No. 7942 of 2008

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

COMPANIES COURT

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN

(1) ANTHONY 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.À.R.L

(3) HUTCHINSON INVESTORS, LLC

(4) WENTWORTH SONS SUB-DEBT S.À.R.L

(5) YORK GLOBAL FINANCE BDH, LLC

Respondents

JOINT ADMINISTRATORS' SKELETON ARGUMENT (for directions hearing on 9 March 2015)

Suggested pre-reading:

If time permits, the Court is invited to pre-read the following documents:

(1) The parties' skeleton arguments [**vol 1, tabs 5 to 8**][1];

(2) The draft order [**vol 1, tab 4**];

(3) The "Note on agreed Issues" [**annexed hereto**];

(4) The "Note on Issue 37" [**annexed hereto**];

(5) The "Note on Issue 1" [**annexed hereto**];

(6) The Order of the Honourable Mr Justice David Richards dated 21 November 2014 (the "**November 2014 Directions**") [**vol 1, tab 3**];

(7) The seventh witness statement of Steven Anthony Pearson dated 27 January 2015 [**vol 1, tab 15**];

(8) The first witness statement of Paul David Copley dated 29 January 2015 [**vol 1, tab 16**]; and

(9) The correspondence between the parties [**vol 2**].

Estimated pre-reading time: Half a day

Estimated hearing time: One day

Introduction

1. This skeleton argument is filed on behalf of the Administrators of Lehman Brothers International (Europe) ("**LBIE**") (the "**Administrators**") in advance of the case management conference on 9 March 2015, at which the parties will ask the Court to give further directions for the case management of the Application. This third case management conference in the Application has been fixed pursuant to paragraph 7 of the November 2014 Directions.

2. The November 2014 Directions [**vol 1, tab 3**] provided (inter alia):

[1] Two case management conference bundles have now been lodged at Court. References to these bundles are in the form "[**vol x, tab x, page x**]".

(1) Preliminary directions for the case management of Issues 9, 34 to 36 and 38 of the Application ("**Tranche B**") (see paragraphs 4 to 9); and

(2) Preliminary directions for the case management of Issues 10 to 27 of the Application ("**Tranche C**") (see paragraphs 10 to 17).

3. Pursuant to paragraphs 7 and 12 of the November 2014 Directions, the matters which fall to be considered by the Court at the hearing on 9 March 2015 include:

(1) As to Tranche B, the further case management of Issues 34 to 36; and

(2) As to Tranche C, whether the parties should be permitted to adduce expert evidence and, if so, then (inter alia) in relation to which area or areas of expertise and addressing which questions.

4. This skeleton argument addresses the various matters falling within the scope of the previous paragraph which require the Court's determination at the 9 March 2015 hearing. In addition, this skeleton argument addresses certain matters outstanding from the trial of the Tranche A Issues, specifically:

(1) The agreed Issues (1, 3, 5, 29, 30);

(2) Issues 31 to 33; and

(3) Issues which may require further oral submissions from the parties.

5. The Administrators wrote to the other parties on 3 March 2015 setting out what they considered to be the issues requiring determination at the 9 March 2015 hearing, with a view to those issues being resolved by agreement to the extent possible [**vol 2, pages 69 to 73**]. Progress has been made towards agreeing various of the issues. To the extent that issues remain outstanding, they are addressed below in the following order:

(1) Tranche A issues (paragraphs 6 to 18):

a) The agreed Issues (paragraphs 6 to 8);

b) Issues 31 to 33 (paragraphs 9 to 14); and

c) Issues which may require further oral submissions from the parties (paragraphs 15 to 18);

(2) Tranche B issues (paragraphs 19 to 31):

a) The November 2014 Directions (paragraphs 19 to 20);

b) Issue 36 (paragraphs 21 to 27); and

c) Issues 34 and 35 (paragraphs 28 to 31);

(3) Tranche C issues (paragraphs 32 to 43):

a) Foreign law experts (paragraphs 34 to 36); and

b) Cost of funding experts (paragraphs 37 to 43).

A. Tranche A issues

(a) The agreed Issues

6. The Administrators have prepared a short note addressing the Tranche A agreed Issues (1, 3, 5 and 29) (including some proposed directions reflecting the agreed position on each Issue). The Administrators have also prepared a short note setting out some written submissions in the outstanding sub-issue arising in

relation to Issue 1 (the "leap year" point); and another short note on what now effectively appears to be the agreed position on Issue 37.

