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

Respondents

POSITION PAPER OF THE FIFTH RESPONDENT

Introduction

1. This Position Paper is on behalf of the Fifth Respondent, York Global Finance BDH, LLC ("**York**"). It is filed and served pursuant to paragraph 3 of the Order of David Richards J dated 25 June 2014. In accordance with that direction, the Position Paper sets out in detail York's position on each of the questions contained in the application (where relevant to the position of York) and the basis on which York intends to adopt

such position, including references to the principal authorities on which York intends to rely.

The LibertyView Claims

2. York is one of four co-participants in five claims against Lehman Brothers International (Europe) ("**LBIE**"), legal title to which is held by Banc of America Credit Products, Inc ("**BACP**"). The other co-participants in the claims are RMF Liberty LLC, SCPC Group LLC and OZ LV Holdings LLC. These co-participants have authorised York to act as a respondent to the application on their behalf.

3. The claims are referred to as the "**LibertyView Claims**" as the original holders of the claims were five funds managed by LibertyView G.P., LLC ("**the LibertyView Funds**")[1]. The claims arise under New York law governed prime brokerage agreements to which LBIE was a party.

4. The claims are not subject to the Claim Resolution Agreement. However, the claims of each LibertyView Fund are the subject of a separate Claims Determination Deed ("**CDD**") dated 26 March 2013. Pursuant to such CDDs, the claims were agreed as unsecured claims against LBIE in the total amount of US$676.25 million.

5. The LibertyView Funds entered into prime brokerage agreements with Lehman Brothers, Inc ("**LBI**") and LBIE. Four of the funds entered into such documentation in August 2005 and one in July 2007. The documentation for each fund is, for all material purposes, identical. The prime brokerage documentation included:

   (1) a New York law Customer Account Prime Brokerage Agreement ("**PBA**");

   (2) a New York law Margin Lending Agreement ("**MLA**"); and

   (3) a New York law Global Master Securities Lending Agreement ("**GMSLA**"), which was incorporated into the MLA.

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1 LibertyView Credit Opportunities Fund, L.P.; LibertyView Credit Select Fund, L.P.; LibertyView Funds, L.P.; LibertyView Global Risk Arbitrage Fund, L.P.; LibertyView Special Opportunities Fund, L.P.

6. In summary, pursuant to these agreements the LibertyView Funds deposited cash and securities with LBIE under the MLA, which LBIE held as security for amounts owed to LBIE, particularly in respect of cash margin loans advanced by LBIE under the MLA or securities loans made by LBIE under the GMSLA[2].

7. At the time of the commencement of LBIE's administration on 15 September 2008, a significant proportion of the cash and securities deposited by the LibertyView Funds with LBIE had been the subject of rights of use exercised by LBIE such that, unless and until LBIE returned the cash and/or securities to the custodian accounts, the LibertyView Funds would not have any proprietary interest in such cash and/or securities.

8. Under the agreements, the relevant LibertyView Fund was not entitled to call at any time for delivery of its cash and securities. Under the MLA, LBIE was only obliged to release any of the collateral when all obligations owed by the relevant LibertyView Fund to LBIE (and all other affiliates of LBIE) had been satisfied. Under the terms of the GMSLA, a LibertyView Fund could only close out a securities loan by actually returning the relevant securities to LBIE.

9. The LibertyView Funds did not have a unilateral right to terminate any of the PBA, MLA or GMSLA upon LBIE’s administration. In particular, they did not have any right to terminate and close out all outstanding transactions resulting in a single net balance due to or from LBIE.

10. On 26 March 2013 each LibertyView Fund entered into a CDD with LBIE setting out its “Agreed Claim Amount” (in US dollars) that is admitted as an “Admitted Claim” qualifying for dividends from the estate of LBIE. In summary, the Agreed Claim Amount represents the damages payable by LBIE for failing to return any cash or securities in respect of which LBIE exercised a right of use. The damages payable are based on the market value of those securities at the time that LBIE failed to return them together with all income that would have been received on such securities since September 2008. In calculating the net amount due from LBIE, all amounts due to

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2 In practice, all of the LibertyView Funds’ assets were held with LBIE under the MLA, even if those assets were initially deposited into the relevant LibertyView Fund's account with LBI opened under the PBA.

