IN THE HIGH COURT OF JUSTICE **No. 7942 of 2008**

CHANCERY DIVISION

COMPANIES COURT

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N

(1) ANTONY VICTOR LOMAS

(2) STEVEN ANTHONY PEARSON

(3) PAUL DAVID COPLEY

(4) RUSSELL DOWNS

(5) JULIAN GUY PARR

(THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION))

Applicants

- and -

(1) BURLINGTON LOAN MANAGEMENT LIMITED

(2) CVI GVF (LUX) MASTER S.A.R.L.

(3) HUTCHINSON INVESTORS, LLC

(4) WENTWORTH SONS SUB-DEBT S.A.R.L.

(5) YORK GLOBAL FINANCE BDH, LLC

Respondents

SENIOR CREDITOR GROUP'S SKELETON ARGUMENT FOR PRE-TRIAL REVIEW ON 21 APRIL 2015

1. This skeleton argument is filed on behalf of Burlington Loan Management Limited, CVI GVF (Lux) Master S.a.r.l, and Hutchinson Investors, LLC (collectively, the "Senior Creditor Group") for the purpose of the pre-trial review in respect of Part B of the Administrators' application for directions. References in this skeleton argument to "the Order" are references to the Case Management Directions dated 9 March 2015[1].

2. At present it is unclear what, if any, issues are in dispute between the parties which will need to be resolved at the PTR.

3. The trial of Part B is listed with a time estimate of 3 to 4 days commencing on 19 May 2015, with a reading day on 18 May 2015. The Senior Creditor Group considers that 3 – 4 days remains a reasonable estimate.

4. Part B of the Application currently concerns:

   (1) Question 9 (whether accession to the CRA affects the answers to Questions 7 and 8[2]);

   (2) Questions 34-35 (the meaning of the CRA and CDDs and, in particular, whether as a matter of construction entry into the CRA or a CDD has the effect of releasing creditors' entitlements to Statutory Interest, Currency Conversion Claims or other non-provable claims);

   (3) Question 36A (if, as a matter of construction, entry into the CRA or the CDD has the effect of releasing creditors' entitlements to Statutory Interest, Currency Conversion Claims or other non-provable claims, whether the Administrators should be required not to enforce such releases by reason of, or by analogy with, the rule in *Ex Parte James* (1874) LR 9 Ch App 609; and

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1 As at the date of this Skeleton Argument the final form of the Order has not been agreed by the parties, albeit the language of the material paragraphs for the purpose of this PTR is agreed.

2 Questions 7 and 8 were determined in the trial of Part A and concern the date from which Statutory Interest accrues on contingent and future claims.

(4) Question 38 (whether Part VII of the CRA is capable of giving rise to Currency Conversion Claims).

5. The Senior Creditor Group considers that the following issues may need to be addressed at the PTR:

(1) Wentworth's position on whether there is any dispute of fact between it and the Senior Creditor Group and the Administrators in relation to the facts relevant to Questions 34 - 36;

(2) The application of paragraph 74 of Schedule B1 to the Insolvency Act 1986 (the "**Unfair Harm Provision**") to the matters raised by Question 36A; and

(3) The versions of the CDDs which will be before the Court, and referred to by the parties, at the trial of Part B.

(1) COMPLIANCE WITH PRIOR DIRECTIONS

6. Since the last CMC:

(1) The Senior Creditor Group has filed:

(a) A supplemental position paper articulating the grounds on which they say (in the context of Question 36A) that the releases (if they are held to be effective in the sense relevant to Questions 34 and 35) (the "**SCG Supplemental Position Paper**") in accordance with paragraph 4(1) of the Order; and

(b) A statement particularising the relevant facts of general application to creditors upon which they intend to rely in their argument on Issue 36A (the "**SCG Statement of Facts**") in accordance with paragraph 4(2) of the Order.

(2) Wentworth has filed:

(a) A reply position paper in relation to Issue 36A in accordance with paragraph 5(1) of the Order; and

(b) A statement of Relevant Facts in relation to Issue 36A in clean and redline against the SCG Statement of Facts (the "**Wentworth Statement of Facts**") in purported compliance with paragraph 5(2) of the Order.

(3) The Administrators have circulated a draft Statement of Facts in respect of Questions 34 and 35 (under the terms of the Order, the Administrators are required to file and Agreed Statement of Facts in respect of Questions 34 and 35 on 24 April 2015).

