

**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**  
**(6) GOLDMAN SACHS INTERNATIONAL**

**Respondents**

---

**SKELETON ARGUMENT OF**  
**YORK GLOBAL FINANCE BDH LLC**  
for the consequentials hearing on 12 December 2016

---

**INTRODUCTION**

1. This skeleton argument is on behalf of the Fifth Respondent, York Global Finance BDH, LLC (“**York**”) for the hearing taking place on 12 December 2016 to deal with consequential issues arising from the Waterfall II Part C Judgment ([2016] EWHC 2417 (Ch)).
2. The terms of the substantive declarations are agreed. The only outstanding issues concern permission to appeal and costs.

## **(1) PERMISSION TO APPEAL**

3. York applies for permission to appeal declaration (xxvii) (Supplemental Issue 1(A)). This is an entirely novel point of law on which there is no previous authority. It is plainly a matter of some legal complexity and any appeal would have a real prospect of success.
4. Moreover, as the Judgment notes at para.454, this issue arises out of Issue 4 (determined in the Part A proceedings) in respect of which David Richards J granted permission to appeal, and which is due to be determined (along with a number of other issues) at a hearing in the Court of Appeal on 3-11 April 2017. The Court of Appeal has already written to the parties raising the possibility of that hearing being extended to deal with other consequential issues arising out of the Waterfall II Application, and it is respectfully submitted that it would be appropriate for permission to be granted, so that the Court of Appeal can consider Supplemental Issue 1(A) alongside Issue 4.

## **(2) COSTS**

5. York seeks the same order in respect of costs that was made by David Richards LJ in his order of 17 October 2016: that York's costs be paid as an expense of the administration. The other parties have been invited in correspondence to indicate whether they oppose York's application for its costs, and no objection has been raised (see Michelmores' letter of 17 October 2016).
6. By way of background:
  - (1) In the Waterfall II Application, the Administrators sought the court's directions on a number of novel and important points of law, considering that they were unable to distribute the surplus without doing so. The Respondents participated in the application not just for their own benefit but also for the benefit of their respective types of creditor claims that they held. The Waterfall II proceedings can properly be described as a "test case", and the Respondents, although not formally appointed as representatives of

their respective classes, have between them advanced submissions on behalf of the general body of creditors.

- (2) It was as a consequence of this that David Richards LJ ordered that the parties' costs (in respect of the issues determined in his order of 17 October 2016) be paid as an expense of the administration. This was consistent with a long line of authority entitling the respondents to such an application to have their costs out of the estate.<sup>1</sup>
- (3) As noted in the Judgment at paras 466-467, the York group's claims against LBIE arise out of New York law Prime Brokerage agreements. In contrast, the Senior Creditor Group, Wentworth and GSI hold a sufficiently large volume of ISDA Claims (as a percentage of their total admitted claims) so as to have an economic incentive both to maximise recoveries on ISDA claims and to minimise recoveries on non-ISDA claims. York is therefore the only respondent to the Waterfall II Application with a material economic incentive to advance issues which could increase recoveries on the approximately £8 billion of admitted claims which are not ISDA claims by reducing the level of recoveries on ISDA claims being sought by the other respondents.
- (4) It was therefore necessary for York to participate in these proceedings in order that there could be effective argument on Supplemental Issue 1(A), an issue on which the position of the ISDA creditors (advanced by the SCG and supported by the Administrators) is diametrically opposed to that of the non-ISDA creditors (advanced by York). As noted in the Judgment at para.465, York's involvement in the Part C proceedings has been limited to making submissions on this single point.

---

<sup>1</sup> See *Chancery Guide* para.29.16 and *Lewin on Trusts* para.27.139(1), which explain the right of a beneficiary of a trust to receive his costs out of the estate. The rules applicable to trust beneficiaries are applied by analogy to the respondents to an insolvency officeholder's application for directions, see for example *Re Westdock Realisations Ltd* (1988) 4 BCC 192, *Re Ciro Citterio Plc* [2002] EWHC 897 (Ch) [3], [25]-[26] and the *RASCALS* judgment [2010] EWHC 3044 (Ch) [11], where Briggs J noted that: "*there is an undoubted public interest in the due administration of the assets of an insolvent's estate in accordance with the statutory insolvency code, and parties who are joined in proceedings made necessary for that purpose should not be unduly discouraged by an unthinking recourse to the general rule [that costs follow the event] where, in the end, the issue is decided against them*".

7. Since York's participation was essential in order that Issue 1(A) could be determined, and York's involvement was limited to arguing that one issue, the Court is invited to follow the approach of David Richards LJ in his order of 17 October 2016, and award York its costs out of the estate.

Robert Amey

South Square  
Gray's Inn  
London  
WC1R 5HP

9 December 2016