In the Supreme Court of the United Kingdom

Notice of objection/ Acknowledgement

(1) BURLINGTON LOAN MANAGEMENT LIMITED;
(2) CVI GVF (LUX) MASTER SARL; (3) HUTCHINSON INVESTORS LLC;
(4) WENTWORTH SONS SUB-DEBT SARL;
(5) YORK GLOBAL FINANCE BDH LLC

— V —

(1) ANTHONY VICTOR LOMAS; (2) STEVEN ANTHONY PEARSON
(3) PAUL DAVID COPLEY; (4) RUSSELL DOWNS
(5) JULIAN GUY PARR
(As the Joint Administrators of Lehman Brothers International (Europe))

Appeal number: UK/SC 2017/0203

Date of filing: 20/NOV/2017
(D D M M M Y Y Y Y)

Name of respondent

YORK GLOBAL FINANCE BDH LLC

Respondent's solicitors

Michelmores llp
12th Floor, 6 New Street Square,
London
EC4A 3BF

Name of appellant

Wentworth Sons Sub-Debt Sarl

Appellant's solicitors

Kirkland & Ellis,
30 St Mary Axe,
London
EC3A 8AF

1. Respondent

Respondent's full name: York Global Finance BDH LLC

The respondent was served with the

- [x] application for permission to appeal
- [ ] notice of appeal
- [ ] application

On date: 20/NOV/2017 (D D / M M M / Y Y Y Y)

The respondent intends to ask the Court to:

- [x] refuse to grant permission to appeal
- [ ] order the appellant to give security for costs if permission to appeal is granted
- [ ] dismiss the appeal
- [ ] give the respondent permission to cross-appeal
- [ ] allow the appeal for reasons which are different from, or additional to, those given by the court below
- [ ] Other *(please specify)*

The respondent wishes to receive notice of any hearing date and to be advised of progress. The respondent's details are:

Solicitor

Name: MICHELMORES LLP

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How would you prefer us to communicate with you?

- [ ] DX
- [x] Email
- [ ] Post
- [ ] Other *(please specify)*

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2. Certificate of Service

Either complete this section or attach a separate certificate

On what date was this form served on the

Appellant ☐☐/☐☐☐/☐☐☐☐ (D D M M M Y Y Y Y)

Other ☐☐/☐☐☐/☐☐☐☐ (D D M M M Y Y Y Y)

I certify that this document was served on

by

by the following method

Signature

3. Other information about the respondent

☐ The respondent is in receipt of public funding/legal aid

Certificate number

☐ The respondent is applying for public funding/legal aid

Information about the respondent's case

Set out here the respondent's grounds of appeal, reasons why permission to appeal should be refused or why the appeal should be allowed. Include information to explain what the respondent intends to ask the Court to do.

See Continuation Sheet

Is the respondent seeking a declaration of incompatibility?

☐ Yes ☑ No

☐ The respondent will seek to raise issues under the Human Rights Act 1998 *(please give brief details)*

☐ The respondent will ask the court to make a reference to the European Court of Justice *(please give brief details)*

Please return your completed form to:

The Supreme Court of the United Kingdom, Parliament Square, London SW1P 3BD
DX 157230 Parliament Square 4

Telephone: 020 7960 1991/1992 Fax: 020 7960 1901

email: registry@supremecourt.uk

www.supremecourt.uk

SC003 Notice of objection – Continuation sheet

Section 3 – Information about the respondent's case

1. Rule 2.88(7) of the Insolvency Rules 1986[1] provides, in the event of a surplus in the administration after payment of proved debts, for the payment of interest on debts "*in respect of the periods during which they have been outstanding since the company entered administration*". The Courts below held that a contingent debt is "*outstanding*" from the commencement of the administration. Wentworth has applied for permission to appeal on this point, arguing that a contingent debt is "*outstanding*" from such later date on which the debt ceases to be contingent. York invites the Supreme Court to dismiss Wentworth's application for permission to appeal:

    a. Wentworth's proposed appeal does not raise an arguable point of law and is, on closer examination, in reality an invitation to the Supreme Court to re-write the insolvency rules applicable to future and contingent debts rather than to interpret those rules ; and

    b. the point raised is not one of general public importance.

