

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

No. 7942 of 2008

Before the Honourable Mr Justice David Richards

9 March 2015



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.À.R.L
(3) HUTCHINSON INVESTORS, LLC
(4) WENTWORTH SONS SUB-DEBT S.À.R.L
(5) YORK GLOBAL FINANCE BDH, LLC

Respondents

ORDER

UPON THE APPLICATION of Anthony Victor Lomas, Steven Anthony Pearson, Paul David Copley, Russell Downs and Julian Guy Parr of PricewaterhouseCoopers LLP, 7 More London Riverside, London SE1 2RT, the administrators of Lehman

Brothers International (Europe) (“LBIE”) (the “Administrators”), dated 12 June 2014

AND UPON READING the written submissions filed on behalf of the Administrators, the First to Third Respondents (the “Senior Creditor Group”), the Fourth Respondent (“Wentworth”) and the Fifth Respondent (“York”)

AND UPON HEARING Mr William Trower QC, Mr Robin Dicker QC, Mr Antony Zacaroli QC and Mr Tom Smith QC (Leading Counsel respectively for the Administrators, the Senior Creditor Group, Wentworth and York)

AND UPON READING the evidence

IT IS HEREBY ORDERED AND DIRECTED that:

Amendments to the Application Notice

1. The Administrators have permission to amend the Application Notice in accordance with the amended Application Notice set out in Schedule A hereto.

PART A: Issues 31 to 33

2. Issues 31 to 33 be adjourned generally with liberty to restore.

PART B: Issues 9, 34 to 36 and 38

Issue 36

3. Issue 36B be adjourned generally with liberty to restore.
4. The SCG, by 4.00pm on 6 April 2015:
 - (1) Do file and serve on the other parties a position paper articulating the grounds on which they say (in the context of Issue 36A) that the

releases (if they are held to be effective in the sense relevant to Issues 34 and/or 35) should not be enforced;

- (2) Do file and serve a statement particularising the relevant facts of general application to creditors upon which they intend to rely in their argument on Issue 36A.

5. Wentworth, by 4.00pm on 15 April 2015:

- (1) Do file and serve on the other parties a reply position paper in relation to Issue 36A;
- (2) Do file and serve on the other parties a statement setting out comments on the facts upon which the SCG intend to rely in respect of Issue 36A and particularising the facts which Wentworth accepts and any additional facts of general application to creditors upon which it intends to rely in respect of Issue 36A.

6. The Administrators, by 4.00pm on 24 April 2015, do, if so advised, file and serve on the other parties a position paper on Issue 36A.

Issues 34, 35 and 36

7. The Administrators, by 4.00pm on 24 April 2015, do file a document identifying:

- (1) Those facts, agreed between the parties, of general application to creditors, which are contended by one or more of the parties to be admissible and relevant to Issues 34 and 35 (indicating, if necessary, those facts in respect of which there is a dispute as to admissibility or relevance); and
- (2) Those facts, agreed between the parties, of general application to creditors, which are contended by one or more of the parties to be

admissible and relevant to Issue 36A (indicating, if necessary, those facts in respect of which there is a dispute as to admissibility or relevance).

8. Paragraph 21 of the Order of David Richards J dated 21 November 2014 be amended so that, so far as Part B is concerned, it reads as follows:

- (1) By 4.00pm on Friday 1 May 2015 (as regards Part B), the Respondents do lodge at Court, and serve on the Administrators and each other, their skeleton arguments;
- (2) By 4.00pm on Friday 8 May 2015 (as regards Part B), the Administrators do lodge at Court, and serve on the Respondents their skeleton argument;
- (3) By 4.00pm on Wednesday 13 May 2015 (as regards Part B), the Respondents shall have liberty to (if so advised) lodge at Court and serve on the other parties any supplemental skeleton arguments. The contents of any such supplemental skeleton arguments shall be limited to arguments in reply to the arguments set out in the skeleton arguments served by the other parties; and
- (4) The parties do use their best endeavours to agree and file, by 4.00pm on the Thursday before the commencement of the trial of Part B, an agreed bundle of authorities and a reading list.

The position of York

9. York is to be served (at the same time as the other parties are to be served) with each of the statements, position papers and skeleton arguments referred to at paragraphs 4 to 8 above.

10. For the avoidance of doubt, York is not required to file and serve any position papers, statements or skeleton arguments in relation to the Part B or Part C trials of the Application.

