mts.

106 Later that day (*ie*, 11 July 2014), Mr Liu sent Mr Wolfe an email to say, among other things, that Graceland had received Macquarie's "termination notice and settlement statement which looks very ridiculous", and that they would not be "honoured". Mr Liu also added that Graceland had requested that correspondence be addressed to him directly instead of Mr Luo and Ms Zhang "since they are not authorized". Following further correspondence (which is unnecessary to set out), the present proceedings were commenced by Writ of Summons dated 22 April 2016.

The Issues

107 Against that background, I now turn to consider the main issues which I can deal with quite shortly in light of my factual conclusions as already stated above.

Issue 1: The Terms of the Transaction

108 It is convenient to deal first with the question of the terms of the Transaction. At the risk of repetition, it is important to emphasise that this particular question is *not* whether there was any binding agreement, but only what were the terms of the Transaction. In summary, it was Macquarie's case that the agreement between the parties was that the Transaction would be on the terms of the Revised LFC (which itself incorporated the terms of the ISDA Form) with full details of the swap as contained in the Execution LFC. In contrast, it was Graceland's case that the LFC (whether in the form of the Revised LFC or the Execution LFC) and the ISDA Form were *not* incorporated into the agreement between the parties; alternatively that, even if the LFC was incorporated, the ISDA Form was not.

109 In particular, it was submitted on behalf of Graceland that this was not a case governed by the so-called rule in *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 which provides that a party who *signs* a document would ordinarily be bound by the terms contained therein; that where (as in the present case) there is no signed document, the Court must "scrutinise parties' intentions"; and that such exercise includes consideration of the "background", *ie*, absolutely anything reasonably available to the parties which would have affected the way in which the language of the document would have been understood by the reasonable man. In support of such submissions, I was referred to various textbooks and the decision of the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896. However, it is important to bear in mind that such exercise is one which generally is confined to what "crosses the line" between the parties or information in common available to both parties.

110 This issue was dealt with at some length in paragraphs 95–105 of Graceland's closing written submissions which I have carefully considered. However, I do not consider that it is necessary to set out such submissions in detail because, in my view, the determination of this issue is relatively straightforward in light of basic applicable legal principles and the emails which passed between the parties. These have already been set out above but in summary:

(a) On 21 May 2014, Mr Wolfe sent an email to Ms Zhang (copied to Mr Liu) attaching the Revised LFC which was stated to be "in final form for [Graceland's] acceptance". This email also stated expressly that in order to do the first swap, Macquarie needed from Graceland an email response confirming that Graceland accepted the wording of the Revised LFC (see [81] above).

(b) Following an email from Mr Liu, Mr Wolfe replied on 22 May 2014 seeking clarification of five points. In particular, in his fourth point ("Point 4"), Mr Wolfe sought confirmation that the swap would be "booked in the name of Graceland and covered by the LFC documentation that ha[d] been provided" (see [85] above).

(c) Shortly thereafter, Mr Liu responded confirming his agreement to all the points listed in Mr Wolfe's email – *including* Point 4 (see [85] above).

111 In light of the above, it is my conclusion that the agreement of the parties is to be found in the emails which "crossed the line", *ie*, the parties agreed that the swap would be on the terms of the Revised LFC which on its face made an express and direct reference to the ISDA Form and was effective to incorporate its terms (see *Credit Suisse Financial Products v Société Generale d'Enterprises* [1997] CLC 168 at 172; *7E Communications Ltd v Vertex Antennentechnik GmbH* [2007] 1 WLR 2175 at [31]–[35]; and *Calyon v Wytwornia Sprzetu Komunikacynego PZL Swidnik SA* [2009] 2 All ER (Comm) 603 at [81]–[83]). (Insofar as may be relevant, this conclusion is also supported by Graceland's internal discussions which referred to an index price "as detailed in the draft LFC agreed between us", where in this context it is clear that the term "us" is a reference to Macquarie and Graceland.) For the avoidance of doubt, the Execution LFC subsequently prepared by Macquarie and sent to Graceland does no more than set out the full details of the transaction as executed on the basis of Mr Liu's confirmation and thus contains or evidences the agreement between Macquarie and Graceland. (For the sake of completeness, I should mention that Graceland raised in argument a further point with regard to the alleged failure by Mr Wolfe to follow certain internal

procedures. However, this point was not pleaded and, even if correct in fact, is in my view, legally irrelevant.)

Issue 2: Unilateral Mistake

112 On behalf of Graceland, it was submitted that, at common law, the applicable legal principle is that where one party has made a mistake as to the terms of the contract and that mistake is known to the other party, the contract is not binding; that the reason for this is that although the parties appear, objectively, to have agreed, it is clear that they are in fact *not* in agreement; that therefore the normal rule of looking only at the objective agreement of the parties is displaced and the court admits evidence to show what each side subjectively intended to agree; and that if it is clear from such evidence that there was no consensus, then there can be no contract, because the parties have not truly agreed on the terms. In support of those submissions, Graceland relied, in particular, on *Statoil ASA v Louis Dreyfus Energy Services LP (The "Harriette N")* [2008] 1 All ER (Comm) 1035 ("*Statoil*") at [87]. As to the remedy available in the case of unilateral mistake, it was submitted on behalf of Graceland that (a) the *lex fori*, *ie*, the law of Singapore, applies; and (b) as a matter of Singapore law, the equitable remedy of rescission is available for unilateral mistake. As to those submissions, Graceland relied, in particular, on *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia and another* [2010] 2 SLR 329 at [20]; *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2017) at para 75.256; *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th Ed, 2012) at para 7-011; and *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 in particular at [74].