No arguable point of law

2. First, the correctness of the judgments below is clear from the statutory scheme. In a distributing administration (such as the administration of LBIE):

    a. Creditors are entitled to submit a proof of debt in respect of any "*debt*", including contingent debts and future debts (r.12.3(1)). The debtor's assets are then applied *pari passu* amongst the claims of creditors (r.2.69).

    b. In order to achieve a *pari passu* distribution, debts must be ascertained as at the same point of time. For these purposes, it is a longstanding principle of insolvency law that the realisation of assets and the distribution of the proceeds among creditors are treated as notionally taking place simultaneously on the date of the commencement of the administration (Tranche A Judgment para.202). Consistently with this, a creditor's proof must state the value of the claim "*as at the date on which the company entered administration*" (r. 2.72(3)(b)(ii)), foreign currency debts must be converted to sterling at the exchange rate prevailing on the date of administration (r.2.86) and interest is provable up to the date of administration, but not thereafter (r.2.88(1)).

    c. Where a debt is not yet due at the date of administration, the Rules provide a mechanism for ascertaining its present value as at the date of

[1] References to the Rules in this document are to the 1986 Rules in the form applicable to LBIE.

administration. The creditor is then entitled to receive a *pari passu* distribution on that amount from the debtor's assets, regardless of when the underlying liability would have fallen due outside the administration process. In particular:

i. In the case of future debts, if a dividend is paid before the maturity date of the underlying obligation, the debt is discounted for futurity back to the date of administration at the rate of 5% p.a., and dividends are paid by reference to that discounted sum (r.2.105). If a dividend is paid after the maturity date, there is no discount (Tranche A Judgment para.197, CA Judgment para.55).

ii. In the case of contingent debts, if a dividend is declared before the occurrence of the relevant contingency, there is no express provision for discounting in the rules. However, the officeholder must estimate the value of the debt (r.2.81), and the estimate will include a discount for futurity. To take David Richards J's example, "*if the contingent debt cannot fall due for payment for a period of, say, five years, the estimate of the liability must include an element of discount for that period*" (Tranche A Judgment para.198). If a dividend is declared after the occurrence of the relevant contingency, there is no discount for futurity: the full amount of the debt is admitted to proof (Tranche A Judgment paras 216-222).[2]

d. Since provable debts (including in respect of contingent and future liabilities, discounted where appropriate) are all ascertained as at the date of administration and it is the amounts determined as at that date which rank for a distribution, it follows (as the Courts below held) that in the event of a surplus, statutory interest is payable on those debts for the delay between the date of administration and the payment of dividends. This is the case even if the underlying liability owed to the creditor was not yet due as at the date of administration, since the interest is compensation for the delayed payment of the provable debt (which may already have been discounted for futurity back to the date of administration), not delayed payment of the underlying liability (which might not yet have fallen due): CA Judgment para.57.

[2] There is no challenge to the correctness of the rules as to discounting as described by David Richards J: see CA Judgment paras 55-56.

3. Secondly, Wentworth's construction of r.2.88(7) as it applies to contingent debts is inconsistent with the construction it accepts must apply to future debts. In the case of future debts, Wentworth acknowledges[3] that:

   a. If a dividend is paid before the date on which the debt falls due, then the debt is discounted for futurity, and interest is paid on that discounted sum from the date of administration, on the basis that the discounted sum is "*outstanding*" from the date of administration.

   b. If a dividend is paid after the date on which the debt falls due, then there is no discount. Dividends are paid based on the full value of the debt, and interest is paid on that undiscounted sum from the date of administration, again on the basis that the undiscounted sum is "*outstanding*" from the date of administration.

4. Rule 2.88(7) applies to post-administration interest on all debts, present, future and contingent. It follows that the question whether a provable debt is "*outstanding*" (and therefore interest-bearing) must have the same answer in all cases (CA Judgment paras 53-55). Accordingly, Wentworth's argument that "*outstanding*" has a special, different meaning in the case of contingent debts is unsustainable as a matter of statutory construction. The correct analysis (as the Courts below held) is that all provable debts (including contingent and future debts) are "*outstanding*" from the date of administration.

5. Thirdly, as the Court of Appeal observed at para.54, on Wentworth's view, "*a contingent creditor whose contingency occurred after the dividend date would suffer both discounting and a total deprivation of statutory interest*". It is difficult to see any sensible policy justification for such a result. It should be noted that, on this point, Wentworth's grounds of appeal give an incorrect account of the way in which discounting operates, and the way in which it applies in the present case. In particular:

   a. At paras 25-29 of its grounds of appeal, Wentworth argues that "*the process of estimation for contingent debts does not involve discounting the value of the debt back to the Date of Administration*", and that this "*accords with the practice adopted by the Joint Administrators this case*".

