No. 7942 of 2008

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE)
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 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

ADMINISTRATORS' WRITTEN SUBMISSIONS
ON SUPPLEMENTAL ISSUE 1A

INTRODUCTION

1. These written submissions have been lodged on behalf of the Applicants (the "**Administrators**") in respect of Supplemental Issue 1A.

2. Supplemental Issue 1A is:

> "*Whether, and in what circumstances, the words 'the rate applicable to the debt apart from the administration' in Rule 2.88(9) of the Rules include, in the case of a provable debt that is a close-out sum under a contract, a contractual rate of interest that began to accrue only after the close-out sum became due and payable due to action taken by the creditor after the Date of Administration*".

3. The "*Rules*" mentioned in Supplemental Issue 1A are the Insolvency Rules 1986. The "*Date of Administration*" mentioned in Supplemental Issue 1A is the date of the commencement of LBIE's administration. These two terms will be adopted herein.

4. For the reasons set out below, the Administrators submit that Supplemental Issue 1A should be answered in the affirmative. The words "*the rate applicable to the debt apart from the administration*" in Rule 2.88(9) will include, in the case of a provable debt that is a close-out sum under a contract, a contractual rate of interest that arises from a pre-administration contract but that began to accrue only after the close-out sum became due and payable due to action taken by the creditor after the Date of Administration.

6. In summary, the Administrators submit that a right to interest in accordance with the terms of a pre-administration contract will ***always*** be a "*rate applicable to the debt apart from the administration*" in Rule 2.88(9) and that this conclusion is consistent with the reasoning of David Richards J in his judgment in Tranche A of the Waterfall II Application (the "**Tranche A Judgment**"). In these written submissions, the Administrators proceed on the assumption that the reasoning of David Richards J in the Tranche A Judgment is correct in all material respects.

SUPPLEMENTAL ISSUE 1A

7. Before considering York's arguments, the Administrators draw the Court's attention to seven key points implicit within Supplemental Issue 1A itself, namely:

   (1) Supplemental Issue 1A is concerned with a close-out sum that is a provable debt. It refers expressly to a "*provable debt that is a close-out sum*".

(2) The close-out sum is a provable debt within Rule 13.12(1)(b), namely "*any debt or liability to which* [LBIE] *may become subject after* [the Date of Administration] *by reason of any obligation incurred before that date*". The wording of Supplemental Issue 1A makes clear that the close-out sum " *became due and payable … after the Date of Administration*"; in other words, the close-out sum is a debt to which LBIE became subject after the Date of Administration.

(3) It follows that the contract under which the close-out sum became due and payable is necessarily a pre-administration contract, i.e. a contract entered into by LBIE before the Date of Administration, which was binding on LBIE as at that date. Indeed, if the contract giving rise to the close-out sum did not pre-date the administration, the close-out sum payable under it would not be provable within Rule 13.12 at all and the question of statutory interest (at any rate) being payable on the close-out sum under Rule 2.88 would not arise.

(4) The terms of that pre-administration contract contained an obligation on LBIE to pay interest in certain circumstances. This is reflected in the wording of Supplemental Issue 1A, which refers expressly to a "*contractual rate*".

(5) Although the close-out sum itself is a provable debt under Rule 13.12(1)(b), post-administration contractual interest is not provable, as a result of Rule 2.88(1), which provides: "*Where a debt proved in the administration bears interest, that interest is provable as part of the debt except in so far as it is payable in respect of any period after* [the Date of Administration]". Post-administration interest is payable only in the event of a surplus, pursuant to Rule 2.88(7).

(6) It follows from the third and fourth points identified above that Supplemental Issue 1A is concerned with contractual rights which existed as at the Date of Administration. Both the right to the close-out sum and the right to interest on that close-out sum were rights under a pre-administration contract, which existed (and were binding on LBIE) as at the Date of Administration.

(7) Supplemental Issue 1A is concerned with circumstances where the precondition to the running of contractual interest (as specified in the contract) is first satisfied

after the Date of Administration. The precondition posited by Supplemental Issue 1A involves action by the creditor but it could equally involve action by a third party or an event which occurs automatically, such as automatic termination following an event of default or the effluxion of a specified period of time.

8. Whilst these seven points are all important, it is the second and the sixth which are most relevant for the purposes of answering Supplemental Issue 1A, as explained below.

