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.A.R.L.

(3) HUTCHINSON INVESTORS LLC

(4) WENTWORTH SONS SUB-DEBT S.A.R.L.

(5) YORK GLOBAL FINANCE BDH, LLC

(6) GOLDMAN SACHS INTERNATIONAL

Respondents

APPLICANTS' POSITION PAPER ON ISSUES 11, 12 AND 13

INTRODUCTION

1 This position paper has been lodged on behalf of the Applicants (the "**Joint Administrators**") in respect of Issues 11, 12 and 13 in the Amended Application Notice in these proceedings (the "**Waterfall II Application**").

THE JOINT ADMINISTRATORS' ROLE

2 As the Court is aware, the Respondents in the Waterfall II Application have not been appointed as representatives of different classes of creditors under CPR 19.6 or CPR 19.7. Rather, because the Respondents hold claims against LBIE which exhibit a wide variety of claim attributes, they were joined to the Waterfall II Application in the expectation that the Respondents would advance submissions that would take account of the interests of most if not all of the creditors in the estate.[1] The Joint Administrators are content to act on directions given by the Court on this basis. The Joint Administrators have uploaded all the position papers of the Respondents onto the LBIE administration website and have invited any creditor who considered there to be relevant positions or arguments not canvassed in those position papers to contact them.

3 On some issues in the Waterfall II Application, all the Respondents have taken the same position and the Joint Administrators have been content not to advance any other position where they do not consider there to be an arguable position to the contrary. Notice of these agreed positions has been given on the LBIE administration website, with an invitation to creditors who disagreed with those positions to contact the Joint Administrators.

4 By contrast, where the Joint Administrators have considered there to be matters of material significance not raised by the Respondents or an arguable alternative to a common position taken by the Respondents, they have sought to advance

[1] Nevertheless, the ability of the Respondents respectively to advance submissions on behalf of the non-subordinated creditors and the subordinated noteholder should not be overstated. The SCG (defined below) is not able to represent the interests of all non-subordinated creditors of LBIE on all Waterfall II issues because the non-subordinated creditors have conflicting interests in many of the issues raised, particularly in Part C, e.g. depending on whether they have a contractual right to interest at a rate which might exceed the Judgments Act rate. Further, whilst Wentworth holds the subordinated debt, it also has interests in non-subordinated claims which arise from Master Agreements, including ISDAs, which give rise to a right to interest at a rate which might exceed the Judgments Act rate (as to which, see paragraph 17 below).

submissions to that effect, in order to ensure that the Court has the benefit of fully developed adversarial argument on these points.

5 On those issues where the Respondents are divided, the Joint Administrators have also made submissions where they have considered it necessary to do so in order to ensure that all available arguments, to the extent such arguments are tenable and material, are before the Court.

6 In addition, the Joint Administrators have provided relevant background information.

7 They continue to fulfil these roles in respect of Issues 11, 12 and 13.

BACKGROUND TO ISSUES 10 TO 18 AND 27

8 Issues 10 to 18 and 27 (the "**English Master Agreement Issues**") relate to the Default Rate under English law governed ISDA Master Agreements ("**Master Agreements**").

9 These Issues were addressed by the First to Third Respondents (the "**SCG**") and the Fourth Respondent ("**Wentworth**") in their original position papers dated 19 September 2014, which set out their respective positions.

10 In the Joint Administrators' position paper dated 10 October 2014 (the "**Joint Administrators' First Position Paper**"):

(1) The Joint Administrators did not adopt any formal position in respect of Issues 11, 12, 13, 16 or 17 (Joint Administrators' First Position Paper, [61]), whilst expressly reserving their right to adopt a different approach in the future if appropriate (ibid.).

(2) In respect of Issue 10, the Joint Administrators identified additional grounds for concluding that the "*relevant payee*" is the original counterparty to the

Master Agreement (Joint Administrators' First Position Paper, [68]). (It continues to be the Joint Administrators' intention to draw these arguments to the Court's attention.)

(3) In respect of Issues 14, 15 and 18, the Respondents had reached an agreed position (Joint Administrators' First Position Paper, [62]).[2] The Joint Administrators explained that they did not consider there to be an arguable contrary position (Joint Administrators' First Position Paper, [64]). On this basis, the Joint Administrators stated that they did not seek to advance a contrary position and that they would instead invite the Court to give directions in accordance with the agreed position (ibid.). The Joint Administrators intend to give notice of this position on the LBIE administration website and will inform the Court should any creditor raise any objection to this approach.[3]

(4) On Issue 27, the Joint Administrators did not adopt any formal position and asked the SCG to respond to Wentworth's contentions, so that it could be ascertained whether there was in fact any dispute between the parties on this Issue.

