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

BETWEEN

(1) ANTHONY VICTOR LOMAS
(2) STEVEN ANTHONY PEARSON
(3) PAUL DAVID COPLEY
(4) RUSSELL DOWNS
(5) JULIAN GUY PARR
(in their capacity as the joint administrators of Lehman Brothers International (Europe))

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
(6) GOLDMAN SACHS INTERNATIONAL

Respondents

JOINT ADMINISTRATORS' SKELETON ARGUMENT
(for hearing on 12 December 2016 of matters consequential to the judgment in Part C of the Waterfall II Application)

Suggested pre-reading:

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

(1) The skeleton arguments lodged for the hearing; and

(2) The draft order [**tab 3**][1].

Estimated pre-reading time: 1-2 hours

Estimated hearing time: 1-2 hours

A. Introduction

1. This skeleton argument is filed on behalf of the joint administrators of Lehman Brothers International (Europe) ("**LBIE**") (the "**Administrators**") in advance of the hearing, listed for 12 December 2016, of matters consequential upon the judgment handed down on 5 October 2016 in Part C of the Waterfall II Application [**tab 2**].

2. Following the handing down of the judgment, the parties have agreed the form of Order which the Court is invited to make save as regards: (i) permission to appeal; and (ii) costs [**tab 3**].

3. The draft Order was provided to the Court on 2 December 2016 and the declarations set out in it are, subject to the Court, agreed.

B. The Respondents' applications for permission to appeal

4. The Respondents have not yet confirmed to the Administrators what the scope is of any applications they wish to make for permission to appeal.

5. The Administrators will not support or oppose any applications made by the Respondents for permission to appeal; permission to appeal is primarily a matter for the Court.

[1] A small bundle of the documents most relevant to the hearing has been lodged at Court. References to tabs and pages are to this bundle.

6. The Administrators do not make any application themselves for permission to appeal, being content to proceed on the basis of the declarations to be recorded in the Order.

C. Costs

Part C

7. The parties are agreed that the Administrators' costs of and occasioned by Part C of the Waterfall II Application should be paid as an expense of LBIE's administration (see paragraph 1 of the draft order).

8. It appears that each of the SCG and GSI intends to seek an order that its costs also be paid as an expense of LBIE's administration.

9. Wentworth intends to oppose the costs applications of the SCG and GSI, and to seek an order that the SCG and GSI pay Wentworth's costs, on the basis (*inter alia*) that Wentworth has "*substantially succeeded on the issues in dispute in Part C*" (see Kirkland & Ellis' letter to Freshfields dated 21 October 2016 [**5.4/3-5**]).

10. This is primarily a dispute between the Respondents, on which the Administrators are neutral but, in case it is of assistance to the Court, they wish to make the following points:

    (1) The Waterfall II Application was made for the purposes of obtaining directions on a range of issues that the Administrators required to have determined in order to distribute the surplus in the LBIE estate.

    (2) On such an application, it will often be the case that the appropriate costs order is that the costs of all parties should be paid out of the estate. That is most obviously the case in circumstances where the respondents are appointed as representative respondents and, leaving aside their own specific interests, present all the relevant arguments in support of a particular position. There are of course cases where, although not appointed formally as representative

respondents, the parties to an application such as this operate as quasi-representatives. Here, the Respondents were not appointed as representatives of different classes of creditors but they have advanced submissions in effect on behalf of those classes, and the administrators are content to act on directions given by the Court on this basis.

(3) The Administrators consider that the roles undertaken by the Respondents have been of real assistance to the Court in putting forward relevant arguments about the interpretation and operation of contracts to which they were parties or in respect of which they had acquired interests. It is clear that, in order for the Administrators to obtain useful directions, with the Court having had the benefit of adversarial argument on the issues, it was necessary to have active respondents to the Application.

(4) It is, however, also the case that the Respondents have each chosen to take part in the Application because of their particular economic interests in the outcome of certain of the issues raised in the Application. The outcome of the various issues dealt with in the Application is clearly, and understandably, of very real significance to the Respondents and their own financial interests.

11. If and to the extent that the Court does order that the costs of the SCG be paid as an expense of LBIE's administration, the Administrators will contend that the estate should only bear one set of the SCG's costs, the SCG (including its individual members) being represented by a number of different firms. This issue arose in the context of the costs of the Waterfall II A and B costs and David Richards J (as he then was) ordered that the SCG's costs should be limited to "*such costs as would have been incurred had the [SCG] retained one firm of solicitors only*" **[4/4 (paragraph 2)]**. The Administrators consider that a similar restriction on the SCG's costs should be imposed if an order is made in its favour on Part C.

Supplemental Issue 1A

12. The Administrators, the SCG and York all seek orders that their costs of and occasioned by Supplemental Issue 1A be paid as an expense of the administration.

13. Neither Wentworth nor GSI filed written submissions on Supplemental Issue 1A and, despite the fact that Wentworth confirmed its support for York's (ultimately unsuccessful) position on this issue, the Administrators assume that Wentworth seeks no costs order in its favour in relation to it.

14. The Administrators and the SCG prevailed on Supplemental Issue 1A but neither opposes York's application to have its costs paid as an expense (the SCG's position is set out at **[5.8/2 (paragraph 6)]**).

15. Accordingly, subject to the Court, the costs of each of the Administrators, the SCG and York in dealing with the issue should be ordered to be paid as expenses of the administration.

D. Supplemental Issue 1A – appeal timetable

16. If permission is granted to York (or Wentworth) to appeal against the declaration made in response to Supplemental Issue 1A, it is desirable for the appeal to be heard together with: (i) the Part A and Part B appeals; and (ii) the appeal against the declarations made on the other supplemental issues (which were determined by David Richards LJ). Those appeals are all due to be heard (together) in April 2017. The SCG **[5.8/1]** and York **[5.7/1]** have both expressed their agreement with that proposition. The Administrators understand that Wentworth also agrees.

17. In the premises, if permission is granted, it would be helpful if the time for filing appellant's (and respondent's) notices was abridged so that the Court of Appeal can be asked to list the Supplemental Issue 1A appeal together with the other appeals to be heard in April 2017.

Daniel Bayfield QC

South Square

9 December 2016