THE DECISION OF DAVID RICHARDS J

9. In the Administrators' submission, the reasoning of David Richards J in the Tranche A Judgment supports the Administrators' stance on Supplemental Issue 1A in the following two key respects:

   (1) First, the reasoning of David Richards J in respect of Issue 4 of Tranche A provides no support for York's conclusion and is consistent with the Administrators' position on Supplemental Issue 1A.

   (2) Secondly, the reasoning and conclusions of David Richards J in respect of Issues 6 to 8 of Tranche A are difficult to reconcile with York's position on Supplemental Issue 1A.

10. The Administrators' submissions on these two points are set out below.

Issue 4 of Tranche A

11. As explained below, the reasoning of David Richards J in respect of Issue 4 of Tranche A supports the drawing of a clear distinction between:

   (1) A rate of interest which becomes applicable to the debt ***in accordance with the rights of the creditor which existed as at the Date of Administration*** (in which case the rate ***is*** capable of being a "*rate applicable to the debt apart from the administration*" for the purposes of Rule 2.88(9)); and

(2) A rate of interest which becomes applicable to a debt ***as a result of new rights which were first acquired by the creditor after the Date of Administration*** (in which case the rate is ***not*** capable of being a "*rate applicable to the debt apart from the administration*" for the purposes of Rule 2.88(9)).

12. In the Administrators' submission, it is clear that the right to interest under a foreign judgment obtained after the Date of Administration (the subject matter of Issue 4) falls within the second category, whereas a right of interest under a contract entered into before the Date of Administration (the subject matter of Supplemental Issue 1A) falls within the first category. In cases involving other rights to interest it will be necessary to apply the dividing line explained above to identify whether the right in question is one that existed on the Date of Administration or a new one acquired thereafter.

<u>The decision of David Richards J in respect of Issue 4 of Tranche A</u>

13. The reasoning on which York relies in respect of Supplemental Issue 1A relates to Issue 4 (in para 4 of the Waterfall II application notice), which was as follows:

> "*Whether the words 'the rate applicable to the debt apart from the administration' in Rule 2.88(9) of the Rules are apt to include (and, if so, in what circumstances) a foreign judgment rate of interest or other statutory interest rate*".

14. In front of David Richards J, it was common ground between the parties that, where a creditor had obtained a foreign judgment before the Date of Administration, the foreign judgment rate would be "*the rate applicable to the debt*" for the purposes of Rule 2.88(9): see para 172 of the Tranche A Judgment.

15. However there was a dispute as to the correct analysis of the position:

(1) Where the creditor never actually obtained a foreign judgment at all; and

(2) Where the creditor did obtain a foreign judgment, but did not do so until after the Date of Administration.

The first possibility

16. As to the first of these possibilities (i.e. the case where the creditor did not in fact obtain a foreign judgment), the SCG and York submitted that the words "*the rate applicable to the debt apart from the administration*" were apt to include not only a rate which was in fact applicable to the debt but also a rate which would have become applicable to the debt if the creditor had obtained a foreign judgment for it (when the creditor did not actually do so): see para 173 of the Tranche A Judgment.

17. David Richards J rejected this argument, holding that "*the first proposition advanced by the SCG and York is not sustainable on the terms of rule 2.88(9). The words 'the rate applicable to the debt apart from the administration' cannot be read as including a hypothetical rate which would be applicable to a debt if the creditor took certain steps*": see para 177 of the Tranche A Judgment. In other words, if a rate does not in fact become applicable to the debt, it cannot be a "*rate applicable to the debt*" for the purposes of Rule 2.88(9). It will only ever be a rate which might have become applicable, but which, in the event, never in fact became so.

The second possibility

18. As to the second of these possibilities (i.e. the case where the creditor obtained a foreign judgment after the Date of Administration), the SCG and York submitted that, where a creditor obtained a foreign judgment in the course of the administration but after the Date of Administration, the rate of interest applicable under foreign law to that post-administration judgment could be a rate applicable to the debt for the purposes of Rule 2.88(9).

19. David Richards J held that a rate applicable under foreign law to a post-administration foreign judgment was not capable of being a rate applicable to the debt for the purposes of Rule 2.88(9). (As explained below, this is the conclusion which York seeks to apply to the very different factual circumstances contemplated by Supplemental Issue 1A.)