11 Subsequently, it became apparent the Senior Creditor Group and Wentworth had reached agreement in respect of Issue 16: their common position is that the relevant payee or anyone authorised by the relevant payee can provide certification of the cost of funding. The Joint Administrators do not consider there to be an arguable contrary position. Accordingly, the Joint Administrators intend to invite the Court to give directions on Issue 16 in accordance with the agreed position. The Joint Administrators will give notice of this intention on the LBIE administration website in the usual way.

---

[2] The agreement of these issues was confirmed at the case management conference on 9 March 2015 (transcript of 9 March case management conference [page 58]).

[3] The Respondents and the Joint Administrators are yet to agree the formulation of the agreed positions on Issues 14, 15 and 18 but it is anticipated that the parties will be able to do so.

12 In addition, in an exchange of correspondence between the parties' solicitors, Wentworth confirmed that it is no longer contending that the phrase "*cost of funding*" has any special meaning in the case of financial institutions (letter from Kirkland & Ellis International LLP dated 31 March 2015, [3]). As a result, Issue 27 became an agreed Issue. The Joint Administrators do not consider there to be any arguable basis for departing from the common ground and they invite the Court to give directions on Issue 27 in accordance with the agreed position. The Joint Administrators will give notice of this intention on the LBIE administration website in the usual way.

13 Issues 11 and 12 were substantially amended on 13 May 2015 in order to better reflect the scope of the disputes. The revised versions of these Issues are contained in the Amended Application Notice. At the same time, Issue 17 was deleted, on the basis that it was duplicative.

14 Wentworth filed and served a revised position paper on 7 May 2015 (the "**Wentworth Revised Position Paper**") and the SCG filed an updated position paper on 19 June 2015 (the "**SCG Revised Position Paper**").

15 In addition, the Sixth Respondent ("**GSI**") was joined to the Waterfall II Application on 23 June 2015 for the purpose of advancing arguments in respect of Issues 11 to 14 and 27. GSI filed a position paper on 23 July 2015 in respect of those issues (the "**GSI Position Paper**"). In the GSI Position Paper, whilst advancing its own arguments on Issues 11, 12 and 13, GSI has subscribed to the common position in respect of Issues 14 and 27. Accordingly, the joinder of GSI has not made it necessary to make any modifications to the Joint Administrators' approach in respect of Issues 14 or 27.

16 On 7 August 2015, Wentworth filed and served a position paper in reply to the GSI Position Paper. The SCG did not file a position paper in reply to the GSI Position Paper and has confirmed that it does not intend to do so.

17 The principal English Master Agreement Issues which remain in dispute are therefore Issues 11, 12 and 13.

18 Following the development of further arguments by Wentworth, the SCG and GSI in the additional position papers mentioned above, and in subsequent inter-solicitor correspondence, the Joint Administrators have reviewed the current state of the arguments in respect of Issues 11, 12 and 13 for the purpose of ascertaining whether:

(1) there are any other arguable positions in respect of any of those Issues which are not currently being pursued by any of the Respondents; and/or

(2) there are any additional arguments, which are not currently before the Court, which the Joint Administrators consider should be put before the Court at the substantive hearing, in order to ensure that all arguable positions are considered; and/or

(3) there is any further background information or evidence necessary to inform the Court.

19 The Joint Administrators are aware that whilst Wentworth is the holder of subordinated loan notes and would benefit in that capacity from the reduction of claims to default interest on provable debts, Wentworth also owns claims under Master Agreements and would benefit in that capacity from a decision in favour of the SCG on the English Master Agreement Issues. Having regard to Wentworth's position, the Joint Administrators wish to ensure that the arguments which have the effect of reducing claims to default interest are fully developed in argument. The Joint Administrators therefore intend to develop those arguments where necessary in order to ensure that the Court has the benefit of full adversarial argument.

20 Having reviewed the other parties' arguments, the Joint Administrators now intend to develop certain arguments (described further below) in respect of Issues 11, 12

and 13, in order that the Court has the benefit of the full range of sensibly arguable positions.