7. As the Administrators noted in oral submissions at the Tranche A trial (Day One, page 7, lines 7 to 11), the Administrators intend to invite the Court to give directions in accordance with the agreed positions on these Issues. The Administrators note that, although Issue 30 has now in principle been agreed between the parties, the declaration that the court makes may be affected by the Court's consideration of the argument (not accepted by the Administrators) of the First to Third Respondents (the "**SCG**") that there are points of tension between the Administrators' and Wentworth's case on Issue 30 and their case on Issue 39 (and possibly Issue 2). Accordingly, the Administrators do not consider it appropriate to formulate the declaration in relation to Issue 30 until the court has determined those other Tranche A Issues and considered the impact, if any, of the tension perceived by the SCG between the parties' positions on them and Issue 30.

8. Notice has been given to LBIE's creditors on the LBIE administration website that the Administrators intend to seek directions in respect of Issues 1, 3, 5 and 29 in accordance with the agreed position on each of these Issues, inviting any creditor who is not content with this approach to contact the Administrators. To date, no creditor has contacted the Administrators in this regard.

(b) Issues 31 to 33

9. The Administrators ask the Court to proceed on the basis that it is no longer (at least at this stage) required to determine Issues 31 to 33.

10. In their letter of 3 March 2015 [**vol 2, page 69ff.**], the Administrators:

    (1) Noted that Issues 31 to 33 were included in the Application at the request of the Fourth Respondent ("**Wentworth**");

(2) Emphasised the Court's indication during the Tranche A trial that it was the Administrators' responsibility to identify which Issues need to be determined in the Application and that the Administrators should "tease out" from the Respondents what it is that really needs to be determined (Day Seven, page 194, lines 5 to 13); and

(3) Accordingly, encouraged Wentworth to indicate: (a) how Issues 31 to 33 are capable of being determined in the Application; and (b) the basis on which it says these Issues are of general application to the LBIE administration.

11. Issue 31: In Kirkland & Ellis' 4 March 2015 response to Linklaters' letter [**vol 2, page 88ff.**], it was suggested that the Administrators should indicate whether or not Issue 31 does arise in practice. The Administrators have identified a population of 242 creditors which may have had GMSLAs, GMRAs or other master agreements which restricted the application of close-out netting provisions to situations in which LBIE was the non-defaulting party. However, in only two of those cases did LBIE attribute a creditor balance to the GMSLA, GMRA or other agreement. On that basis, the Administrators consider that Issue 31, in its current form, does not have material significance. Accordingly, the Administrators are content for the Court to proceed on the basis that Issue 31 does not need to be determined in the Application.

12. Issue 32: In their 4 March 2015 letter [**vol 2, page 88ff.**], Kirkland & Ellis (for Wentworth) agreed that the Administrators should: (a) post an update to the LBIE administration website prior to the 9 March 2015 hearing notifying creditors that the parties have now agreed that Issue 32 is not capable of being determined as part of the Application; and (b) ask the Court to proceed on the basis that it is no longer required to determine Issue 32.

13. Issue 33: In their 4 March 2015 letter [**vol 2, page 88ff.**], Kirkland & Ellis (for Wentworth) suggested that they believe there to be cases where the holder of a claim denominated in a foreign currency has assigned to an assignee merely the right to prove in respect of that claim, but explained that they had not been able

to identify an example. The Administrators have also been unable to identify any examples relevant to Issue 33. Accordingly, the Administrators are content for the Court now to proceed on the basis that Issue 33 no longer needs to be determined in the Application.

14. In light of the above, the Administrators intend to post updates on the LBIE administration website notifying creditors that the parties have now agreed that Issues 31, 32 and 33 are not to be determined in the Application and inviting creditors to indicate if they object. The Administrators ask the Court to proceed, subject to any objections that may be received from creditors following the relevant updates on the LBIE administration website, on the basis that it is no longer required to determine Issues 31, 32 and 33.

(c) Issues which may require further oral submissions from the parties

15. The Court indicated on Day Seven of the Tranche A trial that an indication would be given if further oral submissions were required on any outstanding Tranche A Issue or sub-issue. On 5 March 2015 the Court indicated that no further submissions would be required in respect of Issue 39.

