

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

No. 7942 of 2008

HMCTS
RECEIVED

21 MAR 2015

LLS
BUILDING

**IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL
(EUROPE) (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

B E T W E E N

(1) ANTONY 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

Respondents

SENIOR CREDITOR GROUP'S SUPPLEMENTAL
POSITION PAPER ON QUESTION 36A

This position paper is filed on behalf of the First to Third Respondents (the “**Senior Creditor Group**”) by way of supplement to the Senior Creditor Group’s Position Paper and Reply Position Paper. It is filed pursuant to paragraph 4(1) of the Order of David Richards J dated 9 March 2015.

Question 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 claim, should such release(s) in the circumstances be enforced by the Administrators and / or LBIE as against all counterparties to such CDD or the CRA by reason of, or by analogy with, the rule in Ex Parte James, Re Condon (1874) LR 9 Ch App 609.

Senior Creditor Group's Position: If, contrary to the Senior Creditor Group's position in relation to Questions 34 and 35, the CRA or a CDD has the effect of releasing a Statutory Interest claim, a Currency Conversion Claim or other non-provable claim, the Administrators should refrain from taking advantage of LBIE's strict or technical legal rights and should not enforce (and the Court should direct the Administrators not to enforce) such releases by reason of, or by analogy with, the rule in *Ex Parte James* (1874) LR9 Ch App 609 and/or paragraphs 63 or 74 of Schedule B1 to the Insolvency Act 1986:

- (1) The Senior Creditor Group relies on the facts and matters set out in the Senior Creditor Group's Statement of Relevant Facts for the purpose of Question 36A dated 6 April 2015.
- (2) The consequences of enforcing any release of rights to Statutory Interest, Currency Conversion Claims or other non-provable claims would be regarded by a reasonable member of the public, knowing all of the facts, as unfair, inappropriate and unbefitting of an officer of the court, would harm the interests of creditors and would confer an unjustified and unfair benefit or enrichment on the estate and a windfall to the subordinated creditors and shareholders;
- (3) The consequences of enforcing any release of rights to Statutory Interest, Currency Conversion Claims or other non-provable claims would result in the release of such claims in a manner, and by reason of an exercise of statutory powers conferred on the Administrators, that was inconsistent with, or did not further, or was not necessary for, the achievement of the purpose of the administration;

(4) The consequences of enforcing any release of rights to Statutory Interest, Currency Conversion Claims or other non-provable claims would result in the CRA and CDD processes causing a loss and harm to some (but not all) unsecured creditors who entered into the CRA or into CDDs in particular forms, which loss:

(a) was inconsistent with, did not further or was not necessary for either process;

(b) was the result of the Administrators requiring creditors to enter into the CRA as a condition to the return of trust assets in a more timely manner in circumstances where:

(a) the Administrators had a duty to return trust assets to, or deal with trust assets in accordance with the wishes of, trust beneficiaries, and the proper performance of that duty did not require the CRA to be entered in a form which had the effect (whether by itself or in conjunction with a CDD) of releasing non-provable claims; and

ii. the CRA was presented to creditors as being non-negotiable.

(c) was the result of the Administrators requiring creditors to enter into CDDs as a condition to the admission of their provable claims in circumstances where:

i. the Administrators had a duty under rule 2.77 to admit or reject provable claims in whole or in part, and the proper performance of that duty did not require CDDs to be entered into at all, or did not require CDDs to be entered into which would have the effect of releasing non-provable claims;

ii. the CDDs were presented to creditors as being non-negotiable;

- iii. the CDDs were in most cases so presented to creditors at times when the Administrators had not made any financial projection for the payment of dividends on provable claims, or were projecting a shortfall in respect of such claims, with the consequence that creditors would receive no compensation for the time value of money in the event that they did not agree to sign CDDs and agree the offers made by the Administrators in respect of their claims;
 - iv. the Administrators told creditors that, if they did not accept the offer made by the Administrators in respect of their claim, and the form of the CDD as presented to the creditor, the creditor would be required to wait until the CDD process had been completed in respect of all creditors who were willing to participate in that process. The Administrators told creditors that they would then be required to engage in individual negotiations in respect of their claims. Such an approach would have resulted in a material delay for the resolution of claims made by creditors who did not participate in the CDD process;
 - v. despite their previous position to the contrary, the Administrators ultimately agreed from late 2013 onwards to admit certain claims without requiring creditors to enter into any form of CDD notwithstanding the requirement previously imposed;
- (d) was not expressly intended, but arose as a consequence of a mistake of fact or law as to the prospect of a surplus or the existence of Currency Conversion Claims when, had the true position been known, such claims would have been expressly preserved (as they subsequently were);
- (e) arose as a consequence of processes initiated by the Administrators for the purpose of facilitating the conduct of the administration, and in which the Administrators did not inform creditors that the releases would deprive the creditors of non-provable claims of value in the event of a surplus;