21 Together with this position paper, the Joint Administrators have filed evidence that seeks to illustrate some of the potential practical implications of adopting certain of the possible approaches to calculating the Default Rate, the permissibility of which is now before the Court under Issues 11, 12 and 13. The Joint Administrators will also advance written and oral submissions which are designed to assist the Court, when addressing the issues of construction which are presently before it, to give the Joint Administrators as much practical guidance as is possible in dealing with "Default Interest" claims. That guidance is sought in circumstances in which it is in the interests of all of the creditors that the surplus in this administration is distributed as soon as possible and, where possible, that the agreement of the statutory interest payable to particular counterparties can be reached expeditiously.

ISSUE 11

Is the meaning that should be given to the expression "cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount" capable of including:

(1) The actual or asserted costs to the relevant payee to fund or of funding the relevant amount by borrowing the relevant amount; and/or

(2) The actual or asserted average cost to the relevant payee of raising money to fund or of funding all its assets by whatever means, including the cost of raising shareholder funding; and/or

(3) The actual or asserted cost to the relevant payee to fund or of funding and/or carrying on its balance sheet an asset and/or of any profits and/or losses incurred in relation to the value of the asset, including any impact on the cost of its borrowings and/or its equity capital in light of the nature and riskiness of that asset; and/or

(4) The actual or asserted cost to the relevant payee to fund or of funding a claim against LBIE.

22 All the Respondents appear to agree that "cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount" is capable of including the "cost of equity":

(1) The SCG says that this phrase is capable of including the "*cost ... of ... shareholder funding*" (SCG Revised Position Paper [11(5)(a)]; see also SCG Revised Position Paper, [11(2)], [11(3)], [11(4)], [11(5)(b)]).

(2) Although Wentworth's primary position is that the phrase encompasses only the cost of borrowing (Wentworth Revised Position Paper, [1]), it appears to accept that in the "*most extreme circumstances, such as where the counterparty in question* [has] *no access to borrowing*" the phrase could encompass the "*cost*" of equity (letter from Kirkland & Ellis International LLP dated 16 June 2015, [2]).

(3) GSI argues that this phrase "*can include ... the cost of equity funding*" (GSI Position Paper, [4]; see also GSI Position Paper, [5(3)] and [10(2)]).

23 The Joint Administrators do not consider that the SCG or GSI have identified what the "*cost of shareholder funding*" or the "*cost of equity funding*" is and will invite them to respond to a request for further information in respect of their respective positions.

24 Since Wentworth is not currently advancing the argument that there is no "*cost*" of equity funding in the relevant sense, the Joint Administrators intend to develop that argument, in order to ensure that the Court has the opportunity to consider all sensibly arguable alternative answers to Issue 11 with the benefit of full adversarial argument.

25 Whilst the Joint Administrators' detailed arguments on this point will be set out in the Joint Administrators' skeleton argument in due course, the Joint Administrators intend to draw the Court's attention to the following specific arguments, which relate to Issues 11(2) and 11(3):

(1) Although in some contexts the concept of "*funding*" an enterprise may be capable of extending to the concept of raising finance by issuing equity, the word "*funding*" in the relevant clause of the Master Agreement must be construed in its own particular context, including the wording of the rest of the clause.

(2) The type of funding with which the relevant clause is concerned is funding which carries a "*cost*". As a matter of ordinary language, a "*cost*" is an amount which has to be paid, now or in the future, in consideration for the provision of goods or services, for example, lending. In the context of the clause, therefore, the type of funding with which the clause is concerned is funding which gives rise to an obligation to repay the amount borrowed together with interest. An interest-bearing debt is a type of funding which bears a "*cost*".

(3) Further, contrary to GSI's arguments (GSI Position Paper, [5(3)], [9]), there is no connection between: (a) the "*cost ... if it were to fund or of funding the relevant amount*"; and (b) the capital adequacy requirements applicable to regulated financial institutions. The fact that regulated financial institutions are required to maintain a certain amount of fully paid-up share capital and distributable reserves in comparison with their risk-weighted assets has no bearing on the cost to them if they were to fund or of funding the relevant amount, which is a cash-flow issue rather than a capital requirement. The fact that the Master Agreement is used frequently by regulated financial institutions has no bearing on the analysis: many of the parties which use the Master Agreement are not regulated financial institutions. The fact that a regulated financial institution may be required to make adjustments to its regulatory capital position because of the manner in which it accounts for a payment obligation owed to it does not mean that the economic consequences of adjusting the regulatory capital position are to be considered a "*cost ... if it were to fund or of funding the relevant amount*". There is no reason to construe the terms of the Master Agreement by

reference to the regulatory requirements applicable to a particular class of counterparty.