LBIE under cash margin loans and all amounts due in respect of securities loans are deducted.

11. Each of the LibertyView Funds transferred all its rights in respect of the claims to BACP under five separate claims assignment agreements each dated 16 August 2013. On the same day, BACP granted participations in each of the acquired claims in favour of York and the four co-participants.

Statutory Interest

Construction of rule 2.88

12. *Question 1*: On the true construction of rule 2.88(7) of the Insolvency Rules 1986 ("**the 1986 Rules**") post-administration interest is payable on a simple basis where the rate applicable is the rate specified in section 17 of the Judgments Act 1838. In particular:

   (1) Neither rule 2.88(7) nor section 17 of the Judgments Act 1838 makes any provision for the payment of compound interest.

   (2) The ordinary meaning of "interest" as used in rule 2.88(7) is simple, not compound, interest.

   (3) There is no suggestion that Parliament, when enacting the right to statutory interest under rule 2.88(7) intended to confer a right to compound, as opposed to merely simple, interest (see, in particular, paragraphs 1363 to 1395 of the Cork Report).

13. *Question 2*: Post-administration interest is calculated on the basis of allocating dividends first to accrued post-administration interest at the date of the relevant dividend payment and then in reduction of the principal.

14. The rule in Bower v Marris (1841) Cr. & Ph. 351 holds that, for the purposes of calculating the remaining amounts due to a creditor in an insolvency where the

proved debts have been satisfied, dividends are applied first in satisfaction of post-insolvency interest and then in satisfaction of principal.

15. The rule in Bower v Marris has consistently been applied to the administration of estates in insolvency proceedings in both England and other common law jurisdictions since at least 1743: Bromley v Goodere (1743) 1 Atkyns 754; Bower v Marris (1841) Cr. & Ph. 351; In re Humber Ironworks and Shipbuilding Co. (1869) L.R. 4 Ch. App. 643; In re Lines Bros (No. 2) [1984] 1 Ch. 438, 446E; Mackenzie v Rees (1941) 65 C.L.R. 1; Midland Montagu Australia v Harkness (1994) 14 A.C.S.R. 318; Gerah Imports Pty Ltd v The Duke Group Ltd (2004) 49 A.C.S.R. 660; Attorney General of Canada v Confederation Trust Company (2003) 65 O.R. (3d) 519.

16. Bower v Marris itself concerned the bankruptcy of an individual. However, in In re Humber Ironworks and Shipbuilding Co. the Court of Appeal held that the rule also applies in the winding up of companies. There is no relevant distinction between a liquidation and an administration where a notice of proposed distribution has been given under rule 2.95 of the 1986 Rules (“**a distributing administration**”) for these purposes. Accordingly, the rule applies equally in a distributing administration such that dividends are applied first in satisfaction of post-administration interest and then in satisfaction of the principal.

17. The rule in Bower v Marris is supported by and is consistent with principle. In particular:

    (1) The process of administration, like winding up, does not affect the debts of the debtor but only the way in which such debts can be enforced. The process of administration does not create new rights or destroy old ones: Wight v Eckhardt Marine GmbH [2004] 1 A.C. 147 P.C.;

    (2) In particular, administration, like winding up, does not effect a discharge of the debtor’s liability for interest accruing after the commencement of the insolvency, but only affects the means by which such liability may be enforced;

(3) Accordingly, administration does not remove the debtor company's liability to pay post-administration interest;

(4) The usual rule is that the law will apply a payment made by a debtor to discharge interest before applying it to the earliest items of the principal: Chitty on Contracts, 31st ed., 21-068;

(5) There is no reason why payments made by way of dividend in an administration or liquidation should have any more advantageous effect for the debtor than they would if they had been made outside of insolvency;

(6) There is no reason why payments made by way of dividend in an administration or liquidation should have any more advantageous effect for a co-obligor than they would if they had been made outside of insolvency.

