

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

No. 7942 of 2008

**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) 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 SÀRL**
- (3) HUTCHINSON INVESTORS LLC**
- (4) WENTWORTH SONS SUB-DEBT SÀRL**
- (5) YORK GLOBAL FINANCE BDH LLC**

Respondents

**SKELETON ARGUMENT OF
YORK GLOBAL FINANCE BDH LLC**
for the CMC on 9 March 2015

INTRODUCTION

1. This skeleton argument is on behalf of the Fifth Respondent, York Global Finance BDH, LLC (“**York**”) for the CMC taking place on 9 March 2015 in relation to the Application Notice of 12 June 2014 (the “**Waterfall II Application**”) issued by the Applicants (the “**Administrators**”).

BACKGROUND

2. At the previous CMC on 21 November 2014, the Court directed that the issues in the Waterfall II Application should be split into three parts.
 - (1) Part A, dealing with questions relating to statutory interest and currency conversion claims;
 - (2) Part B, dealing with questions relating to the effect of CDDs and the CRA, is due to be heard in May 2015.
 - (3) Part C, dealing with questions relating to the ISDA Master Agreement and other master agreements, is due to be heard in late 2015.
3. The Court further directed, at para.7 of its Order, that the present case management conference be fixed after the Part A trial, to consider the further case management of Issues 34-36 of the Waterfall II Application, and expert evidence in relation to Part C.
4. In addition, in a letter from Linklaters LLP dated 3 March 2015, the Administrators identified the following further matters to be dealt with at the CMC:
 - (1) directions on Issues 1, 3, 5, 29 and 30, which are agreed;
 - (2) whether Issues 31-33 still require determination;
 - (3) the possibility of further submissions from the Joint Administrators (if invited by the Court) on

- i. the sub-issue identified in relation to Issue 3 (whether interest continues to compound following payment of 100p in the £);
 - ii. Issue 37 and the sub-issue discussed at paragraphs 441-444 of the Senior Creditor Group's Trial A skeleton;
 - iii. the *Sempra Metals* limb of Issue 39.
- (4) the amendment of Issues 34-35 to address the question of whether non-provable claims generally (as opposed to only currency conversion claims and statutory interest) have been released by a post-administration contract;
- (5) the bifurcation of Issue 36 (whether the release, if any, of currency conversion claims or statutory interest in a CDD or CRA ought to be enforced) into Issue 36A (general legal principles) and Issue 36B (fact-specific arguments relating to particular contracts).

ISSUES RELATING TO THE PART A HEARING

- 5. In relation to Issues 1, 3, 5 and 29, which are agreed, York agrees with the form of the directions proposed by the Administrators and has notified the Administrators accordingly. York also agrees with the proposal in relation to Issue 30 contained in the Administrators' Note.
- 6. York has no position on Issues 31-33 (or whether they still require determination). York did not take a position on these issues in its skeleton argument for Part A.
- 7. As at the date of this skeleton, York has not seen the Administrators' written submissions on the Issue 1 (leap year) point. York therefore makes no written submissions in response, but reserves the right to make a brief reply orally at the CMC if appropriate.
- 8. The remaining matters in the Administrators' letter of 3 March 2015 are dealt with below.

ISSUES RELATING TO THE PART B HEARING

Amendment of Issues 34-35

9. The Administrators propose to amend Issue 34 so that it covers not only currency conversion claims but all non-provable claims. The proposed amendment appears to reflect the possibilities discussed during the Part A trial that (a) a creditor might have a non-provable claim in circumstances where the amount of interest calculated under rule 2.88 was less than the amount of interest payable pursuant to the creditor's rights apart from the administration and/or (b) a *Sempra Metals* type claim.
10. As explained in the context of Issues 4 and 28, York's position is that, both for the purposes of the "*rate applicable to the debt apart from the administration*" in rule 2.88(9) and for the purposes of any non-provable claim in respect of interest, the relevant rights of the creditor apart from the administration include the right to obtain a foreign judgment and to obtain the benefit of the interest rate applicable to such judgment. Such rights are as much a part of the relevant bundle of rights that create the "*contract rate*" applicable to a creditor's claims under a contract as a specific clause setting out a contractual rate. There is no policy reason why only a specific clause in a contract providing for a contractual rate of interest would be protected but not other rights by which creditors protect themselves against late payment e.g. the ability to invoke a particular enforcement process which carries a right to interest.
11. York's position, therefore, is that the type of non-provable claim apparently envisaged by the Administrators would arise both where the applicable interest rate apart from the administration is a contractual rate and where it is a foreign judgment rate.
12. Having made that clarification, York is content with the Administrators' proposed amendment to Issue 34.

Bifurcation of Issue 36

13. York agrees that Issue 36 should be bifurcated in the manner set out in in paragraph 2.2 of the Linklaters letter of 3 March 2015.

14. York has already set out all the facts and arguments on which it relies in its original Position Paper. In order to save costs and avoid duplication, with the Court's permission, York does not intend to file a further position paper.

York's Role in the Proceedings

15. York expects that its position on the Part B Issues will be mirrored by that of the Senior Creditor Group. In order to save costs and to avoid unnecessary duplication, York therefore proposes to limit its further involvement as follows.
16. With the permission of the Court, York's present intention is not to file any further position paper or skeleton arguments, or to appear by counsel at the Part B hearing. This intention would only change if it becomes apparent from the position papers and skeleton arguments which are filed by the other parties that a relevant argument is not being advanced or that new arguments are being advanced that adversely affect York's position on Part A issues.
17. Accordingly, York does not seek an ability to file a further position paper in relation to Issue 36(A).
18. However, in order that it can confirm that all relevant arguments are being advanced, and/or that no new arguments are being advanced that adversely affect York, York proposes that:
 - (1) any further position papers should be served on York at the same time as they are served on the other parties;
 - (2) the existing direction providing for the service of skeleton arguments on all parties (i.e. including York) should continue to apply.

ISSUES RELATING TO THE PART C HEARING

19. York's position in relation to the Part C hearing is the same as in relation to the Part B hearing, as set out above.

Tom Smith QC
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6 March 2015