113 Even accepting these submissions at face value, I do not accept that Graceland made any "mistake" as to the nature or terms of the Transaction. I

reach this conclusion for the reasons which I have already set out above as summarised in [88] above and which I do not propose to repeat. Insofar as may be relevant, it is also my conclusion that no reasonable person in Graceland's position would have believed otherwise. Moreover, I do not accept that Macquarie or Mr Wolfe had actual knowledge of any mistake as alleged by Graceland; nor (if this is a relevant test) that Macquarie through Mr Wolfe had constructive knowledge that Graceland believed in any mistake as alleged by Graceland; nor that there was any element of unconscionability or impropriety on the part of Macquarie or Mr Wolfe.

114 For the sake of completeness, I should mention that it was also submitted on behalf of Macquarie that, in order to succeed in establishing this defence of unilateral mistake, Graceland would have to show that the alleged mistakes were "fundamental" as to the subject matter of the Transaction, and not merely its quality; that this standard is so high that the courts have held that performance under the contract must have been made *impossible*; and that here, Graceland could not succeed in any event under this head because Graceland obtained precisely what it had bargained for, *ie*, 30,000 mts of urea sold for US$275 per mt. In support of that submission, I was referred to passages in *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2017) in particular at paras 3-022, 6-035 and 6-049; *Halsbury's Laws of England* vol 77 (LexisNexis UK, 5th Ed, 2017) at [20]; as well as various authorities including *Statoil* at [88]; and *Clarion Ltd and others v National Provident Institution* [2000] 1 WLR 1888. However, given my previous conclusion, it is unnecessary to address this point.

115 For these reasons, I reject Graceland's case based upon alleged unilateral mistake.

Issue 3: Mutual Mistake

116 In this context, it was submitted on behalf of Graceland that where parties misunderstand each other and are at cross-purposes as to the subject matter of the contract, they are said to be under a mutual mistake; and that this is established when (a) the objective ascertainment of the parties' intentions shows that they are acting at cross-purposes as to the subject matter of the contract and (b) it is not possible to reasonably impute an agreement between them because of the latent ambiguity of the terms of offer and acceptance. In support of those submissions, Graceland relied, in particular, upon *Raffles v Wichelhause* (1864) 2 H & C 906 and *Tamplin v James* (1880) 15 Ch D 215.

117 In light of my fact findings as stated above at [88] and which I do not propose to repeat, I do not accept that there was any mutual mistake. It follows that this defence must be rejected.

118 For the sake of completeness, I should mention that Macquarie submitted that mutual mistake only arises "where parties are genuinely at cross-purposes as to the subject matter of the contract" because "neither party can show that the other party should reasonably have understood his version"; and that even if Graceland was mistaken, its unreasonable conduct means that this defence must fail. Insofar as may be relevant, I accept that submission.

119 Finally, I should also mention that Macquarie sought to rely on Clause 3(a)(ii) of the LFC, the terms of which are set out at [50] above, to defeat Graceland's case on both unilateral and mutual mistake. However, in the event, it is unnecessary to consider the parties' detailed submissions in relation to the scope and effect of that clause.

120 For these reasons, I reject Graceland's case based upon alleged mutual mistake.

Issue 4: Breach of Fiduciary Duties

121 In this context, it was submitted on behalf of Graceland that a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence; and that flowing from this, a fiduciary owes, *inter alia*, a duty of loyalty or fidelity, a duty to avoid any potential conflict of interest, and a duty of full disclosure. Further, it was submitted on behalf of Graceland that by virtue of (a) the long-standing relationship between Mr Wolfe and Graceland, (b) the trust that Graceland reposed in Mr Wolfe and Macquarie, (c) Graceland's reliance on the advice that Macquarie and Mr Wolfe provided to Graceland, and (d) Macquarie's and Mr Wolfe's requests for and Graceland's provision of commercially sensitive and confidential information belonging to the Wengfu Group and Graceland, Macquarie and Mr Wolfe owed fiduciary duties to Graceland, *inter alia*, to: act in good faith; not place themselves in situation(s) where their own interests are contrary to or conflict with those of Graceland; and not act for their own benefit without Graceland's informed consent. In support of those submissions, Graceland relied, in particular, upon *Bristol and West Building Society v Mothew* [1997] 2 WLR 436 at 449.

122 Here, it was submitted that Macquarie and Mr Wolfe were in breach of their fiduciary duties owed to Graceland for the following main reasons: (a) by reason of Macquarie being a counterparty to the Transaction, Macquarie and/or Mr Wolfe placed themselves in positions of conflict of interests when they advised Graceland to enter into the Transaction; (b) Macquarie and/or Mr Wolfe failed to advise Graceland of their position of conflict of interests as a

counterparty to the Transaction; (c) Macquarie and/or Mr Wolfe failed to fully inform Graceland of the facts and implications arising from their positions of conflict of interests; (d) Macquarie and/or Mr Wolfe failed to advise Graceland to seek independent and/or other appropriate advice arising from their positions of conflict of interests; (e) Macquarie and/or Mr Wolfe failed to advise Graceland of the upturn in urea prices; (f) Macquarie and/or Mr Wolfe did not act in Graceland's best interests and failed to disclose their independent speculative and/or profit-making position; and (g) any direct and/or indirect profits and/or benefits made or to be made by Macquarie and/or Mr Wolfe were not brought to Graceland's attention.