18. Further:

(1) The doctrine of appropriation, which depends on the intention of the debtor and the creditor, has no application as the manner of payment of dividends is regulated by the Insolvency Act 1986 ("**the 1986 Act**") and the 1986 Rules;

(2) The 1986 Act and the 1986 Rules do not provide for the appropriation of dividend payments to principal (i.e. the proved debt) in advance of interest accruing post-administration.

(3) In particular, no provision of the 1986 Act or the 1986 Rules provides for dividend payments to be appropriated to the outstanding principal in advance of post-administration interest.

19. In these circumstances, the usual rule applies to the debtor company's continuing liability to pay post-administration interest such that payments made by the debtor company are allocated first to interest and then subsequently to principal.

20. For these purposes, there is no relevant distinction between situations where the claim of a creditor arises under a contract which provides for interest and a claim of a creditor which does not carry a contractual right to interest. In both cases, the right to interest arises under rule 2.88 of the 1986 Rules and, since the purpose of the rule in Bower v Marris is to put the creditor into the position in which he would have been in absent the insolvency, there is no reason for the rule applying differently between these situations.

21. There is nothing in the statutory scheme under the 1986 Act and the 1986 Rules which expressly or impliedly excludes the application of the rule in Bower v Marris. Rule 2.88(7) of the 1986 Rules provides that the surplus to be applied in paying post-administration interest is that remaining after "*payment of the debts proved*". The debt proved is in respect of principal and interest accrued to the date of the administration. The debt proved does not include interest accruing post-administration.

22. However, this does not expressly or impliedly exclude the application of the rule. The authorities have consistently held that the rule as to the amount which may be proved is a rule of convenience only for the benefit of the creditors of the debtor by enabling an efficient and just distribution of the debtor's property i.e. by way of *pari passu* distribution. In particular, it does not and is not intended to affect any other rights which the creditor may have and does not amount to an appropriation in any shape or form: In re Humber Ironworks and Shipbuilding Co. (No. 2) (1868-69) L.R. 5 Ch. App. 88, 92; see also Bower v Marris, In re Joint Stock Discount Co. (1868-69) L.R. 5 Ch. App. 86, 88; Mackenzie v Rees, 8-11; Midland Montagu Australia v Harkness; Triden Contractors Pty Ltd v CE Heath Casualty and General Insurance Ltd (1996) 9 ANZ Ins Cas 61-356; Gerah Imports Pty Ltd v The Duke Group Ltd.

23. Rule 2.88(7) falls to be read with the other provisions of Chapter 10 of the 1986 Rules and the definition of "*debt*" in rule 13.12. Together these rules provide for the calculation and quantification of a debt which may be proved for dividend. In this

respect, the rules give statutory expression to the common law rule of convenience which enables the efficient and just distribution of the debtor's estate by way of a *pari passu* distribution between creditors. The fact that, for these purposes, provision is made in the rules for the calculation of a sum in respect of which a debtor is entitled to claim against the insolvent estate for dividend, does not itself remove the other rights of the creditor including the right to treat payments made by the debtor as being allocated to interest in advance of principal.

24. Moreover, the terms of rule 2.88(7) follow the same form as the previous statutory provisions governing post-insolvency interest, including section 132 of the Bankruptcy (England) Act 1825 referred to in Bower v Marris itself[3], and the rule in Bower v Marris has been held to apply alongside these statutory provisions.

25. Accordingly, the provisions of statutory scheme as contained in the 1986 Act and the 1986 Rules do not affect or prejudice the right of a creditor in respect of interest accruing on his provable debt post-administration to treat payments made by way of dividend as discharging interest in advance of principal.