York's argument on Supplemental Issue 1A

20. York seeks to rely on David Richards J's conclusion on the second of the two possibilities identified above by contending that there is no distinction to be drawn between a rate of interest which became applicable by reason of a ***post-administration foreign judgment*** and a rate of interest which became applicable by reason of a ***pre-administration contract***. York contends that, in both cases, the rate is only contingently applicable as at the Date of Administration (York's written submissions on Supplemental Issue 1A, para 14) and that, on this basis, neither of these rates is capable of being a rate applicable to the debt apart from the administration within Rule 2.88(9).

21. The Administrators' submit that York's argument on Supplemental Issue 1A is wrong, for the reasons set out below.

The reasoning of David Richards J on the second possibility

22. In the Administrators' submission, the reasoning of David Richards J on the second possibility identified above does not support York's position. On the contrary, it supports the Administrators' position.

23. As David Richards J recorded in para 179 of the Tranche A Judgment, as to the second possibility proposed by the SCG and York, Wentworth submitted that "*the rate applicable to the debt apart from the administration*" refers to the rate applicable to the debt "***by reason of the rights of the creditor as at the commencement of the administration***" (emphasis added).

24. This is the submission that David Richards J accepted in para 181 of the Tranche A Judgment, holding: "*In my judgment, these grounds make a compelling case for the proposition that the rate applicable to the debt apart from the administration is to be determined* ***by reference to the rights of the creditor as at the commencement of the administration***" (emphasis added).

25. The key distinction in the conclusion of David Richards J is therefore between:

(1) A rate of interest which becomes applicable to the debt ***pursuant to the rights of the creditor which existed as at the Date of Administration***; and

(2) A rate of interest which becomes applicable to a debt ***pursuant to new rights which were first acquired by the creditor after the Date of Administration***.

26. This dividing line is crucial. The former is a "*rate applicable to the debt apart from the administration*" for the purposes of Rule 2.88(9). The latter is not.

27. A foreign judgment rate of interest payable on a new foreign judgment obtained after the Date of Administration (the issue with which Issue 4 of Tranche A was concerned) is plainly in the second of these two categories. It becomes payable as a result of new rights bestowed on the creditor after the Date of Administration by reason of the acquisition of the foreign judgment after the Date of Administration.

28. By contrast, a right to interest under a pre-administration contract is plainly within the first category: it is a right which (by definition) existed as at the Date of Administration as part of the pre-administration contract. Even if interest at that rate had not yet started to run, the right to such interest existed as part of the contract between the parties which was binding on them on the Date of Administration. To use the terminology of David Richards J, a right to interest under a pre-administration contract is necessarily governed by the "*rights of the creditor as at the commencement of the administration*". It follows that (for example) a right to interest at the Default Rate under an ISDA Master Agreement entered into before the Date of Administration will always be a rate of interest applicable to the debt apart from the administration for the purposes of Rule 2.88(9).

29. The critical question, therefore, is to identify whether the right to interest exists as at the Date of Administration or is created or awarded *de novo* after the Date of Administration. Where the right in question is governed by a foreign law, it will be necessary to analyse the position in accordance with the proper law of the right.

30. York seeks to suggest that, when referring to "*rights*" in paras 179 and 181 of the Tranche A Judgment, David Richards J was referring only to "*accrued rights*": see para 15 of York's written submissions on Supplemental Issue 1A. However this argument does not assist York: whilst it may fairly be said that a right under a post-administration judgment does not accrue unless and until the judgment is awarded, it is clear that rights under a contract accrued (in the sense of becoming binding on the parties) when the contract was first entered into. There is a difference to be drawn between:

(1) a right to payment which does not exist at all on the Date of Administration (which is the position in the case of a post-administration judgment in Issue 4 of Tranche A); and

(2) a right to payment which exists on the Date of Administration in a contract then in existence and binding on the parties, but which is conditional in its operation.

31. This is a difference recognised by the law. In the latter case, but not in the former, "*the obligation has been incurred but the date for payment has not fallen due, or the event triggering payment has not occurred; a position which Lindley LJ in Webb v Stenton (1882) 11 QBD 518 elegantly described as debitum in praesenti solvendum in futuro*" (*Tager v Westpac Banking Corporation* [1998] B.C.C. 73).

32. York's submissions therefore fail to recognise the difference between (a) the possibility of a future right to payment and (b) the existence of a present right to payment on the fulfilment of a condition. Whereas the interest that would be payable under a foreign judgment not yet obtained involves merely the possibility of a future right to interest at a foreign judgment rate, the interest which will become payable under a presently existing contract if certain stipulated conditions are fulfilled is in a different category.