PART C: Issues 10 to 27

Expert evidence of foreign law

New York Law

11. The SCG and Wentworth and (if so advised) the Administrators each be permitted to rely on expert evidence of New York law, appointing one expert each, addressing the questions set out in Schedule B hereto.
12. Wentworth shall file and serve a report of its expert in New York law by 4.00pm on 26 June 2015.
13. If and to the extent the SCG considers necessary, the SCG shall file and serve a report of its expert in New York law by 4.00pm on 24 July 2015.
14. If and to the extent Wentworth considers necessary, Wentworth shall file and serve a report of its expert in New York law in reply by 4.00pm on 14 August 2015.
15. The Administrators shall be at liberty (if so advised) to file and serve a report of an expert of New York law by 4.00pm on 28 August 2015.
16. To the extent required, the New York law experts shall by 4 September 2015 hold a discussion for the purpose of: (a) identifying the issues, if any, between them; and (b) where possible, reaching agreement on those issues.
17. To the extent required, the New York law experts shall by 4.00pm on 18 September 2015 prepare and file a Statement for the Court showing: (a) those

issues on which they are agreed; and (b) those issues on which they disagree and a summary of their reasons for disagreeing.

18. To the extent required, the parties shall be at liberty to file short supplemental expert reports of New York law by 4.00pm on 25 September 2015.

German Law

19. The SCG and Wentworth and (if so advised) the Administrators each be permitted to rely on expert evidence of German law, appointing one expert each, addressing the questions set out in Schedule C hereto.
20. The SCG and Wentworth shall file and serve reports of their experts in German law by 4.00pm on 10 July 2015.
21. The SCG and Wentworth shall be at liberty to file and serve reports of their experts in German law in reply by 4.00pm on 31 July 2015.
22. The Administrators shall be at liberty (if so advised) to file and serve a report of an expert in German law by 4.00pm on 21 August 2015.
23. The German law experts shall by 21 September 2015 hold a discussion for the purpose of: (a) identifying the issues, if any, between them; and (b) where possible, reaching agreement on those issues.
24. The German law experts shall by 12 October 2015 prepare and file a Statement for the Court showing: (a) those issues on which they are agreed; and (b) those issues on which they disagree and a summary of their reasons for disagreeing.
25. The parties shall be at liberty to file short supplemental expert reports of German law by 19 October 2015.

French law

26. The SCG and Wentworth and (if so advised) the Administrators each be permitted to rely on expert evidence of French law, appointing one expert each, addressing the questions set out in Schedule D hereto.
27. The SCG and Wentworth shall file and serve reports of their experts in French law by 4.00pm on 26 June 2015.
28. The SCG and Wentworth shall be at liberty to file and serve reports of their experts in French law in reply by 4.00pm on 17 July 2015.
29. The Administrators shall be at liberty (if so advised) to file and serve a report of an expert in French law by 4.00pm on 31 July 2015.
30. The French law experts shall by 14 August 2015 hold a discussion for the purpose of: (a) identifying the issues, if any, between them; and (b) where possible, reaching agreement on those issues.
31. The French law experts shall by 11 September 2015 prepare and file a Statement for the Court showing: (a) those issues on which they are agreed; and (b) those issues on which they disagree and a summary of their reasons for disagreeing.
32. The parties shall be at liberty to file short supplemental expert reports of French law by 18 September 2015.

Expert evidence in relation to “cost of funding”

33. By 4.00pm on 31 March 2015, Wentworth’s solicitors shall write to the solicitors acting for the other parties stating Wentworth’s position in respect of the contents of the witness statement of Patrick Michael McKee (“Mr McKee”) dated 15 January 2015 and in particular whether (and if so to what

extent) Wentworth accepts that the matters identified by Mr McKee are properly capable of being described as “costs”.

Trial of Part C and pre-trial arrangements

34. The parties shall apply to the clerk of the list to fix a date for trial of Part C, before David Richards J, on the first available date after 29 October 2015.
35. A Pre-Trial Review (“**PTR**”) be listed in respect of the trial of Part C, with a time estimate of half a day on a date falling not less than 4 weeks prior to the commencement of that trial, to be fixed between counsel’s clerks and the Listing Office with a time estimate of half a day.
36. In respect of the trial of Part C, the parties shall agree the contents of the trial bundles no later than 10 business days prior to the PTR and Linklaters LLP shall produce trial bundles in accordance with the agreed contents to be lodged at Court and sent to all other parties to the Application no later than 5 business days prior to the PTR, so as to be available for use at the PTR.
37. In respect of the trial of Part C:
 - (1) By 4.00pm on 16 October 2015, the SCG and Wentworth shall lodge at Court, and serve on the Administrators and each other, their skeleton arguments;
 - (2) By 4.00pm on 23 October 2015, the Administrators shall lodge at Court, and serve on the Respondents their skeleton argument;
 - (3) By 4.00pm on 30 October 2015, the SCG and Wentworth shall have liberty (if so advised) to lodge at Court and serve on the other parties any supplemental skeleton arguments. The contents of any such supplemental skeleton arguments shall be limited to arguments in reply to the arguments set out in the skeleton arguments served by the other parties; and