7. As the Administrators stated in their letter of 15 April 2015, there is a significant degree of overlap between the facts set out in the SCG Statement of Facts (prepared in relation to Question 36A) and the facts set out in the Administrators' draft Statement of Facts (prepared in relation to Questions 34 and 35).

(2) WENTWORTH'S FAILURE TO COMPLY WITH PARAGRAPH 5(2) OF THE ORDER

8. Under paragraph 5(2) of the Order, Wentworth was required to:

> "*file and serve on the other parties a statement setting out comments on the facts upon which the SCG intend to rely in respect of Issue 36A and particularising the facts which Wentworth accepts and any additional facts of general application to creditors upon which it intends to rely in respect of Issue 36A.*"

9. One of the purposes of this direction was to enable the parties and the Court to identify the extent to which (if at all) the facts relied upon by the Senior Creditor Group in connection with Question 36A are disputed by Wentworth and to enable the Court to make appropriate case management directions in relation to the trial of Part B. The overlap between the factual matrix relevant to the construction of the CRA and CDDs and the facts relevant to Question 36A

means that Wentworth's compliance with paragraph 5(2) also materially impacts on the case management of Questions 34 and 35.

10. On 15 April 2015, Wentworth filed the Wentworth Statement of Facts in purported compliance with paragraph 5(2) of the Order. However, contrary to the requirements of the Order, Wentworth did not provide any comment on the SCG Statement of Facts, nor did it indicate with which (if any) of the facts relied on by the Senior Creditor Group it disagreed. Wentworth produced a red-line document simply striking out most of the facts relied upon by the SCG, and instead setting out the facts or the characterisation of the facts on which it intended to rely.

11. The Senior Creditor Group immediately wrote to Wentworth on 15 April 2015, highlighting that Wentworth had not set out any comments on the SCG's Statement of Facts, had not indicated any facts with which it disagrees and, as a consequence, that the Senior Creditor Group did not know the extent to which (if at all) there was a factual dispute between the parties. The Senior Creditor Group therefore asked Wentworth either to confirm that it does not assert that the SCG's Statement of Facts contains statements which are factually incorrect or to identify which facts it disagrees with and comment on them in accordance with paragraph 5(2) of the Order by close of business on 16 April 2015.

12. Wentworth responded by letter dated 17 April 2015 stating that its mark up *"clearly illustrates those purported statement of fact included in your statement which are in dispute"* and that its *"deletions show the facts that are not supported by evidence and with which we do not agree*".

13. The Senior Creditor Group does not accept that any of the facts in the SGC Statement of Facts is unsupported (whether directly or by way of reasonable inference) by the evidence. Further, Wentworth's deletions make no sense, and cannot be justified on the purported basis set out in its letter of 17 April. By way of example only:

    (1) Wentworth has deleted paragraph 6 of the SCG's Statement of Facts, which states *"Prior to April 2013 the Administrators' Progress Reports indicated*

that LBIE would, even in the best case "high end" scenario, be unable to pay provable claims in full. The Administrators did not provide creditors with information prior to April 2013 which indicated that, even in the projected best case, LBIE would be able to pay provable claims in full". The Senior Creditor Group does not understand the basis on which this fact is or could be disputed by Wentworth, as it reflects information contained in the Administrators' Progress Reports.

(2) Wentworth has deleted the statement *"the CRA and CDD processes were initiated by the Administrators"* from paragraph 7 of the SCG's Statement of Facts. Again, the Senior Creditor Group does not understand the basis, if any, on which this fact is or could be disputed by Wentworth or, if it is disputed, who Wentworth says initiated the CRA and CDD processes if not the Administrators.

(3) Wentworth has deleted paragraph 17 of the SCG's Statement of Facts, which states, *"under an Agreed Claims CDD, the amount of a creditors' Agreed Claim was generally (but not always) expressed in the currency of the underlying entitlement*". The Administrators have included a statement to this effect at paragraph 72 of their draft Statement of Facts for Questions 34 and 35 (circulated to the parties on 15 April 2015). The Senior Creditor Group does not understand the basis on which this fact is disputed by Wentworth or what Wentworth's position is in relation to the currency in which Agreed Claims CDDs generally expressed the amount of creditors' Agreed Claims.