123 I do not accept these submissions. In particular, in light of my findings of fact as stated above, I do not accept that Macquarie or Mr Wolfe are to be regarded as "fiduciaries" or as having any fiduciary duties in any relevant respect or that they were in breach of any duties that might have existed. In summary, I reach these conclusions for the following reasons.

(a) For reasons already stated at [88] and which I do not repeat, the Transaction itself was one between counterparties acting as principals. I readily accept that it does not necessarily follow from this premise that such parties may not *also* be in a fiduciary relationship or owe fiduciary duties but, in my view, the facts in the present case do not justify such a conclusion.

(b) As to the specific matters relied upon by Graceland in support of its case that Macquarie and/or Mr Wolfe were in breach of the alleged fiduciary duties:

(i) I do not accept that Macquarie and Mr Wolfe placed themselves in positions of conflict of interests when they

allegedly "advised" Graceland to enter into the Transaction. As already stated, I do not accept that Macquarie or Mr Wolfe gave any "advice" to Graceland in the sense of taking up any advisory role; and, in any event, the decision to enter the Transaction was taken by Mr Liu himself independently (see [66] and [68] above).

(ii) I do not accept that Macquarie and Mr Wolfe failed to advise Graceland of their position of conflict of interests as a counterparty to the transaction. On the contrary, as already stated, Macquarie and Mr Wolfe made it abundantly plain that Macquarie and Graceland would be acting as counterparties. At the risk of repetition, that is clear from *inter alia,* the explanation provided by Mr Wolfe in the Overview, the discussion at the Guizhou meeting, the express terms of the LFC and the absence of any agreement by Graceland to pay commission to Macquarie (see [88] above). It follows that I do not accept that there was any relevant "conflict" of interest; and equally I do not accept that Macquarie and Mr Wolfe failed to fully inform Graceland of the relevant facts and implications.

(iii) I do not accept that Macquarie and Mr Wolfe failed to advise Graceland to seek independent and/or other appropriate advice arising from their positions of conflict of interests. As stated above, I do not accept that there was any relevant "conflict"; and, in any event, Mr Wolfe (and thus Macquarie) did specifically tell Graceland in the Overview that Graceland should seek its own legal advice in regard to the documents which it would have to complete to execute a swap. As already stated, this was ignored by Mr Liu (see [34] above).

(iv) As to the allegation that Macquarie and Mr Wolfe failed to advise Graceland of the upturn in urea prices, it is correct to say that Macquarie and/or Mr Wolfe did not get back to Graceland between 23 May 2014 and 4 June 2014. I have already dealt with this criticism at [92] above.

(v) I do not accept that Macquarie and/or Mr Wolfe did not act in Graceland's best interests and failed to disclose their independent speculative and/or profit-making position. As I have found at [71]–[73] above, the fact that Macquarie was intending to make a margin for itself was expressly disclosed by Mr Wolfe at the Guizhou meeting. Mr Liu's own email dated 5 June 2014 indicates that he was well aware that Macquarie was making a "margin" – even though he might not have been aware of the amount of such margin. It follows that I do not accept the allegation that any direct and/or indirect profits and/or benefits made or to be made by Macquarie and/or Mr Wolfe were not brought to Graceland's attention.

124 For the sake of completeness in relation to this issue, I should mention that Macquarie relied upon Clause 3(a)(iii) of the LFC and Clause 3(g) of the ISDA Form in support of its case that it cannot possibly be regarded as a fiduciary or owing any fiduciary duties to Graceland. For reasons already stated at [83(a)] above, Clause 3(g) of the ISDA Form is, in my view, irrelevant. As to Clause 3(a)(iii) of the LFC, it was submitted on behalf of Macquarie that it is a "relationship-defining" or "duty-defining" clause contained in an industry-wide standard form to which effect should be given in accordance with its terms. In the context of that argument, I was referred to numerous authorities. In particular, on behalf of Macquarie, I was referred to, *inter alia*, *Thornbridge* at

[98], [108]–[109] and [111] – the appeal in *Thornbridge* was dismissed without a reported judgment; *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) at [17]–[19], [567]–[568] and [573] – while this went on appeal, it was on a different issue: [2012] EWCA Civ 1049 at [5]; *Property Alliance Group Limited v The Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch) at [226], [231] and [234]–[236]; *Flex-E-Vouchers Ltd v The Royal Bank of Scotland Plc* [2016] EWHC 2604 (QB) at [42]–[43]; *Sears v Minco* [2016] EWHC 433 (Ch) at [80]; *Prime Sight v Lavarello* [2014] 2 WLR 84 at [47]; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry and others and related appeals* [1990] 2 AC 418 at 516A–B; *Shogun Finance Ltd v Hudson* [2004] 1 AC 919 at [159]; *Susilawati v American Express Bank Ltd* [2008] 1 SLR(R) 237 at [66]–[67]; and *Nitine Jantilal v BNP Paribas Wealth Management* [2012] SGHC 28 at [13]. On behalf of Graceland, it was submitted that Clause 3(a)(iii) of the LFC was not determinative and that the courts will look to substance over form. In support of that latter submission, I was referred to various other textbooks and authorities including *Bowstead & Reynolds on Agency* (Sweet & Maxwell, 21st Ed, 2018) at para 2-031; *Anglo Group Plc v Winter Brown & Co. Ltd* [2000] EWHC (TCC) 127 at [257]; *Brandeis (Brokers) Ltd v Black and others* [2001] 2 All ER (Comm) 980; *UBS AG (London Branch) and another v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC (Comm) 3615. In addition, it was submitted on behalf of Graceland that Clause 3(a)(iii) of the LFC could not be relied upon by Macquarie because it was onerous and/or unusual and fell foul of s 3(2)(b)(i) of the Unfair Contracts Terms Act 1977 (c 50) (UK) ("UCTA"); and, in that context, Graceland relied on numerous further authorities including *Phillips Products Ltd v Hyland* [1987] 1 WLR 659; *Smith v Eric S Bush* [1990] AC 831; and *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221.