Wentworth's submissions on Issue 4 of Tranche A

33. This distinction between a right which existed as at the Date of Administration and a right which came into existence after the Date of Administration is borne out by a careful analysis of the submissions of Wentworth, which David Richards J accepted.

34. Wentworth submitted on Issue 4 at the Tranche A trial that "*a creditor who obtains a judgment after the commencement of the administration*" could not rely on that judgment rate, "*because at the date of the administration he had **no right** to interest at the relevant judgment rate*" (emphasis added): see para 179 of the Tranche A Judgment. By contrast, where a creditor becomes entitled after the commencement of the administration to a rate of interest under a pre-administration contract, he is able to rely on that contractual rate, because, at the Date of Administration, he did have a right to interest at the relevant contractual rate. The running of interest at that rate may have been conditional, but the right to interest at that rate upon the fulfilment of that condition was a right which existed as at the Date of Administration, so that interest at the contractual rate would begin to run in accordance with the terms of the pre-administration contract immediately upon the fulfilment of the condition specified in the contract.

35. As Mr Zacaroli QC for Wentworth put it in his oral submissions (Tranche A transcript, 25 February 2015, page 1 line 21 to page 2 line 1), "*the rate applicable to the debt apart from administration is intended to refer to the rate in fact applicable to the debt proved. That necessarily fixes it as the rate applicable by reason of **the rights attaching to the debt proved as at the date of administration***" (emphasis added). Again the emphasis was on the rights in existence as at the date of administration. According to Wentworth's submissions, which were accepted by David Richards J, a rate of interest will be a 'rate applicable' within Rule 2.88(9) provided that it accrues in accordance with the rights which existed as at the Date of Administration.

Wentworth's five arguments on Issue 4 of Tranche A

36. As recorded by David Richards J in para 180 of the Tranche A Judgment, Wentworth advanced five arguments in support of its position on Issue 4. David Richards J accepted these arguments. On a close analysis of these arguments, it is submitted that none of them provides any support for the contention which York now advances. On the contrary, they support the Administrators' answer to Supplemental Issue 1A.

37. First, Wentworth submitted that it is as necessary for the operation of Rule 2.88 as it is for the ascertainment of provable debts that there should be a single cut-off date for

ascertaining the rights of creditors (namely, the Date of Administration). That is correct, but it does not assist York. On the contrary, it is consistent with the conclusion of David Richards J that the key determinant is the rights of the creditor which existed on that cut-off date. A rate of interest in accordance with a pre-administration contract will always be a rate which runs in accordance with the rights in existence on that cut-off date.

38. Secondly, Wentworth relied on the fact that Rule 2.88(9) requires a comparison to be made between (i) the judgment rate as at the Date of Administration and (ii) the rate applicable to the debt apart from the administration. Wentworth submitted (to quote the Judge at para 180) that "[this] *further suggests a comparison with a rate to which the creditor may otherwise be entitled* ***under rights existing as at that date***" (emphasis added). Again the emphasis is on the rights which existed as at the Date of Administration. A contractual rate of interest in accordance with a pre-administration contract is always a rate to which the creditor may be entitled under rights existing as at that date.

39. Thirdly, Wentworth relied on the extension of the provision for statutory interest beyond the recommendation of the Cork Committee of a single rate applicable to all debts as at the date of liquidation or administration (the judgment rate), to include the alternative of the rate applicable to the debt apart from the liquidation or administration. In summary:

    (1) The White Paper preceding the new insolvency legislation, *A Revised Framework for Insolvency Law* (Cmnd. 9175) published in February 1984, stated that if "*a higher contractual rate applies to the debt, post-insolvency interest will be chargeable at that rate*".

    (2) Relying on these words, Wentworth submitted (to quote the Judge at para 180) that Rule 2.88(9) "*was not intended to include rates of interest* ***for which no right existed at the commencement of the relevant insolvency proceeding***" (emphasis added).

Again, this provides no assistance to York, as a contractual rate of interest under a pre-administration contract is (by definition) a rate for which a right existed at the commencement of the relevant insolvency proceedings: it existed in the terms of the pre-administration contract as at that date. The running of interest may have depended on the fulfilment of the contractual condition, but the right itself is a pre-administration one. As explained above, this is the important distinction between the possibility of a future right and a presently existing (but conditional) right. The two cannot be elided.