26. *Question 3*: York takes no position on Question 3 but reserves the right to advance a position if it becomes apparent from other Position Papers or the parties' positions at trial that the question is not being fully argued.

27. *Question 4*: The words "*the rate applicable to the debt apart from the administration*" in rule 2.88(9) of the 1986 Rules are apt to include the rate of interest applicable to a foreign judgment. In particular:

    (1) The language in rule 2.88(9) directs an enquiry as to what the position would have been absent the administration;

    (2) Winding up and distributing administration are processes of collective enforcement by creditors: In re Lines Bros Ltd [1983] 1 Ch. 20 C.A.; Wight v Eckhardt Marine GmbH, 155;

[3] See also section 129 of the Bankruptcy (England) Act 1824; section 197 of the Bankrupt Law Consolidation Act 1849; section 40(5) of the Bankruptcy Act 1883; section 33(8) of the Bankruptcy Act 1914.

(3) Such collective enforcement is in substitution for individual enforcement by individual creditors of their debts, whether by way of self-help remedy or legal process.

28. This is consistent with the purpose of statutory interest, namely to compensate creditors who are prevented by the liquidation (or administration) regime from obtaining judgment against the company which judgment would then carry the relevant judgment rate: Re Lehman Brothers International (Europe) [2014] EWHC 704 (Ch), [2014] BCC 193 at [163].

29. In principle, therefore, in order to determine the rate applicable apart from the administration, it is necessary to look to the position which would have occurred on an individual enforcement by the relevant creditor. Moreover, it would be wrong in principle for any creditor to be placed in a materially worse position in respect of interest than he would have been if he had been able to take individual enforcement action rather than being confined to collective enforcement action through a winding up or distributing administration. If the position were otherwise, those creditors whose contracts provided for a contractual rate of interest would obtain a windfall at the expense of those creditors whose contracts did not provide for interest or whose claims did not arise under contracts.

30. Alternatively, the rate of interest applicable to a foreign judgment is a rate applicable to the debt apart from administration since a creditor has at all times a contingent right to such interest.

31. *Question 5 and 6*: York takes no position on Questions 5 and 6 but reserves the right to advance a position if it becomes apparent from other Position Papers or the parties' positions at trial that the questions are not being fully argued.

Period during which the debts "*having been outstanding since LBIE entered administration*" for the purposes of rule 2.88(7)

32. *Question 7*: Post-administration 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.

33. Rule 2.88(1) of the 1986 Rules, in the form applicable to the administration of LBIE, 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 company entered administration or, if the administration was immediately preceded by a winding up, any period after the company went into liquidation."

34. Rule 2.88(7) provides:

> "… any surplus remaining after payment of the debts proved shall, before being applied for any purpose, be applied in paying interest on those debts in respect of the period during which they have been outstanding since the company entered administration"

35. As to the time at which provable debts become "*outstanding*" for these purposes, it is necessary to analyse the scheme for the distribution of a debtor's assets amongst its creditors in a winding up and in a distributing administration.

Statutory Scheme for Distribution

36. As to this, in the case of a winding up:

    (1) A creditor who wishes to make a claim against the debtor company in respect of his debt may submit a proof in respect of that debt;

    (2) The debts which can be admitted for proof are ascertained as they exist as at the date of the winding up order: In re Humber Ironworks and Shipbuilding Co. 646-647, In re Dynamics Corporation of America [1976] 1 W.L.R. 757; In re Lines Bros; Wight v Eckhardt Marine GmbH at [27];

    (3) This is consistent with winding up being a process of collective enforcement which takes effect on the day on which a winding up order is made: Wight v Eckhardt Marine GmbH at [27];

(4) The liquidation and distribution of the assets of the insolvent company are treated as notionally taking place on the date of the winding up order: In re Dynamics Corporation of America, 762; M.S. Fashions Ltd v BCCI SA [1993] Ch. 425, 432; Stein v Blake [1996] 1 A.C. 243 H.L.(E.), 252.