125 In my view, it is unnecessary to consider these authorities in any detail for a number of reasons. First, for the reasons already stated, I do not consider that Macquarie and Mr Wolfe are, as a matter of fact, properly to be regarded as a "fiduciary" or an "agent" of Graceland in any relevant respect. It follows that any reliance on Clause 3(a)(iii) of the LFC is unnecessary. Second, even if Graceland is right in its submission that this clause is not determinative, nevertheless the facts in the present case are not such as would justify any different conclusion. Third, so far as UCTA is concerned, it is, in my view, irrelevant because (a) neither Graceland nor Macquarie contracted with the other as a "consumer" and (b) the parties did not contract on one of their "written standard terms of business".

126 For these reasons, I reject Graceland's case under this head.

Issue 5: Fraudulent Misrepresentation or Non-Disclosure

127 In summary, it was Graceland's case that even if the Transaction is not void for mistake (or rescinded for unilateral mistake), Graceland was induced by and relied on Macquarie's and Mr Wolfe's Representations into entering the Transaction; that these Representations were known by Macquarie and/or Mr Wolfe to be false (or made without any reasonable basis), and were intended to induce reliance on Graceland's part; and that, upon discovery of Macquarie's and/or Mr Wolfe's misrepresentations, Graceland validly rescinded the Transaction. Alternatively, it was submitted on behalf of Graceland that even if Macquarie and/or Mr Wolfe had believed the Representations to be true, Macquarie and/or Mr Wolfe knew or would have known that they were no longer true on or around 29 May 2014 when the market prices of urea started to rise; that Macquarie and/or Mr Wolfe ought therefore to have disclosed this material fact to Graceland; and that Macquarie's and/or Mr Wolfe's (a) failure

to inform Graceland of the change in circumstances, *viz*, that the Representations were no longer true, and/or (b) deliberate withholding of such information from Graceland, constitutes material non-disclosure for which Macquarie and Mr Wolfe are liable to Graceland.

128 In support of these submissions, Graceland relied upon numerous authorities including *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC (Comm) 484; *Davies v London Provincial Marine Insurance Co.* (1878) 8 Ch D 469; and *With v O'Flanagan* [1936] 1 Ch 575. In the event, it is unnecessary to consider these authorities in any detail because of my fact findings as stated above in relation to the alleged misrepresentations. In particular, for reasons already stated which I need not repeat (see [65] above), it is my conclusion that Mr Wolfe did not make any of the Representations and it necessarily follows that there were no misrepresentations (actionable or otherwise) by or on behalf of Macquarie or Mr Wolfe; and/or there was no reliance by Graceland (see [68] above). In such circumstances, it is unnecessary to consider the further detailed submissions advanced on behalf of Macquarie with regard to the scope and effect of Clause 9(a) of the ISDA Form; or on behalf of Graceland with regard to the scope of the alleged misrepresentations, the effect of s 2 of the Misrepresentation Act or the applicability and scope of UCTA. Nor is it necessary to address the parties' submissions with regard, in particular, to the scope and effect of Clause 3(a)(i) of the LFC.

129 As to Graceland's case based on alleged non-disclosure, the key allegation is that Macquarie and/or Mr Wolfe knew or would have known that the Representations were no longer true from on or around 29 May 2014 when (according to Graceland) the market prices of urea started to rise. In my view, this allegation is flawed for a number of reasons. First, as formulated, the

allegation is founded on the premise that Macquarie or Mr Wolfe made the Representations; but, as already stated at [65], I have concluded otherwise. Second, it is only with the benefit of hindsight that it is really possible, in my view, to say that the market "started to rise" prior to 4 June 2014. As previously stated (see [91] above), the significant increase in the market occurred primarily after that date. Third, I do not consider that either Macquarie or Mr Wolfe was under any obligation (fiduciary, contractual or otherwise) to provide information that the market had "started to rise" to Graceland. Fourth, I am not persuaded that the provision of such information by Macquarie or Mr Wolfe would have made any difference. Both Mr Liu and Ms Zhang acknowledged in the course of cross-examination that they watched the urea market. The Transaction was effected on the terms agreed, *ie,* 30,000 mts at US$275 per mt and, as already noted above at [94]–[95], when Mr Wolfe confirmed the Transaction, Mr Liu's immediate reaction in his email on 5 June 2014 was to say "very good". It was only about a week later that Graceland expressed any dissatisfaction with the Transaction.

130 For these reasons, I reject Graceland's case based upon alleged misrepresentations and non-disclosure.

Conclusion on Liability

131 For all these reasons, it is my conclusion that there was a binding agreement between Macquarie and Graceland on the terms of the Execution LFC which incorporated the terms of the ISDA Form; that the defences raised by Graceland should all be rejected; and that the counterclaim must be dismissed.