40. Fourthly, Wentworth argued that the submissions made by the SCG in relation to the inefficiency and unfairness of permitting creditors who obtain foreign judgments after the commencement of the administration to claim interest at the rate applicable to such a judgment[1] "*support the proposition that the* ***rights to interest are to be determined as at the commencement of the administration***" (to quote the Judge at para 180, emphasis added). Again, this provides no support to York: a contractual rate of interest under a pre-administration contract is a right which exists in the terms of the contract as at the commencement of the administration. The right to payment may be conditional on the occurrence of the event specified in the contract, but there is nothing "*ethereal*" about it (*cf.* para 182 of the Tranche A Judgment).

41. Fifthly, Wentworth submitted that, as a matter of construction of sub-rules (7) and (9) of Rule 2.88, the words "*the rate applicable to the debt apart from the administration*" refer back to "*the debts proved*" in sub-rule (7)[2]. The debts proved are: (i) the debts to which LBIE was subject at the Date of Administration (see Rule 13.12(1)(a)); and (ii) the debts to which LBIE "*may become subject after that date by reason of any obligation incurred before that date*" (see Rule 13.12(1)(b)). In its skeleton argument on Tranche A and in oral submissions at the trial of Tranche A, Wentworth:

[1] Those submissions were made in support of the SCG's position that the words "*the rate applicable to the debt apart from the administration*" were apt to include not only a rate which was in fact applicable to the debt but also a rate which would have been applicable to the debt if the creditor had obtained judgment for it (when in fact he did not do so).

[2] As Mr Zacaroli QC for Wentworth put it in his oral submissions (Tranche A transcript, 25 February 2015, page 10 lines 1 to 7), "*the debt referred to in [sub] rule 9 is necessarily a cross-reference to 2.88(7) because (9) is only relevant for determining the rate applicable of interest. So it cross-refers to (7). (7) refers to paying interest on those debts and those debts in the last line of (7) must be referring back to the debts proved in the first line*".

(1) relied on the fact that a post-administration foreign judgment would be a new debt, which would not fall within Rule 13.12(1)(a) or (b);

(2) cited the hindsight principle (see *Wight v Eckhardt Marine GmbH* [2004] 1 A.C. 147 at paras 29-32) to show that the proof of debt would always be lodged in respect of the pre-judgment claim (in the form that existed as at the Date of Administration), even where a judgment was obtained subsequently; and

(3) submitted that the post-administration judgment in such a case would be taken into account in accordance with the hindsight principle for the purpose of valuing the provable claim.

42. However this argument does not assist York:

(1) A post-administration close-out sum under a pre-administration contract is plainly a provable debt within Rule 13.12(1)(b). Since it arises under a pre-administration contract, it is a liability to which LBIE "*may become subject after that date by reason of any obligation incurred before that date*" for the purposes of Rule 13.12(1)(b), which defines provable debts.

(2) Since the close-out sum is a provable debt (even where it becomes due after the Date of Administration), it is a "*debt proved*" within Rule 2.88(7) and a "*debt*" to which a "*rate*" may be "*applicable*" within Rule 2.88(9).

(3) A post-administration judgment is therefore very different from a post-administration close-out sum under a pre-administration contract.

43. These points provide the answer to York's argument in para 26 of its written submissions on Supplemental Issue 1A that the provable debt is the contingent right to the close-out amount in the form in which it existed on the Date of Administration. York's argument is wrong: the close-out sum itself is the provable debt. As explained above, the close-out sum which becomes due after the Date of Administration is a provable debt within Rule 13.12(1)(b), namely "*any debt or liability to which* [LBIE] *may become subject after* [the Date of Administration] *by reason of any obligation*

incurred before that date". Indeed, Supplemental Issue 1A recognises expressly that the close-out sum itself is the provable debt – a point which the Administrators and their legal team had assumed to be common ground as a result of York's agreement of this aspect of the wording of Supplemental Issue 1A.

44. York's attempt in para 28 of its written submissions to draw an analogy between a pre-administration contractual right which crystallises after the Date of Administration (which is within Rule 13.12(1)(b)) and a new post-administration right under a post-administration foreign judgment (which is not within Rule 13.12(1)(b)) is therefore misconceived. The former is a provable debt within Rule 13.12(1)(b); the latter is not.