- (4) The parties shall use their best endeavours to agree and file, by 4.00pm on 4 November 2015 before the commencement of the trial, an agreed bundle of authorities and a reading list.

Miscellaneous

38. The Order of David Richards J dated 21 November 2014 shall remain in full force and effect save insofar as it has been varied hereby, and save for paragraph 6 thereof the provisions of which are hereby discharged.
39. Liberty to apply.

Service of the order

The Court has provided a sealed copy of this order to the serving party:

Linklaters LLP,
One Silk Street,
London, EC2Y 8HQ

SCHEDULE A
AMENDED APPLICATION NOTICE

The following issues in the Application Notice shall be amended as follows:

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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 cost 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 any 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.

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

(iii) funding for some other duration?

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34 Whether (as a matter of construction) a creditor's Currency Conversion Claim and/or any other non-provable claim has been released in circumstances in which the creditor entered into either:

- (i) a Foreign Currency CDD incorporating a Release Clause;
- (ii) a Sterling CDD incorporating a Release Clause; or
- (iii) the CRA.

35 Whether (as a matter of construction) a creditor's claim to Statutory Interest has been released in whole or in part in circumstances in which the creditor entered into either:

- (i) a CDD incorporating a Release Clause; or

(ii) the CRA.

- 36A If (as a matter of construction) a CDD or the CRA has the effect of releasing a Currency Conversion Claim, Statutory Interest claim or other non-provable claims, whether, by reason of, or by analogy with, the rule in *Ex parte James* (1874) LR 9 Ch App 609 and/or because to enforce such release(s) would unfairly harm creditors who have entered into a CDD or the CRA within the meaning of paragraph 74 of Schedule B1 to the Insolvency Act 1986, in all the circumstances, the Administrators should be directed not to enforce, or to cause LBIE to enforce, such release(s).
- 36B If (as a matter of construction) a CDD or the CRA has the effect of releasing a Currency Conversation Claim, Statutory Interest claim or other non-provable claim, whether or not there are any bases (other than those of general application to all CDDs or the CRA considered by the Court in the context of Issue 36A) for the Court to determine that the releases should not in the circumstances be enforced or are not in the circumstances effective (such as rectification, estoppel and/or relief from the consequences of a common or unilateral mistake).

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SCHEDULE B
QUESTIONS FOR NEW YORK LAW EXPERTS

Issue 19

1. What principles of New York law are relevant when construing:
 - (1) The following expressions, when used in the context of the term “Default Rate” in the ISDA Master Agreement:
 - i. “*relevant payee*”; and
 - ii. “*cost (without proof or evidence of actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*”? and
 - (2) Sections 6(d)(ii) and 7(b) of the 1992 ISDA Master Agreement?
2. In construing a commercial document that contains standardised terms such as the ISDA Master Agreement, in what circumstances, if any, would a New York court consider market practice or understanding (and, if so, how, would “market” be defined) concerning the transaction so documented, and what significance would a New York court ascribe to the market practice or understanding?
3. What principles of New York law would a New York court apply to determine whether or not a practice is a market practice or an understanding is a market understanding?
4. What principles of New York law are relevant when considering:
 - (1) Whether a relevant payee’s certification of its cost of funding for the purposes of applying the “Default Rule” is conclusive;

- (2) If not, under what circumstances and on what bases can the Defaulting Party challenge the relevant payee's certification of its cost of funding;
- (3) How the cost of funding should be established in the event that the certifying party's certification is successfully challenged; and
- (4) In the event the relevant payee is not capable of providing or does not provide certification, who is entitled to provide certification of the cost of funding?