Issue 6: Quantum

132 In the event, Graceland failed to sign and execute the LFC and ISDA Form within 30 days from the Trade Date (as defined) and, accordingly, pursuant to Clause 9(B) of the Execution LFC an Additional Termination Event (as defined) occurred on 6 July 2014. It follows that, pursuant to Clause 6(b)(iv) of the ISDA Form, Macquarie was entitled to terminate the Transaction by its letter dated 8 July 2014 and to designate that date (as it did) as the Early Termination Date (as defined).

133 On this basis, it was Macquarie's case that the various contractual obligations of the parties were replaced by the single obligation of Graceland to pay Macquarie the Early Termination Amount as defined and determined in accordance with Clauses 6(e)(i) and 6(e)(ii)(1) of the ISDA Form; that as there were no Unpaid Amounts (as defined) owing between the parties, the Early Termination Amount in the present case was and is equal to the Close-out Amount (as defined), *viz*, US$1.2 million in accordance with the calculation set out in the letter from Macquarie dated 11 July 2014 (see [105] above).

134 As to the calculation of the Close-out Amount, it was submitted on behalf of Macquarie that the relevant legal principles were as follows:

(a) The definition of Close-out Amount in Clause 14 of the ISDA Form provided in material part as follows:

> "Close-out Amount" means, with respect to each Terminated Transaction … and a Determining Party, the amount of the losses or costs of the Determining Party that are or would be incurred under then prevailing circumstances (expressed as a positive number) or gains of the Determining Party that are or would be realised under then prevailing circumstances (expressed as a negative number) in replacing, or in providing for the Determining Party the economic equivalent of, (a) the

> material terms of that Terminated Transaction […], including the payments and deliveries by the parties under Section 2(a)(i) in respect of that Terminated Transaction […] that would, but for the occurrence of the relevant Early Termination Date, have been required after that date (assuming satisfaction of the conditions precedent in Section 2(a)(iii)) and (b) the option rights of the parties in respect of that Terminated Transaction …
>
> Any Close-out amount will be determined by the Determining Party (or its agent), which will act in good faith and use commercially reasonable procedures in order to produce a commercially reasonable result … Each Close-out Amount will be determined as of the Early Termination Date or, if that would not be commercially reasonable, as of the date or dates following the Early Termination Date as would be commercially reasonable.
>
> …
>
> In determining a Close-out Amount, the Determining Party may consider any relevant information, including, without limitation, one or more of the following types of information: -
>
> (i) quotations (either firm or indicative) for replacement transactions supplied by one or more third parties that may take into account the creditworthiness of the Determining Party at the time the quotation is provided and the terms of any relevant documentation, including credit support documentation, between the Determining Party and the third party providing the quotation;
>
> (ii) information consisting of relevant market data in the relevant market supplied by one or more third parties including, without limitation, relevant rates, prices, yields, yield curves, volatilities, spreads, correlations or other relevant market data in the relevant market; or
>
> (iii) information of the types described in clause (i) or (ii) above from internal sources (including any of the Determining Party's Affiliates) if that information is of the same type used by the Determining Party in the regular course of its business for the valuation of similar transactions.
>
> …
>
> Without duplication of amounts calculated based on information described in clause (i), (ii) or (iii) above, or

> other relevant information, and when it is commercially reasonable to do so, the Determining Party may in addition consider in calculating a Close-out Amount any loss or cost incurred in connection with its terminating, liquidating or re-establishing any hedge related to a Terminated Transaction or group of Terminated Transactions (or any gain resulting from any of them).
>
> …

(b) In effect, Clause 14 expressly gives Macquarie the choice between identifying the losses or costs, or the gains which it *would* incur or realise in (i) replacing *or* (ii) in providing for itself the economic equivalent of, two items, *viz*, (i) the material terms of the Terminated Transaction (as defined) and (ii) the option rights of the parties in respect of the Terminated Transaction (as defined). The present dispute does not concern any option rights of the parties in respect of the Terminated Transaction.

(c) The definition of Close-out Amount does not require that the Determining Party (as defined, *ie*, Macquarie) actually enter into one or more replacement transactions: *Lehman Brothers International (Europe) (In Administration) v Lehman Brothers Finance SA* [2012] EWHC 1072 (Ch) ("*Lehman Brothers (HC*)") at [33]; on appeal [2014] 2 BCLC 451 ("*Lehman Brothers (CA)*") at [22]; *Lomas v JFB Firth Rixson* [2011] 2 BCLC 120 at [32]; and *Derivatives: Law and Practice* (Simon Firth gen ed) (Sweet & Maxwell, 2017) ("*Firth*") at para 11.163, citing *BNP Paribas v Wockhardt EU Operations (Swiss) AG* [2009] EWHC 3116 (Comm) at [32].

(d) In determining the Close-out Amount, Macquarie is required to "act in good faith and use commercially reasonable procedures in order to produce a commercially reasonable result" (see, also, *Lehman*

Brothers (HC) in at [82]). As further stated in Clause 14, the Close-out Amount "will be determined as of the Early Termination Date or, if that would not be commercially reasonable, as of the date or dates following the Early Termination Date as would be commercially reasonable".