45. The contention in para 29 of York's written submissions is therefore a *non sequitur*: the fact that a post-administration judgment is outside Rule 13.12(1)(b) does not mean that a close-out sum under a pre-administration contract is also outside Rule 13.12(1)(b). In fact, the wording of Rule 13.12(1)(b) itself shows clearly why the position in respect of the former is different from the position in respect of the latter.

46. For these reasons, since the close-out sum is a provable debt (even where it becomes due after the Date of Administration), it follows that is a "*debt proved*" within Rule 2.88(7) and a "*debt*" to which a "*rate*" may be "*applicable*" within Rule 2.88(9). The Administrators submit that York's contrary argument in para 30 of its written submissions on Supplemental Issue 1A is therefore wrong.

47. York's "*further point*" in para 31 of its written submissions (on the fact that a close-out sum requires steps to be taken by the creditor post-administration) is also misplaced. It is clear that a "*debt or liability to which* [LBIE] *may become subject after* [the Date of Administration] *by reason of any obligation incurred before that date*" will be a provable debt within Rule 13.12(1)(b) whether it arose after the Date of Administration as a result of steps taken by the creditor or by reason of some other occurrence.

Issues 6 to 8 of Tranche A

48. In the Administrators' submission, David Richards J's answers to Issues 6 to 8 of Tranche A are inconsistent with York's arguments on Supplemental Issue 1A.

Issues 6 to 8

49. As David Richards J recorded in para 185 of the Tranche A Judgment, Issues 6 to 8 of Tranche A were as follows:

> *"6. Whether, for the purposes of establishing, as required under Rule 2.88(9) of the Rules, 'whichever is the greater of the rate specified under paragraph (6) and the rate applicable to the debt apart from the administration', the amount of interest to be calculated based on the latter is calculated from:*
> *(i) the Date of Administration;*
> *(ii) the date on which the debt became due; or*
> *(iii) another date.*
>
> *7. Whether Statutory Interest is payable in respect of an admitted provable debt which was a contingent debt as at the Date of Administration from:*
> *(i) the Date of Administration;*
> *(ii) the date on which the contingent debt ceased to be a contingent debt (including in circumstances where the contract was 'closed out' after LBIE entered administration); or*
> *(iii) another date,*
> *having regard to whether:*
> *(i) the contingent debt remained contingent at the time of the payment of:*
> *a) the final dividend; or*
> *b) Statutory Interest; and/or*
> *(ii) (to the extent applicable) the Joint Administrators revised their previous estimate of the contingent debt by reference to the occurrence of the contingency or contingencies to which the debt was subject.*
>
> *8. Whether Statutory Interest is payable in respect of an admitted provable debt which was a future debt as at the Date of Administration from:*
> *(i) the Date of Administration;*
> *(ii) the date on which the future debt ceased to be a future debt; or*
> *(iii) another date,*
> *having regard to whether the future debt remained a future debt at the time of the payment of:*
> *(i) the final dividend; or*
> *(ii) Statutory Interest.*"

The declarations

50. The declarations made by David Richards J in respect of Issues 6 to 8 in the Tranche A Order are in the following terms:

> "*Issue 6 (paragraph 6 of the Application Notice)*
> *(xiii) For the purpose of establishing 'whichever is the greater of the rate specified under paragraph (6) and the rate applicable to the debt apart from the administration' (as required by Rule 2.88(9) of the Rules), the amount of interest to be calculated based on the latter is to be calculated from the Date of Administration.*
>
> *Issue 7 (paragraph 7 of the Application Notice)*
> *(xiv) Statutory Interest is payable in respect of an admitted provable debt which was a contingent debt as at the Date of Administration from the Date of Administration.*
>
> *Issue 8 (paragraph 8 of the Application Notice)*
> *(xv) Statutory Interest is payable in respect of an admitted provable debt which was a future debt as at the Date of Administration from the Date of Administration*".

51. These declarations reflect the conclusion of David Richards J in para 225 of the Tranche A Judgment:

> "***I conclude therefore on Issues 7 and 8 that, in the case of both future and contingent debts, interest is payable under rule 2.88(7) from the date that the company entered administration, not from the date (if any) on which any such debt fell due for payment in accordance with its terms***. *The parties are agreed that it follows that* ***the comparison under Issue 6 is between judgment rate and the rate applicable apart from the administration, in each case from the date of administration***" (emphasis added).