- (f) arose, at least in some cases, after the Administrators knew or ought to have known that there was an issue to be resolved regarding the scope of the releases, either because they realised that a surplus was possible (and thus that Statutory Interest may be payable) or because they learnt that other non-provable claims, such as Currency Conversion Claims, might exist and might be payable; and
 - (g) arose, in circumstances where there was no commercial or other proper justification for unsubordinated creditors to be required to release non-provable claims.
- (5) The consequences of enforcing any release of rights to Statutory Interest, Currency Conversion Claims or other non-provable claims would be for the CRA or CDDs to deprive creditors of such claims without conferring any benefit on creditors in respect of such release.
 - (6) The consequences of enforcing any release of rights to Statutory Interest, Currency Conversion Claims or other non-provable claims would result in the CRA and CDD processes initiated by the Administrators having the effect of treating unsubordinated creditors participating in such processes differently from other unsubordinated creditors, without any proper or commercial or other justification for such differential treatment having been identified or intended by the Administrators;
 - (7) The consequences of enforcing any release of rights to Statutory Interest, Currency Conversion Claims or other non-provable claims would result in the conferral of an unjustified windfall benefit on subordinated creditors or shareholders at the expense of certain classes of general unsecured creditors;
 - (8) The differential treatment referred to in paragraph (6), above, would arise as a consequence of the form of CRA or CDD being used by the Administrators from time to time, and whether and, if so, when creditors happened to agree to participate in the process. In particular, enforcement of any release of rights to Statutory Interest, Currency Conversion Claims or other non-provable claims arising from the CRA or CDD processes would result in differential treatment

without any commercial or other justification having been identified or intended by the Administrators between, for example, the following categories of creditors:

- (a) Creditors who were presented with, and entered into, CDDs in the predominant form insisted on by the Administrators in the period from 30 November 2010 to April 2011. Such CDDs were Agreed Claim CDDs, which generally recorded creditors' claims in the currency of their underlying entitlement. According to Wentworth, creditors who were presented with and entered into such CDDs (i) have lost the right to claim Statutory Interest at the rate applicable to the debt apart from the administration; but (ii) have not lost the right to assert Currency Conversion Claims where the CDD recorded their claim in the currency of their underlying entitlement;
- (b) Creditors who were presented with, and entered into, CDDs in the predominant form insisted on by the Administrators in the period between April 2011 and September 2012. Such CDDs were Admitted Claim CDDs, pursuant to which the Administrators generally recorded creditors' proved claims in Sterling, having initially communicated to creditors the amount at which the Administrators were prepared to admit the creditors' claims in the currency of entitlement and then converted that offer into Sterling pursuant to rule 2.86(1) at the official exchange rate applicable to the underlying currency of entitlement as at the Date of Administration. According to Wentworth, creditors who were presented with and entered into such CDDs (i) have lost the right to claim Statutory Interest at the rate applicable to the debt apart from the administration; and (ii) have lost the right to assert Currency Conversion Claims;
- (c) Creditors who, after the possibility of a Surplus was being discussed in the market in early 2012, were presented with and entered into CDDs in the predominant form insisted on by the Administrators in the period between April 2011 and September 2012 but who were able (despite the Administrators previously having stated that the CDDs were non-negotiable) to benefit from a decision by the Administrators to include on a

case by case basis language expressly preserving rights to Statutory Interest. The effect of Wentworth's position is that creditors who were presented with and entered into such CDDs (i) depending on the scope of the preservation clause, may not have lost the right to claim Statutory Interest at the rate applicable to the debt apart from the administration; but (ii) have lost the right to assert Currency Conversion Claims;

- (d) Creditors who were presented with, and entered into, CDDs in the predominant form insisted on by the Administrators in the period between September 2012 and February 2014. Such CDDs incorporated language expressly preserving creditors' rights to interest under rules 2.88(7) to 2.88(9). Pursuant to such CDDs the Administrators generally recorded creditors' claims in Sterling, converted pursuant to rule 2.86(1) at the official exchange rate applicable to the underlying entitlement as at the Date of Administration. The effect of Wentworth's position is that creditors who were presented with and entered into such CDDs (i) have not lost the right to claim Statutory Interest at the rate applicable to the debt apart from the administration; but (ii) have lost the right to assert Currency Conversion Claims;
- (e) Creditors who, after the possibility of Currency Conversion Claims had been raised in February 2013, were presented with and entered into CDDs in the predominant form insisted on by the Administrators in the period between September 2012 and February 2014 but who were able (despite the Administrators previously having stated that the CDDs were non-negotiable) to benefit from a decision by the Administrators to include on a case by case basis language expressly preserving Currency Conversion Claims. The effect of Wentworth's position is that creditors who were presented with and entered into such CDDs (i) have not lost the right to claim Statutory Interest at the rate applicable to the debt apart from the administration; and (ii) may, depending on the scope of the individually negotiated clause, not have lost the right to assert Currency Conversion Claims;