37. It follows that the debts which rank for proof are ascertained as at the date of the winding up order. The debts as ascertained as at the date of the winding up order then rank for, and are paid, dividends accordingly.

38. Thus, for the purposes of the statutory scheme, provable debts become outstanding as from the date of the winding up order, being the date on which such debts are ascertained.

39. The same analysis applies in a distributing administration with the date of administration being substituted for the date of the winding up order. This is consistent with the scheme of the 1986 Rules applicable to a distributing administration: see rules 2.72(3)(b)(ii), 2.86, 2.88 and 2.89. Although a distributing administration only comes into effect on the giving of a notice under rule 2.95, the statutory scheme of collective enforcement and distribution takes effect retroactively as from the date of the commencement of the administration.

Set-off

40. Consistent with the operation of the statutory scheme, in winding up mandatory insolvency set-off applies automatically as at the date of the winding up order: Stein v Blake, 252; In re Bank of Credit and Commerce International S.A. (No. 8) [1998] A.C. 214 H.L.(E.), 223. Set-off operates to produce a net balance which, if due to the creditor, is outstanding from the date of the winding up order.

41. In the case of a distributing administration, rule 2.85(3) provides that:

> "An account shall be taken as at the date of the notice referred to in paragraph (1) of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other."

42. Rule 2.85(8) provides that:

> "Only the balance (if any) of the account owed to the creditor is provable in the administration. Alternatively the balance (if any) owed to the company shall be paid to the administrator as part of the assets except where all or part of the balance results from a contingent or prospective debt owed by the creditor and in such a case the balance (or that part of it which results from the contingent or prospective debt) shall be paid if and when that debt becomes due and payable."

43. Even though the account is to be taken as at the date of the notice of intended distribution given under rule 2.95:

    (1) insolvency set-off is treated as having taken place on the date of commencement of the insolvency (the retroactivity principle): M.S. Fashions Ltd v BCCI SA, 432; In re Bank of Credit and Commerce International S.A. (No. 8), 223;

    (2) the claim of the creditor for the purposes of the set-off is the debt for which the creditor is entitled to prove: Stein v Blake, 253; In re Bank of Credit and Commerce International S.A. (No. 8), 228. Accordingly, amongst other things, post-administration interest is excluded from the operation of the set-off: rule 2.85(6)(c);

    (3) the net balance resulting from the operation of the set-off (assuming a net amount is due to the creditor) is then provable by the creditor in the administration.

44. In these circumstances, the actual taking of the account itself is merely the process of calculation of the balance due in accordance with the principles of insolvency law i.e. in the case of a distributing administration, as at the date of commencement of the administration: Stein v Blake, 253.

45. Therefore, the account, taken as at the date of the notice given under rule 2.95, establishes the net balance which was owing as at the date of commencement of the administration and, if such net balance is due to the creditor, that is the amount which the creditor is entitled to prove for and which is outstanding as from the date of commencement of the administration.

Post-administration interest

46. It follows from provable debts being ascertained as at the date of the winding up order that interest accruing after the date of the winding up order is excluded from proof. Logically, it follows from this that where there is a surplus after the payment of provable debts available to pay interest, such interest should run from the date of the winding up order. This means that there is then no gap in the period in respect of which the creditor receives interest on his claim.

Contingent debts

47. The analysis is the same in relation to debts which are contingent at the date of the winding up or administration. In particular, in the case of administration:

(1) Contingent debts can be the subject of proofs: rule 13.12 of the 1986 Rules;

(2) The value of such debts as at the date of administration may be estimated by the administrators: rule 2.81 of the 1986 Rules; Stein v Blake, 252-253;

(3) The administrator may revise any estimate previously made if he thinks fit by reference to any change of circumstances or to information becoming available to him;

(4) In particular, in valuing claims at the date of the winding up, or taking the account for the purposes of set-off, the court has regard to events which have occurred at the date of distribution or payment since the date of the winding up (the hindsight principle): M.S. Fashions Ltd v BCCI SA 432-433; Re MF Global UK Ltd [2013] EWHC 92 at [48]-[55];

(5) Contingent debts will also be subject to mandatory insolvency set-off and their value, for these purposes also, may be estimated: rule 2.85(5); Stein v Blake, 252-253.