135 Further, it was Macquarie's case that the figure of US$1.2 million represented the appropriate Close-out Amount as determined by it in accordance with the relevant terms of the ISDA Form and the above legal principles, *viz*:

(a) Macquarie determined the Close-out Amount by reference to (i) the actual cost incurred on 8 July 2014 in replacing the material terms of the Terminated Transaction and (ii) quotations for replacement transactions supplied by third parties obtained on 8 July 2014 (see [105] above).

(b) The actual cost incurred on 8 July 2014 in replacing the material terms of the Terminated Transaction is evidenced by the Direct Hedge trade confirmations dated 8 July 2014 in respect of replacement transactions for 20,000 mts of urea.

(c) The cost of replacing the material terms of the Terminated Transaction in respect of the remaining 10,000 mts of urea was determined by reference to a quotation from a broker of US$320 per mt ("US$320 Quote").

(d) The US$320 Quote is evidenced by an email from Mr Jean-Baptiste Denat to Mr Stephen Vallely dated 9 July 2014 reproducing a transcript of Mr Denat's chat with the broker. It is deemed to be conclusive evidence of the existence and accuracy of the quotation or market data under Clause 6(d)(i) of the ISDA Form.

(e) These figures produce a total figure of US$1.2 million after taking account of brokerage, operations costs and "rounding".

136 As to such calculation, it is noteworthy that paragraph 44 of Graceland's amended defence and counterclaim merely stated that Macquarie "did not comply with the formula for the calculation of the Close-out Amount under the ISDA agreement"; and that it was only in the course of the latter part of the trial that Counsel on behalf of Graceland identified the specific objections advanced by Graceland with regard to the quantum of Macquarie's claim. In my view, that was most unsatisfactory. The days of trial by ambush are long gone. Although the legal burden of proving quantum remains on any plaintiff, fairness demands that a defendant who wishes to raise a positive case as to quantum should generally identify the points relied upon in its pleading or, at the very least, well before the commencement of the trial so that the plaintiff has proper notice of any such points.

137 Be all this as it may, it was submitted on behalf of Graceland that the figure of US$1.2 million had been calculated inaccurately and that Macquarie was only entitled to damages of US$710,000, being US$(310 - 275) x 20,000 mts + US$0.50 x 20,000 mts. In effect, this calculation accepts the figure of US$310 mt in respect of the first 20,000 mts of urea but not the figure of US$320 mt in relation to the balance of 10,000 mts and, in effect, excludes or disregards any claim for loss or damages in respect of that balance. The main basis for such objection was that the US$320 Quote was obtained on 8 July 2014 whereas Macquarie ought to have waited until the following day (*ie*, 9 July 2014) to obtain a quote. In this context, Graceland advanced a number of points which I would summarise as follows:

(a) In calculating the Close-out Amount, Macquarie was, in effect, obliged to consider the conditions in the relevant market at the material time, *ie*, 8 July 2014 – which it failed to do.

(b) As to such market conditions, between 4 June 2014 and 7 July 2014: (i) there were trades only on six days; (ii) the prices of the urea swaps reached a maximum of only US$310; and (iii) the maximum volume traded in a single day was 15,000 mts. The urea FOB Yuzhny swaps market was an illiquid market in which prices never once exceeded US$310. In this context, Macquarie had not used "commercially reasonable procedures" when it "dumped" 30,000 mts of urea swaps on the market on 8 July 2014 and did not produce a "commercially reasonable result" by the US$320 Quote obtained.

(c) That such conduct was not a "commercially reasonable procedure" is supported by the following.

(i) First, the parties' experts agreed that "a dealer that enters into an actual transaction to replace the economic equivalent of the material terms of a terminated transaction at an actual loss cannot then instead use a hypothetical valuation under the definition of Close-out to claim a higher loss." To this end, Macquarie has not adduced any evidence of any actual replacement transaction entered into for the remaining 10,000 mts.

(ii) Second, while the ISDA Form allows a non-defaulting party to consider quotations in determining the Close-out Amount, it does not expressly provide that the use of quotations obtained *from third parties* is a "commercially reasonable

procedure". In contrast, the use of relevant market data from third parties and quotations and relevant market data from internal sources are expressly recognised as "commercially reasonable procedures" under Clause 14 of the ISDA Form. This distinction must be because quotations obtained from third parties must be viewed in light of the conditions in the relevant market at the material time before they are deemed a "commercially reasonable procedure".

(iii) Both Mr Ingram and Mr Henderson opined that "the $320/metric tonne offer for the remaining 10,000 metric tonnes does not constitute a commercially reasonable quotation for that quantity. A commercially reasonable activity would have been to wait until the following day (July 9) to transact in a market that was edging lower before July 8 and on that date was 'saturated' with the 200 contracts already traded that day." Mr Selvaggio also admitted during cross-examination that on 8 July 2014, "20,000 tonnes were already transacted at 310, and the supply/demand obviously was being thrown a little bit off-kilter".

(iv) In this context, the US$320 Quote was not obtained by a "commercially reasonable procedure". Macquarie should have waited until 9 July 2014 to obtain a further quote for the remaining 10,000 mts. It did not do so.

(d) Macquarie itself also could not have reasonably believed in good faith that the quotations obtained from placing 30,000 mts of urea swaps on the market in a single day constitutes a "commercially reasonable

procedure" or would produce a "commercially reasonable result". In particular:

(i) On 8 July 2014, Macquarie's broker opined that 20,000 mts was a "big piece and [the potential seller] didn't get scared up" and Macquarie's Mr Denat stated that the "market is 305/310". The subsequent lack of response from Mr Denat to the US$320 Quote suggests that he did not seriously consider the US$320 Quote to be commercially reasonable.