16. However, in case the Court does revisit in due course the question whether to call for further oral submissions on any Tranche A Issues, the Administrators have identified two Issues falling to be determined as part of the Tranche A trial which were only addressed cursorily in the course of oral submissions, specifically:

(1) The sub-issue identified in relation to Issue 3[2] (Day five, page 131, lines 24ff.); and

[2] Namely, on the basis that the agreed position on Issue 3 is correct, where a creditor has a contractual or other entitlement to receive compound interest: (a) whether accrued statutory interest continued to compound following the payment in full of the principal; and (b) if not, whether the creditor has a non-provable claim in respect of interest that would have continued to compound on a contractual basis following the payment in full of the principal amount (see paragraph 31 of the Administrators' position paper)

(2) Issue 37, and the sub-issue discussed at paragraphs 441 to 444 of the SCG's first skeleton argument.

17. The Administrators consider that both of these Issues have been addressed adequately in the parties' written submissions and so do not propose to make any further oral submissions in relation to them unless the Court positively requests such further oral submissions.

18. However, for the sake of clarity and to assist the Court, the Administrators have filed along with the present written submissions a short note on Issue 37 setting out what the parties' agreed position on it is (and annexing some draft directions for the disposal of Issue 37).

B. Tranche B issues[3]

(a) The November 2014 Directions

19. Paragraphs 4 to 9 of the November 2014 Directions [**vol 1, tab 3**] provided preliminary directions for the determination of the Tranche B Issues (i.e. Issues 9, 35 to 36 and 38).

20. As to paragraphs 4 and 5 of the November 2014 Directions [**vol 1, tab 3**]:

(1) Pursuant to paragraph 4.1, on 30 January 2015, the Administrators filed the seventh witness statement of Steven Anthony Pearson dated 27 January 2015;

(2) Pursuant to paragraph 4.2, on 30 January 2015, the Administrators filed the first witness statement of Paul David Copley dated 29 January 2015; and

[3] It is noted that Michelmores (for York) have indicated, by way of their letter dated 4 March 2015, that York does not at present intend to file any skeleton arguments in respect of the Tranche B Issues nor to appear by Counsel at the Tranche B trial.

(3) Pursuant to paragraph 5, on 3 March 2015, the SCG filed the second witness statement of Mary Nell Browning and Wentworth filed the first witness statements of Paul Goldschmid and Robert Ryan.

(b) Issue 36

21. As to paragraph 6 of the November 2014 Directions [**vol 1, tab 3**], efforts were made by the Administrators to complete a draft scenarios paper (relevant to Issues 34 to 36) which might be provided to the Respondents.

22. However, the process of attempting to agree a scenarios paper has not been proceeded with and has been replaced with the following:

(1) By way of a letter dated 27 February 2014 [**vol 2, page 56ff.**], Freshfields (for the SCG) suggested that the scope of Issue 36 to be determined at the Tranche B hearing be limited so as to omit any consideration of arguments predicated on rectification, estoppel and/or mistake (on the basis that these issues are highly fact sensitive), leaving only the SCG's argument that the Administrators and/or the estate should not be permitted to take advantage of LBIE's strict legal and technical rights, given for example the principle in *Ex parte James.*

(2) The parties are all now broadly agreed[4] that it would be best to bifurcate Issue 36, such that *Ex parte James*-type argument be heard in Tranche B ("**Issue 36A**"); and any other points under Issue 36 be determined, if necessary, at a later stage ("**Issue 36B**").

(3) The parties also agree that Issue 36A will not require the use of hypothetical fact patterns set out in a scenarios paper, as envisaged in paragraph 6 of the November 2014 Directions.

[4] See Linklaters' letter dated 3 March 2015; Freshfields' letter dated 4 March 2015; and Kirkland & Ellis' letter dated 4 March 2015.

23. Whilst the matters set out above are broadly agreed among the parties, the parties have not yet agreed all of the further directions which will be required prior to the Court being able to determine Issue 36A. The SCG and Wentworth have agreed with the Administrators' proposal (in Linklaters' letter of 3 March 2015 [**vol 2, page 69ff.**]) that further position papers be filed, with the SCG setting out in detail in their position paper the legal principles upon which they intend to rely and the arguments they wish to assert on the basis of those principles. However the parties are not yet *ad idem* as to when such position papers should be filed and precisely what should be included within them.

24. Further, Wentworth have also suggested (see Kirkland & Ellis' letter of 4 March 2015, paragraph 2.2(e)(iii)(B)) [**vol 2, pages 93 to 94**], and the Administrators broadly agree, that it would assist if (following the SCG and Wentworth identifying the facts and matters relied upon by them for the purposes of Issue 36A) the Administrators prepare, for the purpose of Issue 36A, a consolidated document identifying those facts of general application to creditors on which the Administrators and Respondents are in agreement.