48. Further, although the net balance is established at the date of the commencement of the administration and is outstanding from that point, pursuant to the hindsight principle, the value of the net balance may be adjusted in light of subsequent events.

The LibertyView Claims

49. The claims by the LibertyView Funds against LBIE were contingent at the date of the commencement of LBIE's administration, being claims for damages contingent on LBIE's failure to return the relevant cash and securities. Nevertheless, such claims were provable.

50. On the notice of intended distribution being given by the LBIE Administrators pursuant to rule 2.95 of the 1986 Rules, the contingent damages claims were subject to insolvency set-off, insofar as necessary to set-off LBIE's cross-claims, resulting in a net balance due to each LibertyView Fund from LBIE as at the date of commencement of LBIE's administration. In so far as necessary for the purposes of set-off, the claims of the LibertyView Funds were converted to sterling (rules 2.85(6) and 2.86 of the 1986 Rules; Re Kaupthing Singer & Friedlander Ltd (in administration) [2011] 1 BCLC 12), but otherwise remained in US dollars.

51. Accordingly, the effect of mandatory set-off was to result in a net balance of a provable debt claim in US dollars due from LBIE to the LibertyView Funds, as reflected in the US dollar Agreed Claim Amounts agreed in the CDDs.

52. The net balances were outstanding as from that date i.e. the date of commencement of LBIE's administration. The values of such net balances fall to be adjusted in the light of events subsequent to the date of commencement of the administration pursuant to the hindsight principle.

53. *Question 8*: Post-administration 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.

54. The analysis set out in paragraphs 32 to 48 above applies equally to future debts.

55. In particular, the general principle that the debts which can be admitted for proof are ascertained as they exist as at the date of the winding up order or the date of commencement of the administration applies. For these purposes, the rules contain machinery enabling future debts to be valued as at the date of commencement of the insolvency.

56. Similarly, mandatory insolvency set-off of future debts owed to a creditor will take place as at the date of commencement of the winding up or administration: Stein v Blake, 252-253.

57. As to the machinery for valuing future debts:

(1) Rule 2.105 of the 1986 Rules applies where payment of the debt is not due at the date of declaration of the dividend. In these circumstances, for the purpose of dividend (and no other purpose) the amount of the creditor's admitted proof (or the amount remaining outstanding in respect of his proof) is reduced applying the specified formula: rule 2.105(2);

(2) Rule 2.105 also applies for the purposes of insolvency set-off: rule 2.85(7); In particular, rule 2.105 applies to value the relevant part of the future debt as required for the purposes of set-off: Re Kaupthing Singer & Friedlander Ltd.

(3) Rule 2.105 applies to the amount of the creditor's admitted proof or, if a distribution has previously been made to him, the amount remaining "outstanding" in respect of the admitted proof. The word "*outstanding*", as used in this context, clearly means an amount that is unpaid rather than an amount which is due and payable (since rule

2.105 applies to debts payable at a future time) and there is no reason that the same word "*outstanding*" as used in rule 2.88(7) should have a different meaning.

(4) Since rule 2.105 discounts the future debt to a present value as at the date of the commencement of the administration, it is logical for post-administration interest to run from the same date.

58. These mechanics as to the valuation of the provable debt are consistent with the position that such provable debt itself is outstanding from the date of the commencement of the administration.

Master Agreements

59. York does not take any position on Questions 10 to 27.

Currency Conversion Claims

60. *Questions 28 to 30:* Under the statutory scheme, for the purposes of proving, foreign currency debts are converted into sterling at the official exchange rate prevailing on the date when the company entered into administration: rule 2.86. The existence of a claim by a creditor against the company for currency losses suffered by him from the date of liquidation is recognised in the authorities: In re Lines Bros Ltd, 20-21, 26; Re Lehman Brothers International (Europe) [2014] BCC 193 at [110]-[111].