(4) In the case of a relevant payee which "[has] *no access to borrowing*" (to use the example in the letter from Kirkland & Ellis International LLP dated 16 June 2015 at [2]), the relevant payee cannot fund the relevant amount by borrowing it. Accordingly there could be no "*cost ... if it were to fund or of funding the relevant amount*" and the Default Rate for that counterparty would simply be 1% per annum.

(5) Further, contrary to Wentworth's contention (Wentworth Revised Position Paper, [1], [6]), the "*cost*" is not necessarily the lowest possible cost. In accordance with the agreed common position on Issue 14, there is a margin of appreciation available to the relevant payee, who may rationally and in good faith certify a cost which falls within the range of available reasonable positions. In particular, if the lowest possible cost is a cost of borrowing on onerous terms (e.g. with leverage covenants or other covenants or terms which may be unacceptable to the payee), it may be reasonable for the payee to select a higher cost of borrowing on more commercially acceptable terms. However, a payee will not be acting rationally and in good faith if it certifies a higher cost of borrowing than the lowest cost that is, in fact, available to it on reasonable, commercially acceptable terms.

26 The Joint Administrators do not at present advance any position in relation to Issue 11(4). The SCG contends that the Default Rate definition can include the actual or asserted cost to the relevant payee to fund or of funding a claim against LBIE (SCG Revised Position Paper [11(5)(c)]). Wentworth disagrees. It contends that the expression is limited to the cost of funding the relevant amount and is not concerned with the cost to the relevant payee of funding an asset or assets (Wentworth Revised Position Paper [4]). The Joint Administrators are satisfied that there are no further arguable positions which are not presently being pursued by the Respondents.

ISSUE 12

If and to the extent that the "cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund ... the relevant amount" includes a cost of borrowing:

(1) Should such borrowing be assumed to have recourse solely to the relevant payee's claim against LBIE or to the rest of the relevant payee's unencumbered assets?

(2) If the latter, should the cost of funding include the incremental cost to the relevant payee of incurring additional debt against its existing asset base or should it include the weighted average cost on all its borrowings?

(3) Should such cost include any impact on the cost of the relevant payee's equity capital attributable to such borrowing?

(4) Is the cost to be calculated based on obtaining:

(i) Overnight funding;

(ii) Term funding to match the duration of the claim to be funded; or

(iii) Funding of some other duration?

27 As to Issue 12(1):

(1) The SCG appears to say that when determining the hypothetical cost of funding the relevant amount, all relevant funding (including borrowing) should be assumed to have recourse to the relevant payee's unencumbered assets generally (SCG Revised Position Paper, [12(2)]). However, the SCG has also served evidence apparently advancing a position, described as its first basis of calculation, that the cost can be calculated solely by reference to the relevant payee's claim against LBIE (Exhibit PMM1 to the Third Witness Statement of Patrick McKee ("**PMM1**"), [11]-[12]).

(2) Wentworth asserts that the envisaged borrowing should be assumed to have recourse to the whole of the relevant payee's unencumbered assets and not solely to its claim against LBIE (Wentworth Revised Position Paper, [5]). However Wentworth has not yet explained how it intends to develop this argument.

(3) Similarly, whilst GSI has said that funding raised by a relevant payee "*should not be assumed to have recourse solely to the relevant payee's claim*" (GSI Position Paper, [12(1)]), GSI has not explained how it intends to develop this argument.

(4) On the assumptions that the SCG continues to rely on the position outlined as the first basis of calculation in PMM1 and that Wentworth and GSI develop their arguments fully in due course, the Joint Administrators will be content to raise no additional arguments on Issue 12(1) and will instead leave the Respondents to advance the relevant points.

(5) However, if Wentworth and GSI do not adequately develop the argument which they have indicated they will make, the Joint Administrators may wish to do so. In that event, whilst the Joint Administrators' detailed arguments would be advanced in their skeleton argument in due course, the Joint Administrators would wish to draw the Court's attention to the following specific arguments:

   (i) There is nothing in the definition of "*Default Rate*" to indicate that the relevant payee could or should rectify the absence of cash by way of limited recourse borrowing, i.e. where the lender's recourse is limited to the relevant payee's claim against LBIE.

   (ii) Such a construction would be wholly uncommercial and would not reflect the way in which any rational counterparty would in practice raise money to cover a shortfall in its cash position.