(ii) On 20 May 2014, Mr Wolfe recognised that asking the trading desk for a big quote all at once will result in a worse price. During cross-examination, Mr Wolfe also recognised that asking the trading desk to quote a price for the full quantity of 30,000 mts "in one hit" will result in a worse price in an illiquid market such as the urea swaps market.

(iii) Macquarie called no witness from the trading desk to give evidence as to (A) whether the quotations were obtained by "commercially reasonable procedures in order to produce a commercially reasonable result", or (B) whether Macquarie held any reasonable belief in good faith that the US$320 Quote obtained from dumping 30,000 mts of urea swaps on the market in a single day constitutes a "commercially reasonable procedure" or produced a "commercially reasonable result".

138 In addition, Graceland objected to (a) the figure of US$1 per mt in respect of alleged operations costs; (b) the brokerage figure of US$0.50 per mt; and (c) the "rounding-up" exercise referred to above. As to these points, it was submitted on behalf of Graceland as follows:

(a) First, as both Mr Wolfe and Mr Selvaggio acknowledged, there was no documentary evidence to prove that the amount of US$1 per mt was actually incurred by Macquarie and that this sum therefore does not constitute an out-of-pocket expense which Macquarie might claim under Clauses 11 and 14(c) of the ISDA Form.

(b) Second, in the same vein, the brokerage cost of US$0.50 per mt for the 10,000 mts urea swaps not bought from the market was also not incurred by Macquarie and therefore not an out-of-pocket expense which Macquarie might claim under the ISDA Form.

(c) Third, there is no basis for Macquarie to round up the sum of US$314.84 per mt to US$315 per mt.

139 As to these objections by Graceland, my observations and conclusions are as follows.

140 First, it is important to note that Graceland does not object to the price of US$310 per mt in respect of the first 20,000 mts of urea.

141 Second, Graceland's objection to the price of U$320 per mt in relation to the balance of 10,000 mts of urea is founded on the sole unpleaded basis that Macquarie should have waited until 9 July 2014 to transact or to obtain a quote for that additional quantity. Although it is fair to say that there is no direct evidence from Macquarie's trader(s) as to whether waiting some 24 hours until 9 July 2014 was or was not a commercially reasonable thing to do, it does not seem to me that this is a justifiable criticism given the absence of any specific pleading on behalf of Graceland to that effect. In any event, I had the benefit of expert evidence – as to which see below.

142 Third, it is important to note that even putting Graceland's case at its highest, there is, in my view, no basis whatsoever for limiting Macquarie's claim to the quantity transacted, *ie*, 20,000 mts and, in effect, ignoring completely the balance of 10,000 mts.

143 Fourth, it was submitted on behalf of Macquarie that the suggestion that Macquarie should have waited until 9 July 2014 to transact or obtain a quote flies in the face of the wording of the ISDA Form; that the relevant wording in Clause 14 (*ie*, "Each Close-out Amount will be determined as of the Early Termination Date or, if that would not be commercially reasonable, as of the date or dates following the Early Termination Date as would be commercially reasonable") in effect *required* Macquarie, as the Determining Party, to determine the Close-out Amount as of the Early Termination Date; and that this provision was drafted for the sole benefit of the Determining Party, *ie*, Macquarie. In other words, it was Macquarie's submission that the Determining Party has a *qualified right* to determine the Close-out Amount as of a date *other than* the Early Termination Date as would be commercially reasonable; but the Determining Party *cannot* be *required* to determine the Close-out Amount at any other date. In support of that submission, Counsel on behalf of Macquarie relied upon *Firth* at para 11.171 and *Lehman Brothers (HC)* at [77]. In my view, there is much force in that submission but it is unnecessary to reach a definitive conclusion on that point in the circumstances of the present case for the reasons set out below; and for present purposes only, I am prepared to proceed on the assumption in favour of Graceland that the wording does not operate for the sole benefit of the Determining Party.

144 Fifth, even on that assumption, the relevant question is not, in my view, whether it was commercially reasonable to wait 24 hours to transact or to obtain a quote but whether it was *not* commercially reasonable for Macquarie to

determine the Close-out Amount as at 8 July rather than on 9 July 2014. In that context, I well understand that going into the market on 8 July 2014 to obtain a quote for a further 10,000 mts of urea on top of the 20,000 mts transacted on the same day was (or at least may have been) unusual with regard to the total quantities involved on a single day. However, it is, in my view, important to bear in mind, that (a) Macquarie only found itself in the position it did because, as I have found, Graceland was in breach of contract entitling Macquarie to terminate the Transaction; and (b) much of Graceland's case was premised on the assertion that the fertiliser derivative market was (and is) illiquid and volatile. During cross-examination, Mr Liu admitted that one cannot complain about price movements because it is "out of everybody's control". Given the volatility and unpredictability in the market, it does not seem to me to lie very well in the mouth of Graceland (the party who was, as I have found, the contract-breaker) to suggest that Macquarie (*ie*, the innocent party) should have waited until 9 July 2014 to determine the Close-out Amount and, in effect, taken on the risk of further adverse price movements and even greater losses.