61. The nature and scope of the currency conversion claim depends on the manner in which post-administration interest is calculated.

62. In In re Lines Bros (No. 2) the Court identified two methods for the calculation of post-insolvency administration, as set out in Appendices A and B to the judgment.

63. *Appendix A*: Applying the rule in Bower v Marris under the Appendix A approach, sterling dividend payments are credited first to interest and subsequently to principal. This results in the creditor having sterling payments credited against his proved debt

as converted to sterling at the date of commencement of the administration with accrued interest in sterling thereon.

64. On the Appendix A approach, the currency loss claim is therefore for the difference between:

(1) the sterling amounts actually received by the creditor from the company in respect of his proved debt and interest (as applied in accordance with the rule in Bower v Marris and the Appendix A approach) converted into the foreign currency at the time of receipt; and

(2) the amounts which the creditor would have been entitled to receive in respect of his claim in its original currency as at the date of commencement of the administration together with post-administration interest at the higher of the Judgments Act rate or the rate applicable to the debt apart from the administration from the commencement of the administration to the time of receipt.

65. *Appendix B*: Under the Appendix B approach, the creditor's claim remains in its original foreign currency both for the purposes of (a) determining the amount on which post-administration interest accrues and (b) the "notional principal" amount that, following appropriation in accordance with the rule in Bower v Marris, needs to be paid so as to stop statutory interest accruing on the unpaid notional principal balance.

66. York reserves the right to address these questions further pending the outcome of the appeal from the decision in Re Lehman Brothers International (Europe) [2014] BCC 193.

67. *Questions 31 to 32*: Pending clarification of the case being advanced in relation to Questions 31 to 32 (which is presently unclear), York does not respond to these questions but reserves the right to do so following the provision of such clarification.

68. *Question 33*: York takes no position on Question 33 as clarified in the letter from Kirkland & Ellis International LLP dated 25 July 2014. The transfers of the claims pursuant to the claims assignment agreements between the LibertyView Funds and BACP were not confined to the rights associated with the dividend payable on the proof of debt and/or the right to receive a dividend on the provable debt and/or the Agreed Claim defined as a numerical amount in a CDD.

Effect of Post-Administration Contracts

69. *Question 34*: As to Question 34(i), the Release Clauses in Foreign Currency CDDs do not as a matter of construction have the effect of releasing currency conversion claims. York takes no position on Questions 34(ii) and (iii) as those questions are not relevant to the LibertyView Claims.

70. As to Question 34(i), in summary, the effect of the Foreign Currency CDDs entered into by the LibertyView Funds and LBIE was that:

    (1) it was agreed that the unsecured claims of the relevant LibertyView Fund and any Pre-Administration Client Money Claims arising under or in connection with the relevant prime brokerage documentation would be limited to and in an amount equal to a US dollars amount – the Agreed Claim Amount;

    (2) except for the Agreed Claim (and certain other claims), other claims against the Company and the LBIE Administrators were released and discharged;

    (3) where the specified conditions were satisfied, the Agreed Claim would then become an Admitted Claim – an unsecured claim as a creditor of LBIE qualifying for dividends from the estate and for these purposes was to be converted to pounds sterling at the official exchange rate as specified by rule 2.86(2) of the 1986 Rules.

71. The purpose and effect of the release provided for under the terms of the Foreign Currency CDDs was to release the claims of the relevant LibertyView Fund as

against LBIE and/or the LBIE Administrators as at the date of the CDD. The purpose and effect of the release was not to release claims arising out of or relating to the subsequent performance by LBIE and/or the LBIE Administrators of the terms of the CDD itself or their duties under the 1986 Act and the 1986 Rules.