   b. However, this is not correct. As noted above, where a contingent debt or a future debt has become a present liability by the time a dividend is declared, then there is no discount for futurity, but where the contingency has not occurred by the time dividends are paid, the officeholder must estimate the value of the debt (r.2.81), and the estimate will include a

[3] Wentworth accepted that this was the correct position at first instance (see para.188 of the Tranche A Judgment) and on appeal (CA Judgment para.55). David Richards J decided that this was the correct analysis (having heard full argument on the point) and no party has sought to appeal against that finding.

discount for futurity (Tranche A Judgment para.198). This is similar to the position in respect of future debts which have not fallen due by the date of the declaration of dividend, which are discounted under r.2.105.

c. The Joint Administrators have not applied any discount in this case because all future and contingent debts that were admitted as proved debts in the LBIE administration had ceased to be contingent or future before any dividends were paid on such debts. There was therefore no need to estimate their value, or to apply a discount. Had the relevant debts still been contingent as at the date of the dividends, the administrators would have been required to estimate their value under r.2.81, including an element of discount for futurity in that estimate.

6. Fourthly, as to Wentworth's argument that the Court of Appeal's conclusion gives the contingent creditor an undeserved windfall:

a. As the Court of Appeal observed at paras 56-57, the debt on which interest accrues is "*the provable debt rather than the underlying claim*". Contingent creditors, like all other creditors, are entitled to be paid their provable claims at the commencement of the administration (regardless of when the underlying liability would have fallen due), and are entitled to statutory interest for any delay in the payment of dividends. To the extent that the contingent creditor receives a windfall, this is a result of the way in which his provable claim is calculated (i.e., the rules for discounting), which is not in issue in this appeal.

b. Exactly the same alleged windfall arises where future debts have fallen due by the time dividends come to be paid, but the legislation expressly provides that such debts shall not be discounted, and shall bear interest from the commencement of the administration (CA Judgment para.55).

c. It is equally possible to devise examples which go in the other direction and illustrate the injustice of excluding interest on contingent debts until they fall due. Suppose that LBIE issued a credit-linked note to X on 15 September 2006, to be repaid on or before 15 September 2010. The principal amount payable on the note can reduce (potentially to nil) as and when events of default occur on a basket of underlying securities. The interest rate is 10% p.a. on the principal due on the note for the time being. X is entitled to prove for interest accruing on the note between 15 September 2006 and 15 September 2008 (rule 2.88(1)), but is not entitled to prove for interest accruing on the debt from 15 September 2008, being the date of administration (*ibid*). According to Wentworth, X is entitled to claim statutory interest accruing on the note at the contractual rate of 10% from 15 September 2010 until the note is paid in full (r.2.88(7), (9)), but

not in the period from 15 September 2008 to 15 September 2010. More generally, Wentworth submits, no creditor is entitled to receive statutory interest or to prove for contractual interest in respect of the period between the onset of insolvency proceedings and the time when the debt ceases to be contingent. It is difficult to imagine a plausible policy rationale for such a gap.

7. Fifthly, the approach espoused by Wentworth would incentivise undesirable conduct on the part of both officeholders and creditors, where either has the power to cause a contingent claim to crystallise. For example, if contingent creditors were denied statutory interest from the date of the administration, this would create a perverse incentive for officeholders to delay causing contingent claims to become crystallised into actual claims, where this lay only within the power of the officeholder. Similarly, if Wentworth's arguments are correct, it creates a strong incentive for creditors to seek to crystallise contingent claims immediately after any administration commences, before creditors have any way of knowing if the administration will subsequently convert to a distributing administration and/or whether a surplus will become available to pay interest. The creation of such an incentive would, however, be undesirable and at odds with the "*rescue culture*" which administration is intended to promote.

No general public importance

8. Wentworth has wrongly claimed that "*the same point arises in every administration*". This is incorrect: the point raised by Wentworth will only arise in the (extremely rare) situation where a debtor (i) has contingent liabilities; (ii) enters into a distributing insolvency process; and (iii) there is a surplus after payment of proved debts. There do not appear to be any reported examples of this happening before the present case, and the issue cannot be said to be of general public importance.

9. By contrast, the issue raised by York's appeal (as to the application of the approach in *Bower v Marris*) will arise in every insolvency process where there is a surplus, because it is in every such process that statutory interest will be payable (and will have to be appropriately calculated). A very common example is a home owning individual who is made bankrupt for failure to pay his short term liabilities, but who has sufficient equity in his home to discharge all his debts with interest. The issue in York's appeal has arisen and will continue to arise in countless bankruptcies, and there is a general public importance in having it decided.

Tom Smith QC

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