The relevance of Issues 6 to 8

52. As may be seen from the above, David Richards J concluded that, where the debt was future or contingent at the Date of Administration, the "*the rate applicable to the debt apart from the administration*" in Rule 2.88(9) is to be calculated from the Date of Administration. This is inconsistent with York's suggestion that, where interest at the contractual rate was not running on the Date of Administration, there will never be any rate applicable to the debt apart from the administration.

53. In the context of Issues 6 to 8, it is clear that David Richards J proceeded on the basis that contractual interest on future and contingent debts was capable of being the rate applicable apart from the administration. In the Administrators' submission, this

suggests strongly that David Richards J considered a rate which, according to the terms of the contract, did not begin to run until a point in time after the Date of Administration, could nevertheless constitute a "*rate applicable to the debt apart from the administration*" for the purposes of Rule 2.88(9).

THE ANSWER TO SUPPLEMENTAL ISSUE 1A

54. As explained above, the Administrators submit that a contractual rate which starts to run after the Date of Administration is within Rule 2.88(7). In short, since the concept of a "*rate applicable to the debt apart from the administration*" in Rule 2.88(9) is intended to include a contractual rate under a pre-administration contract, it is logical and principled to hold that the sort of contractual rate under a pre-administration contract posited by Supplemental Issue 1A falls squarely within it.

55. It is not necessary for the "*rate applicable to the debt apart from the administration*" to have actually commenced running on the Date of Administration. On the contrary, no distinction is to be drawn between a contractual rate under a pre-administration contract which begins to run on the day ***before*** the Date of Administration and a contractual rate under a pre-administration contract which begins to run on the day ***after*** the Date of Administration. Such a distinction makes no difference for the purpose of identifying the provable debts (see Rule 13.12(1)(a) and (b)) and it would therefore be surprising and anomalous to find that it has any relevance when considering the position in respect of interest on provable debts. The key point, in the Administrators' submission, is that the contract under which the rate is applicable is a pre-administration contract. The right to interest at that rate is therefore a right which existed on the Date of Administration. The accident of timing as to when the rate starts to run is irrelevant, provided that the contract itself existed on the Date of Administration.

56. Further, in the Administrators' submission, no distinction is to be drawn between (i) a pre-administration contract in which the precondition to the running of interest requires action to be taken by the creditor and (ii) a pre-administration contract in which the precondition to the running of interest involves some other criteria, such as automatic termination following an event of default or the effluxion of a specified period of time. The Administrators submit that, where the contractual precondition to the running of

interest has been satisfied after the Date of Administration, there is no principled basis for drawing any distinctions between different types of precondition. The key point, in respect of every case where the contractual condition was satisfied, is that interest in accordance with a right which existed as at the Date of Administration has started to run in accordance with the terms of the pre-administration contract.

57. The position would, of course, be different in any case where the contractual precondition to the running of interest had never been satisfied. In such a case, the contractual rate would never have started to run in accordance with the terms of the contract. Although the contract itself would have existed at the Date of Administration, the contractual interest rate would never have become applicable.

58. That is not the situation postulated by Supplemental Issue 1A. On the contrary, Supplemental Issue 1A is expressly contemplating a "*contractual rate of interest that began to accrue only after the close-out sum became due and payable due to action taken by the creditor after the Date of Administration*". In other words, it is addressing the situation in which the contractual precondition has been satisfied.

59. In cases of financial collateral arrangements (such as derivatives governed by an ISDA Master Agreement incorporating a Credit Support Annex), the conclusion that a post-administration contractual rate is relevant and applicable is fortified by Regulation 12 of the Financial Collateral Arrangement (No 2) Regulations 2003, which provides for close-out netting provisions to take effect in accordance with its terms notwithstanding that the collateral-provider or collateral-taker is subject to winding-up proceedings or reorganisation measures. A close-out netting provision which provides for interest to be payable on the close-out sum must therefore take effect, even where one or the other of the parties goes into administration. York's proposed answer to Supplemental Issue 1A is inconsistent with Regulation 12 of the 2003 Regulations, since, according to York, the interest due under the close-out netting provision will not be payable with the result that the close-out netting provision will not take effect in accordance with its terms. This provides a further ground for rejecting York's submission.

CONCLUSION

60. For these reasons, the Administrators invite the Court to conclude that the words "*the rate applicable to the debt apart from the administration*" in Rule 2.88(9) will include, in the case of a provable debt that is a close-out sum under a contract, a contractual rate of interest that began to accrue only after the close-out sum became due and payable due to action taken by the creditor after the Date of Administration.

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