   (iii) In the present case, for example, in the weeks and months following LBIE's default, there was no expectation in the market that LBIE's debts would ultimately be paid in full.[4] No rational lender would have agreed to lend the relevant amount on terms which limited the

[4] See paragraphs 14 to 19 of the Statement of Agreed Facts on Issues 34 and 35 (Tranche B).

lender's recourse to such sums (if any) as might ultimately be recovered from LBIE.

(iv) Rather, the premise of the "*Default Rate*" definition is that, the other party having failed to pay what is due, the non-payment has given rise to a cash shortfall, which must therefore be funded by the relevant payee (either from borrowing or by the reduction of excess cash on deposit). For the purpose of the clause, it is to be assumed that the relevant payee covers the cash shortfall in an ordinary commercial way.

28 As to Issue 12(2):

(1) The SCG has served evidence apparently advancing a position, described as its second basis of calculation, that the cost of funding may be calculated by reference to the weighted average cost of the relevant payee's capital, being the cost of funding a portfolio of all the payee's existing investments, including its borrowing (PMM1, [19]).

(2) Wentworth asserts that the relevant payee is entitled to rely on the weighted average cost on all its borrowings, where this measure is a reasonable proxy for the cost if it were to fund the relevant amount (subject to the over-arching requirement that this must be the lowest amount which the relevant payee would be required to pay) (Wentworth Revised Position Paper, [6]).

(3) GSI's position is that any impact of funding the relevant amount on the relevant payee's overall weighted average cost of funding may be taken into account in certifying the payee's overall cost of funding (GSI Position Paper, [12(2)]).

(4) In these circumstances it seems that there is no party which is currently contending that the weighted average cost of borrowing is always or necessarily irrelevant.

(5) Accordingly, to ensure that the Court has the benefit of argument on the full range of arguable positions, the Joint Administrators intend to develop the argument that the weighted average cost of a counterparty's existing funding cannot be taken into account.

(6) Whilst the Joint Administrators' arguments will be developed in the Joint Administrators' skeleton argument in due course, the following arguments appear to be available:

(i) The relevant cost is the "*cost ... if it were to fund or of funding the relevant amount*". The "*relevant amount*" is the amount which has not been paid by the other party. That is the amount which has to be funded.

(ii) The relevant "*cost*" is therefore the cost of funding that precise amount by raising that precise amount as an incremental sum of money. It is not the average cost of the relevant payee's existing borrowings, which were incurred prior to (and with no connection to) the other party's payment default.

(iii) Put another way, the relevant "*cost*" is the cost of funding the additional amount required as a result of non-payment; it is not the cost of funding the existing debt of the relevant payee, which is irrelevant.

29 As to Issue 12(3):

(1) As indicated above, no party is currently arguing that the cost cannot include any impact on the cost of the relevant payee's equity capital attributable to additional borrowing. In particular, as explained at paragraph 22(2) above, Wentworth appears to accept that the so-called "*cost*" of equity may be taken into account in certain (albeit extreme) cases.

(2) Therefore, consistently with the Joint Administrators' role generally and the position which they are developing on Issue 11, as set out above, the Joint Administrators will contend that the "*cost*" for these purposes cannot in any circumstances include, or be calculated by reference to, the relevant payee's equity capital.

30 As to Issue 12(4):

(1) In summary of the Respondents' positions:

(i) The SCG contends that a relevant payee may calculate the cost of funding on the basis of overnight funding, term funding to match the duration of the claim to be funded or funding of some other duration, provided that such basis is certified in good faith and rationally. Without limitation, the SCG says that this may be based on an assumption of long duration funding, in circumstances where the relevant payee expected or would have expected (on the date that the relevant amount became due) that the defaulting party would take a number of years to repay the relevant amount (SCG Revised Position Paper, [12(4)]).

(ii) Wentworth also adopts the approach that the cost of funding may be calculated on any of the bases set out in Issue 12(4), provided that it is a rational and good faith estimate of the lowest available cost to the counterparty (Wentworth Revised Position Paper, [8]).

(iii) GSI says that there is "no basis in the ISDA Master Agreement for limiting the basis on which the cost is calculated" (GSI Position Paper, [12(4)]).

(2) No party is therefore arguing that it would be illegitimate, in the context of the LBIE administration (and specifically the lack of market expectation of

repayment in full following LBIE's default (see paragraph 27(5)(iii) above)), for the relevant payee, once paid, to certify its cost of funding with reference to term funding matching the actual duration it went unpaid. So that the Court has the benefit of the full range of sensible arguments on this issue, the Joint Administrators therefore intend to develop an argument that, on the facts of this case, the cost of borrowing cannot be based on obtaining term funding to match the duration of the claim to be funded.

