

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**COMPANIES COURT**

No. 7942 of 2008

**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**
- (6) GOLDMAN SACHS INTERNATIONAL**

**Respondents**

**SUPPLEMENTAL ISSUE 1(b)**  
**SENIOR CREDITOR GROUP'S REPLY SUBMISSIONS**

## A. INTRODUCTION

1. These written submissions are filed on behalf of Burlington Loan Management Limited, CVI GVF (Lux) Master S.a.r.l, and Hutchinson Investors, LLC (collectively, the “Senior Creditor Group”). They are written in response to York’s submissions on Supplemental Issue 1(b), dated 22 December 2015.
2. Supplemental Issue 1(b) asks:

*“How is an independent right to interest that ‘arises outside or other than from the administration’ to be determined when calculating interest on a non-provable Currency Conversion Claim if such a rate would only accrue on a debt that was contingent or future at the Date of Administration if some action was taken after the Date of Administration? How are such rights to be assessed if the creditor did not in fact exercise such rights?”*

3. Supplemental Issue 1(b) has only been included at York’s insistence.
4. The Senior Creditor Group’s understanding is that it, the Administrators and Wentworth<sup>1</sup> all agree that a creditor with a Currency Conversion Claim has a non-provable claim in respect of any interest that in fact accrued on the unsatisfied part of the underlying foreign currency debt in the period after the Date of Administration.

## B. THE SENIOR CREDITOR GROUP’S POSITION

5. Supplemental Issue 1(b) is answered by:

- (1) The court’s reasoning at [169] of *Waterfall IIA* that:

*“There is no provision in the legislation for the payment of interest on such non-provable claims. Rule 2.88 applies to the payment of interest on proved, not non-provable, debts. If the contract between the company and the [foreign currency] creditor provides for interest on any unpaid part of the [foreign currency] debt, the creditor is in my judgment entitled to include such interest as part of his non-provable claim. The position of rule 2.88 as a complete code relating to the*

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<sup>1</sup> In a letter dated 14 December 2015, Wentworth stated that its “provisional” view was in accordance with the position set out above.

*payment of post-administration interest does not, in my judgment, interfere with the enforcement of this contractual right as part of a non-provable claim. Neither explicitly nor implicitly does it interfere with a creditor's contractual right to interest on a non-provable debt. This entitlement to interest is dependent on a remission to contractual or other rights existing apart from the administration and it follows that no interest is payable on a currency conversion claim where the underlying foreign currency obligation is not itself interest-bearing".*

- (2) Declaration (vi) of the Part A Order, which gives effect to the findings in paragraph [169] by providing:

*"If and to the extent that a creditor has a non-provable claim (including but not limited to a Currency Conversion Claim) in respect of a sum on which interest is payable apart from the administration at any time during the period after the Date of the Administration (as defined in the Application Notice), the creditor has a non-provable claim in respect of such interest (if any) as may have accrued on that non-provable claim in that period."*

6. Declaration (vi) is clear as a matter of language, and reflects the correct position as a matter of law both as set out in the Part A Judgment and as a matter of logic:

- (1) The right to interest on a Currency Conversion Claim arises, as set out in [169] of *Waterfall IIA*, on the basis of "*a remission to contractual or other rights apart from the administration*". Part of the creditor's underlying rights have not been satisfied (giving rise to the Currency Conversion Claim) and the Court has held that, in respect of the Currency Conversion Claim, the creditor is also entitled to such interest (if any) as accrued on that part of the creditor's underlying claim during the period of the administration.
- (2) A creditor with a Currency Conversion Claim is therefore entitled to receive the interest that in fact accrued on its unsatisfied foreign currency claim in the period after the Date of Administration, in accordance with its underlying contractual or other rights to interest. This is the case irrespective of whether such interest was due and payable as at the Date of Administration or whether such interest became due and payable at a later date, whether by reason of further steps or action taken by the creditor since the Date of Administration or otherwise.