145 In my view, it is quite impossible to say that it was *not* commercially reasonable for Macquarie to determine the Close-out Amount as at 8 July 2014; and, on the contrary, it is my conclusion that it was commercially reasonable for Macquarie to do so in the circumstances of the present case. I reach these conclusions for the reasons given by Mr Selvaggio (whose evidence I prefer) and for the reasons advanced by Counsel on behalf of Macquarie which were, in summary as follows:

(a) At the heart of Graceland's case that Macquarie should have waited until 9 July 2014 is the suggestion (based on the views expressed by their experts) that this was "commercially reasonable" because the market was "edging lower" before 8 July 2014 and the market was

"saturated" with the 200 contracts already traded by Macquarie on 8 July 2014.

(b) However, such opinion is made in large part with the benefit of hindsight regarding the movement in the market. Although it is fair to say that the market was "edging lower" before 8 July 2014, the decrease in market prices observed from 18 June to 2 July 2014 reversed on 3 July and 7 July 2014 when the market actually moved higher. Even if one assumes that the market was "edging lower" before 8 July 2014, it would have been impossible for Macquarie on 8 July to have predicted the direction of the fertiliser swap market from 8 to 9 July 2014.

(c) In my view, it is also important to bear in mind that it is impossible to say whether if Macquarie had waited until 9 July, the price quoted would have been any different from that obtained on 8 July 2014.

(d) Even if one assumes that Graceland's experts are correct, the fact that it was commercially reasonable to transact or obtain a quote on 9 July 2014 does not *ipso facto* mean that it was *not* commercially reasonable for Macquarie to rely on the US$320 Quote obtained on 8 July 2014. The objective standard of commercial reasonableness "leaves a bracket or range both of procedures and results within which the Determining Party may choose, even if the court, carrying out the exercise itself, might have come to a different conclusion": *Lehman Brothers (HC)* at [82].

(e) As stated by Mr Selvaggio, the US$320 Quote was not a commercially unreasonable one because the US$10 premium over the US$310 per mt price transacted in respect of 20,000 mts on 8 July 2014 represents a commercially reasonable "market risk buffer".

146 As to the figure of US$1 per mt in respect of operations costs included by Macquarie in the calculation of the Close-out Amount, it was submitted on behalf of Graceland that such costs are not substantiated and that there is no proof that such costs have been incurred. However, as submitted on behalf of Macquarie, this argument fails to appreciate that the definition of Close-out Amount in Clause 14 expressly allows the Determining Party to identify the losses or costs which it *would* incur replacing the material terms of the Terminated Transaction. In other words, there is no need for the Determining Party to prove its actual loss or costs. Further, Macquarie's internal correspondence records that its operations costs in respect of entering into replacement transactions would amount to US$1 per mt. Moreover, the evidence of Mr Selvaggio (which I accept) is that such operations costs are commercially reasonable.

147 As to the brokerage included by Macquarie in the calculation of the Close-out Amount with regard to the 10,000 mts, Graceland's objection is, in my view, unsustainable. Of course, no brokerage was actually incurred in respect of that quantity because the Close-out Amount in respect of that quantity was not based on any actual transaction but on the US$320 Quote which is entirely permissible under the ISDA Form. In such circumstances (as Graceland's own experts accepted) customary brokerage fees could be included in the determination of Close-out Amount. As to the amount of such brokerage, the evidence in relation to the bigger 20,000 mts quantity confirms the figure of US$0.50 per mt for brokerage.

148 As to Graceland's submission that Macquarie was wrong to have rounded up the base "average" figure of US$314.84 per mt to US$315 per mt and, in consequence, increased the Close-out Amount from US$1,195,200 to US$1.2 million (a difference of US$4,800), my initial impression was that any

rounding-up was wrong in principle. However, this was not a rounding-up in the ordinary sense. Rather, the evidence of Mr Wolfe was that the reason for such rounding-up was that "the prices only trade in multiples of 50 cents." This evidence was not challenged in cross-examination. For that reason, although the figure of US$314.84 per mt may have been correct mathematically as a calculated "average", it was not, and could not have been, a real figure in reality. On that basis, it seems to me that, contrary to my initial impression, the so-called rounding-up exercise was entirely legitimate.

Conclusion

149 For all these reasons, my conclusions are as follows:

(a) There was a binding agreement between Macquarie and Graceland on the terms of the Execution LFC which incorporated the ISDA Form.

(b) The defences raised by Graceland must all be rejected.

(c) Macquarie was entitled to terminate the Transaction as it did by its letter dated 8 July 2014.

(d) Macquarie is entitled to recover the sum of US$1.2 million.

(e) The counterclaim is dismissed.

150 By agreement of the parties, all questions of interest and costs are stood over for determination by the Court at a later stage unless otherwise agreed. Parties are to write in to the SICC Registry within 14 days of the present judgment to provide an update on the above. I very much hope that such questions will be agreed by the parties and I would invite the parties to seek to

agree a draft order for my approval failing which I will deal with such questions in due course.

Henry Bernard Eder
International Judge

Nish Kumar Shetty, Foo Chuan Min, Jerald and Tay Jia Wei, Kenneth (Cavenagh Law LLP) for the plaintiff by original action and first defendant in counterclaim;
Wong Hin Pkin Wendell, Priscylia Wu Baoyi and Wong Zi Qiang, Bryan (Drew & Napier LLC) for the defendant by original action and plaintiff in counterclaim; and
Abraham Vergis, Lim Mingguan and Kim Shi Yin (Providence Law Asia LLC) for the second defendant in counterclaim.