(4) Wentworth has deleted the statement *"the CDD process arose from a decision of the Administrators that it was desirable to create an alternative process (i.e. alternative to the statutory proof regime) for determining unsecured creditors' claims"* from paragraph 29 of the SCG's Statement of Facts. Lomas 10 at [33], when describing the genesis of the CDD process states as follows: *"The Joint Administrators considered it appropriate to give serious consideration to alternative processes for determining unsecured claims*". It is clear that the CDD process arose from a decision of the Administrators. It is also clear that it was desirable to follow that process and that the process was an

alternative process to dealing with unsecured claims. The Senior Creditor Group does not understand the basis on which this fact is disputed or whether (and if so in what way) Wentworth contends that Mr Lomas's evidence is inaccurate.

14. Wentworth's deletions, taken at face value, suggest that its disagreement with the SCG's Statement of Facts extends to the bulk of the facts stated in it, including facts relevant to Questions 34 and 35.

15. Wentworth's position in relation to these (and other deletions) is all the more difficult to understand since, contrary to the requirements of the Order, it has not provided any comments to assist the Senior Creditor Group or the Court in identifying the basis of any factual dispute in relation to such deletions.

16. In light of this, the Senior Creditor Group immediately wrote to Wentworth on 18 April 2015 highlighting the matters set out above and reiterating that Wentworth's deletions do not (or do not properly or coherently) identify the facts in the SCG's Statement of Facts that it considers factually incorrect. The letter again requested that if there are areas of true factual disagreement (in the sense of there being a fact or facts which Wentworth considers to be incorrect) Wentworth identify them along with the basis of the factual disagreement by close of business on 19 April 2015 to enable the parties to assist the Court at the PTR.

17. As at the date of this Skeleton Argument, no response has been received.

18. On the basis of the materials provided by Wentworth, the Senior Creditor Group does not understand Wentworth to be suggesting that there is any dispute of underlying fact between Wentworth and the Senior Creditor Group and / or the Administrators with respect to Questions 34 and 35 or Question 36A which requires the cross-examination of witnesses and / or the production of further evidence in order to be resolved. However, the position is not known in light of Wentworth's failure to comply with paragraph 5(2) of the Order.

(3) PARAGRAPH 74 OF SCHEDULE B1 TO THE INSOLVENCY ACT

19. At paragraph 81 of its first Position Paper, York Global Finance BDH LLC ("**York**") indicated that it intended to rely on the Unfair Harm Provision in connection with Question 36A. York is no longer taking an active role in the trial of Part B.

20. In its covering letter dated 6 April 2015 the Senior Creditor Group highlighted that the SCG's Statement of Facts and Supplemental Position Paper do not address the possible application of the Unfair Harm Provision and that the Senior Creditor Group reserved its rights in that regard.

21. In a letter to the Senior Creditor Group and Wentworth dated 15 April 2015, the Administrators recommended that if any argument in connection with the Unfair Harm Provision was to be put on the basis of the generic factual scenarios contained in the Senior Creditor Group's Statement of Facts, then such argument ought to be dealt with in the trial of Part B. The Administrators asked the Senior Creditor Group and Wentworth to confirm their positions in advance of the PTR.

22. The Senior Creditor Group responded on 16 April 2015 confirming its view that the generic fact pattern relied on in connection with Question 36A also gave rise to a generic argument under the Unfair Harm Provision and concurred with the Administrators' recommendation that such argument should be dealt with in the trial of Part B, on the basis that it does not require specific additional evidence and that any argument arising from creditor-specific facts would (like any non-generic *ex Parte James* argument) need to be dealt with separately. In that letter, the Senior Creditor Group also agreed to provide the parties with an amended Supplemental Position Paper, incorporating reference to the Unfair Harm Provision, in advance of the PTR.

23. As at the date of this skeleton argument, Wentworth has not set out its position in relation to the inclusion of argument under the Unfair Harm Provision as part of the trial of Part B.

(4) THE VERSIONS OF THE CDDs FOR TRIAL OF PART B

24. A number of different versions of the CDDs were in use by the Administrators at different times and a number of different versions have been referred to in the evidence and Position Papers.

25. The parties recognise the need to agree which versions of the CDDs will be before the Court, and referred to by the parties, at the trial of Part B. The Senior Creditor Group understands that the Administrators intend to circulate their proposals on Monday 20 April 2015 and will, to the extent necessary, update the Court at the PTR.

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20 April 2015

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