(3) Whilst the Joint Administrators' arguments will be developed in their skeleton argument, the following arguments appear to be available:

(i) The terms on which the relevant payee would have raised funding to cover the shortfall are to be determined by reference to the position as it stood when the need to cover the shortfall arose.

(ii) That is the moment in time when a relevant payee who needed to cover the shortfall would have had to do so. That is also the moment in time envisaged by the forward-looking words "if it were to fund". The definition of "Default Rate" does not say "if it were to have funded".

(iii) In the context of the LBIE administration, no relevant payee could conceivably have known at the outset of LBIE's administration: (a) that LBIE's unsecured debts would ultimately be paid in full; and/or (b) how long it would take for that to occur.

(iv) A payee which did not in fact raise funding can be in no better position as to the knowledge used to calculate its cost "if it were to fund" the shortfall.

(v) Further or alternatively, since no relevant payee could have known how long it would take for LBIE to make payment in full, the actual length of that period (as opposed to a good faith estimate of it) is not

something which could properly be taken into account by any counterparty performing a rational certification for these purposes.

(4) As regards the two other possibilities identified in Issue 12(4), the Joint Administrators do not intend to argue that the cost of overnight funding or funding of some other duration would be inappropriate for these purposes, as the Joint Administrators do not consider there to be any properly arguable basis for any such contention.

ISSUE 13

Whether the "cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount" should be calculated:

(i) by reference to the relevant payee's circumstances on a particular date; or

(ii) on a fluctuating basis taking account of any changes in the relevant circumstances (and if so, whether the benefit of hindsight applies when taking into account such changes),

in each case, whether or not taking into account relevant market conditions.

31 As matters stand, the SCG and Wentworth are adopting opposite extremes:

(1) The SCG is contending that the relevant payee may certify the Default Rate as at any time, provided its certification is made in good faith and rationally; and that, where the relevant payee calculates its costs based on an assumption of long duration funding, in circumstances where the relevant payee expected or would have expected the defaulting party would take a number of years to repay the relevant amount, it may do so "*with reference to circumstances and market conditions on the date the relevant amount became due*" (SCG Revised Position Paper, [13]). The implication of the SCG's position appears to be that the relevant payee can select a historic date which gives rise to a high cost, even if circumstances or market conditions thereafter were different. For instance, if interest rates were high at the time when the debt became due, but then fell and remained low for 5 years, it is apparently the SCG's position that, in the event of the payee certifying the cost at the end of the 5 year period, the payee could calculate

the cost for the whole of that period by reference to the high rates which happened to exist for a short time at the beginning of that period, notwithstanding that those rates were inapplicable for the remainder of the period. (This is what Wentworth characterises as the SCG's calculation "*based on a snapshot of funding for the first year*" (Wentworth Revised Position Paper, [20])).

(2) By contrast, Wentworth is arguing that the certification must take place "*at the end of the period*" and calculated from time to time on a fluctuating basis (Wentworth Revised Position Paper, [17], [18], [19]). It is assumed that Wentworth considers the end of the period to be the date of payment in full.

32 It is not entirely clear whether (or to what extent) GSI intends to align itself with the position adopted by either the SCG or Wentworth (GSI Position Paper, [13]-[16]).

33 To ensure that the Court has the benefit of argument on the full range of arguable positions, the Joint Administrators intend to develop a "middle ground" position by drawing to the Court's attention the arguments that:

(1) Contrary to Wentworth's position, the relevant payee is not constrained to certify the cost at the end of the relevant period, i.e. on the date of payment in full. Rather, the relevant payee may certify the cost at another time or times.

(2) Where the relevant payee certifies its cost of funding on the "if it were to fund" basis, based on an assumption of a particular method of funding, that assumption must be based on facts and circumstances existing as at the date the relevant amount became due. When calculating for the purposes of the certification the costs that would have been incurred based on that assumed method of funding, the relevant payee must take account of the costs that would in fact have been incurred based on the actual cost of funding

available to it over the period covered by the certification, thereby reflecting variation in costs where such variation occurred.

(3) Further or alternatively, a retrospective calculation designed to create the highest possible cost is, by definition, irrational, arbitrary and capricious.

William Trower QC

Daniel Bayfield

Stephen Robins

South Square

Gray's Inn

London WC1R 5HP

20 August 2015