SCHEDULE C
QUESTIONS FOR GERMAN LAW EXPERTS

Issue 20

1. What rules or principles of construction govern and apply, as a matter of German law, to the interpretation of commercial contracts such as section 3(4) of the German Master Agreement?
2. What basis is there, as a matter of German law and specifically pursuant to the German Master Agreement, to award damages in respect of the late payment of debt and what form or forms can the award of damages take? In particular:
 - (1) What, in relation to any such basis or bases, has to be established as a matter of law and fact for such an award to be made?
 - (2) How would such an award be expressed? In particular, is an award capable of expression only as an amount, or is it (and if so, in what circumstances is it) capable of expression as a rate? If both expressions would be possible, would these be mutually exclusive?
 - (3) In circumstances in which the award is capable of expression as a rate, on what principal sum would such an interest rate accrue, how would the applicable rate be determined?
3. As a matter of German law and specifically pursuant to section 3(4) of the German Master Agreement, in your opinion:
 - (1) Is the relevant entity entitled to the fixed rate of interest (as a minimum) pursuant to the first sentence of that section regardless of any loss?

- (2) If the relevant party's loss as a result of any delay in payment is greater than the amount of the interest at such fixed rate, is the relevant entity entitled to recover: (i) the entire loss, or (ii) the loss exceeding such fixed rate by way of a claim for (further) damages in respect of late payment?

Issue 21

4. If LBIE's counterparty has transferred its claim against LBIE under the German Master Agreement (the "relevant claim") to a transferee, in what circumstances, if any, can the transferee of that relevant claim assert any entitlement to a claim for default interest under the first sentence of Section 3(4) or a Damages Interest Claim as a matter of German law?
5. If such a transferee can assert either claim as a matter of German law, is the claim for damages (only) that of LBIE's original counterparty, or is the transferee entitled to assert a claim for damages in place of or in addition to that of LBIE's original counterparty? If such a transferee is entitled to assert either claim for damages either in place of or in addition to that of LBIE original counterparty, what has to be established as a matter of fact and law for such a claim to be sustained as a matter of German law? What should the calculation of damages in respect of the relevant claim measure: the damages of LBIE's original counterparty (transferor), the damages of the transferee, or (for example on a *pro rata temporis* basis) the damages of both the transferor and the transferee? In particular, under what circumstances are assigned claims time barred (*verjährt*) (including taking into account any extension, suspension or interruption of the statutory limitation period as a matter of German law on the two assumptions that (a) English limitation periods are stayed as a matter of English law by reason of the English administration and (b) English limitation periods are not stayed as a matter of English law by reason of the English administration) and/or precluded for any other reasons, for example because an assignee claiming default interest and/or (further) damages has been aware of the obligor's default prior to the assignment?

6. Where does the burden of proof lie in relation to such issues, as a matter of German law?

SCHEDULE D

QUESTIONS FOR FRENCH LAW EXPERTS

Issue 23

1. What rules or principles of construction govern and apply to the interpretation of commercial contracts such as the FBF, AFB, AFTB and AFTI Master Agreements?
2. What modes of transfer of a contract or a claim exist under French law?
3. What is the effect of a *cession de créance* under French law? What is the position of a transferee of rights pursuant to a *cession de créance* as against the original non-transferor counterparty?
4. Can the transferee of a claim transferred pursuant to a *cession de créance* recover more from the original non-transferor counterparty than the transferor could have recovered (for instance, on the basis of the *nemo plus juris* principle)?
5. Is there a principle of French law that an assignee of a claim shall also benefit from the “ancillary rights” (*accessoires*) attached to the claim? If so, what is the scope of the principle and what “ancillary rights” can the assignee of a claim claim?

Issue 24

6. What rules or principles of construction govern and apply to the interpretation of the interest rate provisions in commercial contracts such as the FBF, ABF, AFTB and AFTI Master Agreements?

7. To what extent, if at all, when the parties have not specified a rate in the schedule negotiated between themselves in respect of a French Master Agreement or have not modified the rates already provided in the standard provisions of a French Master Agreement (such as in the financial parameters section), would the French court, in construing the clauses referred to above, have regards to a rate published in the inter-bank market in contractual currency chosen by the parties, either EONIA (in the case of a Euro selection by the parties) or to a rate charged by the European Central Bank for supplying liquidity (in the case of a Euro selection by the parties) or a rate equivalent to such rate (in the case of a non-Euro selection by the parties) or a rate equivalent to Eonia (in the case of a non-Euro selection by the parties) or other rates such as a refinancing rate of a party/payee?

Issue 26

8. What principles of French law and applicable standards, if any, constrain the right or power of a party to state or certify any of the rates mentioned in Issue 26?