72. The currency conversion claims arise out of the subsequent performance by the LBIE Administrators of the terms of the Foreign Currency CDDs, viz. the acceptance of the Agreed Claims as Admitted Claims and the conversion of the claims from US dollars to pounds sterling for these purposes. Such claims are not released by the terms of the Foreign Currency CDDs.

73. Further or alternatively, currency conversion claims were not in the contemplation of the parties at the time of entry into the Foreign Currency CDDs in March 2013. As a matter of construction, the general wording contained in the release provisions is therefore inapt and ineffective to release and discharge these claims: cf. Bank of Credit and Commerce International SA v Ali [2002] 1 A.C. 251 H.L.(E.); Grant v John Grant & Sons Pty Ltd (1954) 91 CLR 112. If the intention had been to release such claims, express and specific language would have been used to this effect.

74. *Question 35*: York takes no position on Question 35. The terms of the Foreign Currency CDDs entered into by the LibertyView Funds include the Statutory Interest Language referred to in paragraph 70 of the tenth witness statement of Anthony Victor Lomas.

75. *Question 36*: If, contrary to the above, the Release Clauses in the Foreign Currency CDDs do as a matter of construction have the effect of releasing currency conversion claims, then such releases should not in the circumstances be enforced.

76. The relevant circumstances are that the LBIE Administrators publicly announced that it was necessary to establish a "systematic, consensual approach applicable to all creditors" in order to accelerate and simplify the process of agreeing the amount for which unsecured claims should be admitted for distributions. This approach was described to creditors as "the Consensual Approach". LBIE represented that the amounts offered to creditors pursuant to the Consensual Approach were based on a

"reliable and pragmatic" approach. Amongst other things, it was implicit in this that LBIE was and would continue to treat all comparable creditors equally.

77. The LBIE Administrators did not at any time indicate that that they had any intention to treat comparable creditors differently. Accordingly, creditors were entitled to proceed on the basis that the Consensual Approach was intended to result in equal treatment of all comparable creditors.

78. The LBIE Administrators' approach to admitting unsecured claims eventually evolved into simply offering fully or partially to admit claims through Admittance Letters, under which there is no release of any rights that relate to anything other than the portion of the proved debt (if any) for which the LBIE Administrators served a notice of rejection.

79. In circumstances where the LBIE Administrators represented that comparable creditors would be treated equally, LBIE and the LBIE Administrators are estopped from now alleging that the terms of the CDDs were effective to release Currency Conversion Claims, in circumstances where they have subsequently agreed not to release such claims of unsecured creditors pursuant to the process of admitting claims.

80. Further or alternatively, as officers of the Court, the LBIE Administrators are barred by the rule in Ex parte James, In re Condon (1874) LR 9 Ch App 609 from contending that the terms of the CDDs were effective to release Currency Conversion Claims and/or from seeking to enforce any terms of the CDDs which do on their true construction have such effect. It is no part of the functions of administrators, as officers of the court, to "entrap" creditors and to obtain a release of claims where the administrators know that there is a question to be determined as to whether or not the creditors are entitled to such claims: In re W W Duncan & Co [1905] 1 Ch 307, 314.

81. Further or alternatively, to the extent that the Release Clauses in the Foreign Currency CDDs entered into by the LibertyView Funds do have the effect of releasing Currency Conversion Claims and are enforceable, then the co-participants in the LibertyView Claims reserve the right to bring a claim under paragraph 74 of

Schedule B1 to the 1986 Act in respect of the unfair harm resulting from the LBIE Administrators' unequal treatment of comparable creditors.

82. *Questions 37 and 38*: York takes no position on Questions 37 and 38.

Compensation for Time Taken to Discharge Non-Provable Claims

83. *Question 39*: In the alternative to an entitlement to post-administration interest as determined in accordance with the rule in Bower v Marris, creditors would have a non-provable damages claim for the loss of the time value of money.

Tom Smith QC
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19 September 2014

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

Respondents

POSITION PAPER

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