25. Wentworth appear to consider that the Administrators should compile two separate statements of agreed facts, one for Issue 36A and another for Issues 34 and 35. The Administrators consider that this is a sensible suggestion. It is noted that the agreed facts for Issues 34 and 35 are likely to be relevant and admissible for the purposes of Issue 36A (whereas some of the agreed facts for Issue 36A may well not be relevant or admissible for the purposes of Issues 34 and 35). In these circumstances, the Administrators consider that it would be sensible for there to be two sets of agreed facts. By contrast, the SCG appears to consider that the Administrators' position in relation to factual matters raised by the other parties will be addressed in their position paper and thus a statement of agreed facts is not necessary. The Administrators consider that a separate document or documents setting out agreed facts for all of Issues 34, 35 and 36A will likely be of assistance to the Court in identifying where, if at all, there are factual points in dispute and therefore may serve to streamline the hearing.

26. As to the timing for the filing and service of position papers, the parties are not yet *ad idem* as to what the relevant deadlines should be. The following suggestions have been made by the parties:

(1) As to the SCG position paper: the SCG favours 10 April 2015; Wentworth and the Administrators favour 24 March 2015;

(2) As to the Wentworth position paper: the SCG favours 17 April 2015; Wentworth favours 14 April 2015; the Administrators favour 7 April 2015; and

(3) As to the Administrators' position paper: the SCG favours 24 April 2015; Wentworth favours 28 April 2015; the Administrators favour 21 April 2015.

27. A compromise which might work would be deadlines as follows: 31 March 2015 for the SCG's position paper; 13 April 2015 for Wentworth's position paper; and 21 April 2015 for the Administrators' position paper. Such a compromise would mean that the existing timetable for the filing of skeletons for the Tranche B trial, which is already quite tight, can remain in place. Statements of fact could then follow the same timetable.

(c) Issues 34 and 35

28. As to Issue 34, the Administrators have proposed to the Respondents that the parties amend Issue 34 so that it is framed as follows (proposed additions underlined):

> "*Whether a creditor's Currency Conversion Claim and/or any other non-provable claim has been release in circumstances in which the creditor entered into either:*
>
> *(i) a Foreign Currency CDD incorporating a Release Clause;*
>
> *(ii) a Sterling CDD incorporating a Release Clause; or*
>
> *(iii) the CRA.*"

29. The rationale for suggesting this amendment to Issue 34 is so that it encompasses all non-provable claims, including any which might arise as a result of the Court's determination of any of the Issues which fall to be determined as part of Tranche A of the Application.

30. Wentworth have agreed to this proposed amendment. The SCG have not objected to it but have sought further clarification from the Administrators as to why the amendment is sought. As stated above, it is sought in order to ensure that Issue 34 deals with the position in respect of such other non-provable claims as may be held to exist (whether in the context of the Court's judgment on Issue 39 or otherwise).

31. As to Issues 34 and 35 generally, it is noted that Wentworth has raised various issues relating to the admissibility (so far as Issues 34 and 35 are concerned) of some of the evidence filed (see Kirkland & Ellis letter dated 4 March 2015 [**vol 2, pages 90ff.**], paragraph 2.1). The Administrators agree that only admissible evidence can be considered in determining Issues 34 and 35. However it is likely to be undesirable for issues of admissibility to be addressed at this stage. In the Administrators' submission, arguments about admissibility (insofar as they arise at all in the context of the proposals as to statements of facts) should be addressed at the PTR or (insofar as they relate more generally to evidence filed by the parties) during the course of the trial itself.

C. Tranche C Issues: expert evidence

32. Paragraph 12 of the November 2014 Directions [**vol 1, tab 3**] provided that, at the case management conference which is now listed for 9 March 2015, the Court would consider whether the parties should be permitted to adduce expert evidence in respect of the Tranche C Issues and, if so, then (inter alia) in relation to which area or areas of expertise and addressing which questions.

33. The parties have made some progress towards reaching agreement on what expert evidence will be needed to determine the various Tranche C Issues (Issues 10 to 27). The point falls into two parts: (a) foreign law experts; and (b) cost of funding experts.

(a) Foreign law experts

34. Various Tranche C Issues concern the construction of contracts governed by foreign laws, specifically: the law of the State of New York (Issue 19); German law (Issues 20 and 21); and French law (Issues 22 to 26).

35. Accordingly, the parties have agreed that expert evidence from foreign law experts in respect of each of these three foreign laws will be required for the determination of Issues 19 to 26.