- (f) Creditors who were presented with, and entered into, CDDs in the predominant form insisted on by the Administrators in the period from February 2014. Such CDDs incorporated language expressly preserving creditors' rights to interest under rules 2.88(7) to 2.88(9) as well as language expressly preserving Currency Conversion Claims. On any view, creditors who were presented with and entered into such CDDs (i) have not lost the right to claim Statutory Interest at the rate applicable to the debt apart from the administration; and (ii) have not lost the right to assert Currency Conversion Claims;
- (g) Creditors who entered into the CRA and who were entitled to assert a Net Financial Claim and had that Net Financial Claim established pursuant to a Net Contractual Position Statement. The CRA required the calculation of creditors' claims, including Net Financial Claims, in US dollars. The effect of Wentworth's position is that CRA creditors (i) have lost the right to claim Statutory Interest at the rate applicable to the debt apart from the administration; but (ii) are entitled to assert Currency Conversion Claims;
- (h) Creditors who entered into the CRA and who were entitled to assert a Net Financial Claim but who subsequently entered into a CRA CDD. The effect of Wentworth's position is that:
- i. Irrespective of the terms of the CRA CDD, such creditors have lost the right to claim Statutory Interest at the rate applicable to the debt apart from the administration;
 - ii. CRA creditors who were presented with and entered into CRA CDDs which recorded their claims in a foreign currency (being similar to the Agreed Claim CDDs referred to in paragraph 8(a) above) are entitled to assert Currency Conversion Claims;
 - iii. CRA creditors who did not have (or who agreed to waive) client money claims and therefore were presented with and entered into CRA CDDs which recorded their claims in Sterling, are not entitled to assert Currency Conversion Claims unless (i) the form

of CRA CDD incorporated language expressly preserving creditors' Currency Conversion Claims (such CRA CDDs were not predominantly used by the Administrators until February 2014); or (ii) the creditor managed but who were able (despite the Administrators previously having stated that the CDDs were non-negotiable) to benefit from a decision by the Administrators to incorporate on a case by case basis language expressly preserving Currency Conversion Claims.

- (9) In the circumstances of this case, the Administrators as officers of the Court should be directed not to enforce any such releases in order to ensure the proper conduct of the administration, consistent with its purpose and the Administrators' duties and the equal treatment of creditors and to avoid the unintended, inadvertent, mistaken, unequal, arbitrary or unfair consequences which would otherwise arise.
- (10) The situation requires the application of, or is analogous with, the rule in *ex parte James, Re Condon* (1874) LR 9 Ch App 609 i.e. per Lord Neuberger in *Re the Nortel Companies* [2014] AC 209 at [122]. See also, and by way of example: *In Re W.W. Duncan & Co* [1905] 1 Ch. 307; *In Re Wiggell, Ex Parte Hart* [1921] 2 KB 835 per Younger LJ at 869, *Re Clark* [1975] 1 WLR 559 at 564; *Re Multi-Guarantee Co Ltd* [1987] BCLC 257 at [29]; *Re Lune Metals* [2007] BCC 217 at [34] and [35]; *Collins & Aikman Europe SA* [2006] EWHC 1343 (Ch) at [17].
- (11) Alternatively, the situation entitles creditors to relief under paragraph 74 of Schedule B1 to the Insolvency Act 1986 (see, for example, *Re Coniston Hotel (Kent) LLP* [2013] 2 BCLC 405; *Hockin v Marsden* [2014] 2 BCLC 531) on the basis that:
- (1) By entering into and / or proposing to enforce the terms of the CRA and/or CDDs which would have the effect of releasing or waiving non-provable claims, the Administrators have acted or are proposing to act in a way which would harm the interests of creditors who have entered into such CRA or CDDs;

(2) Such harm is or would be unfair by reason of the matters set out above, and in particular on the basis that:

- (a) certain unsecured creditors participating in the CRA or CDD process would unintentionally, inadvertently, mistakenly, unequally, arbitrarily or unfairly be treated differently by the Administrators depending on the form of CRA or CDD being used by the Administrators from time to time, and whether and, if so, when creditors happened to agree to participate in the CRA or CDD process;
- (b) there were and are no sound commercial reasons to impose such harm on creditors;
- (c) imposing such harm on creditors is not necessary in order to achieve the purpose of the administration, nor is it consistent with the purpose of the Administration and the Administrators' duties.

(3) In the premises, creditors are entitled to relief under paragraph 74(3) of Schedule B1 to the Insolvency Act 1986 including, under paragraph 74(4), an order or direction requiring the Administrators not to enforce any releases of claims to Statutory Interest, Currency Conversion Claims and other non-provable claims.

(4) Such a claim is advanced in these proceedings without prejudice to the ability of any creditor to rely on the general matters identified in conjunction with factors particular to itself in any subsequent claim for relief pursuant to paragraph 74 of Schedule B1 or otherwise

(12) For the avoidance of doubt, the Senior Creditor Group does not contend that the Administrators or their advisors knowingly or wilfully acted in a manner which was unfair or inconsistent with the purpose of the administration, or their duties.