36. Further, the parties have now finalised the list of questions to be put to the foreign law experts. See in particular the letter of Freshfields dated 23 February 2015 [**vol 2, page 37ff.**], which includes the consolidated draft of foreign law experts' questions which are now agreed; and the letter of Kirkland & Ellis dated 3 March 2015 [**vol 2, page 79ff.**].

(b) Cost of funding experts

37. For the purpose of Issue 11, the Court is called upon to construe the phrase "*cost... if it were to fund or of funding the relevant amount*" in the definition of Default Rate in the ISDA Master Agreement.

38. The parties have engaged in detailed correspondence as to what the proper scope of expert evidence is in respect of Issue 11. Broadly:

    (1) Wentworth is contending that the words have an established 'private dictionary' meaning as a matter of trade usage. In particular, Wentworth considers that the phrase "*cost... if it were to fund or of funding the relevant amount*" has a generally understood meaning among financial

institutions that actively participate (whether as broker or dealer) in the derivatives markets and that expert evidence is therefore relevant in order to demonstrate such generally understood meaning. See the letter of Kirkland & Ellis dated 3 March 2015, paragraph 5 [**vol 2, page 74**].

(2) The SCG disagrees with Wentworth's contentions and wishes to argue that there is no such established meaning. In particular the SCG contends that "*there is no special 'trade usage' of 'cost of funding' other than its general meaning*". See Freshfields' letter dated 13 February 2015 [**vol 2, page 34ff.**].

(3) In those circumstances, the Administrators consider that expert evidence will be relevant in order to assist the Court in deciding whether there is any trade usage of the term used in the ISDA Master Agreement, as alleged by Wentworth. Wentworth agrees that this is the purpose of expert evidence in connection with Issue 11. See the letter of Kirkland & Ellis dated 3 March 2015, paragraph 4 [**vol 2, page 74**]. The SCG appears to agree that this is (at least in part) a matter to be addressed by expert evidence.

(4) In addition, however, the SCG have indicated that they wish to adduce expert evidence from an expert in the field of corporate finance theory and practice, because it is the field of expertise generally concerned with the economics of raising and deploying funding and, as such, is the appropriate field from which to draw an expert who can elucidate the concept of "cost of funding". See Freshfields' letter dated 13 February 2015 [**vol 2, page 34ff.**].

(5) Wentworth has objected to this approach and has argued in the correspondence that it is unnecessary for the experts to explain how in practice entities raise funds, as that is not an issue in respect of the proper construction of the words contained in the Master Agreement.

39. The Administrators have been seeking to broker agreement between the SCG and Wentworth as to the scope of the expert evidence and as to which questions are to be put to experts, in particular by providing them with revised draft questions (under cover of Linklaters' letters dated 5 February 2015 [**vol 2, page 17ff.**] and 4 March 2015 [**vol 2, page 81ff.**]).

40. The most recent draft of the Administrators' version of the questions has been divided into four paragraphs: (1) the first addressing whether "cost of funding" has any particular trade usages; (2) the second asking further questions about any trade usage meanings identified in the first paragraph with reference to various matters; (3) the third seeking to address the factual matrix issues which the Administrators understand the SCG to be running; and (4) the fourth addressing by what method(s) the matters which constitute the cost of funding are to be quantified in practice.

41. Wentworth is now broadly content with the way that paragraph (1) and (2) of the Administrators' draft questions are framed but consider that what is now paragraph (4) should be deleted (see Kirkland & Ellis' letter dated 3 March 2015 [**vol 2, page 74]**). Although the SCG have not yet responded, the Administrators anticipate from previous correspondence that the SCG will oppose the deletion of paragraph (4).

42. Further, Kirkland & Ellis have contended in their letter dated 4 March 2015 [**vol 2, page 88ff.**] that, with the exception of Issue 10 and such part of Issue 11 that is a pure question of construction of the ISDA Master Agreement, the Issues that remain in dispute between the parties in Tranche C are unlikely to be capable of resolution at a generic level (paragraph 3.2(b)); and that representative test cases should instead be found as a way of determining the non-construction issues in dispute between the parties (paragraph 3.2(c)).

43. It is likely, unless the parties achieve further progress in negotiations prior to the hearing on 9 March 2015, that the Court will be invited resolve the dispute between the SCG and Wentworth as to the proper scope of expert evidence in relation to Issue 11.

Conclusion

44. In light of the above, the Administrators respectfully request that the Court give directions in respect of the matters addressed above. The parties will seek to agree a draft order, to the extent possible, ahead of Monday's hearing reflecting what the parties consider to be the most appropriate directions.

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6 March 2015