- (3) By contrast, if no interest in fact accrued at any time during the period after the Date of Administration, a creditor with a Currency Conversion Claim has no non-provable claim for interest in that period.
7. Declaration (vi) of the Part A Order was made after submissions at the consequential hearing as to whether such interest should be paid:
  - (1) For the period during which interest accrued on the provable debt between the Date of Administration until payment of the Currency Conversion Claim (as the Administrators and the Senior Creditor Group contended was logical); or
  - (2) Only from the date after payment of the final dividend in respect of the proved debt to the date or dates on which payment is made in respect of the Currency Conversion Claim (as Wentworth contended).
8. The Court preferred the submissions of the Senior Creditor Group and the Administrators in this regard, which conclusion is reflected in Declaration (vi) of the Part A Order. If York disagrees with this conclusion, the proper course is for it to appeal rather than seek to re-open this issue by way of supplemental submissions.

**C. YORK'S POSITION**

9. The Senior Creditor Group understand York's "*primary position*" to be that interest which in fact accrued during the period after the Date of Administration cannot be recovered by a creditor with a Currency Conversion Claim as a non-provable claim if it only accrued as a consequence of steps or action taken by the creditor after the Date of Administration. Irrespective of whether this point has already been determined by the Court, York's "*primary position*" is confused and incorrect:

- (1) York’s argument appears to rely solely on the finding at paragraph [177] of *Waterfall IIA* to the effect that the “*rate applicable to the debt apart from the administration*”, within the meaning of Rule 2.88(9), does not include “*a hypothetical rate which would be applicable to a debt if the creditor took certain steps*”.
- (2) However, paragraph [177] of *Waterfall IIA* was addressing the scope of Rule 2.88(9), which is concerned with claims to interest on provable debts. By contrast, a creditor’s entitlement to interest on a non-provable Currency Conversion Claim does not derive from Rule 2.88(9) but from its underlying contractual or other rights. For that purpose (i.e. ascertaining the interest payable on a Currency Conversion Claim by reference to the creditor’s underlying rights to interest rather than Rule 2.88(9)), the only question is one of fact: what interest accrued during the period of the administration by reference to such rights on the Currency Conversion Claim?
- (3) For the purposes of determining a creditor’s entitlement to interest on a Currency Conversion Claim, all that therefore matters is whether interest in fact accrued during the period of administration. This is because such an entitlement is dependent on a remission to contractual or other rights existing apart from the administration. There is no logical basis for limiting it to creditors who had an existing or accrued right to interest as at the Date of Administration or to limit it by reference to the terms of Rule 2.88(9).
- (4) In any event, even if a creditor’s entitlement to interest on a Currency Conversion Claim is limited by reference to the terms of Rule 2.88(9) then, for the reasons contained in the Senior Creditor Group’s submissions in respect of Supplemental Issue 1(a), a right to interest arising under a contract is a right that exists at the Date of Administration, and is part of the “*rate applicable to the debt apart from the administration*” within the meaning of Rule 2.88(9), even if interest has not begun to accrue as at the Date of Administration.

10. The Senior Creditor Group understand York's "*secondary position*" to be that, if its primary position is incorrect for the reasons given above or otherwise, a creditor with a Currency Conversion Claim who could have taken some step to gain a right to interest, but did not do so, should also be entitled to claim interest on its Currency Conversion Claim at that rate of interest from the Date of Administration. This argument is, however, also incorrect<sup>2</sup>:

- (1) As explained in paragraph [169] of *Waterfall* IIA, the entitlement to interest on a Currency Conversion Claim is dependent on a remission to contractual or other rights existing apart from the administration "*and it follows that no interest is payable on a currency conversion claim where the underlying foreign currency obligation is not itself interest-bearing*".
- (2) There is no logical reason why a creditor with a Currency Conversion Claim should be treated as if interest had accrued on that part of his claim which reflects the Currency Conversion Claim when, in fact, no such interest did accrue. To so hold would contradict the underlying rationale for both the Currency Conversion Claim and the right to interest thereon i.e. remission to underlying rights.
- (3) The only basis put forward by York for this argument is an alleged inconsistency in treatment between a creditor with a Currency Conversion Claim who in fact acquired a right to interest after the commencement of Administration (by, for example, obtaining a judgment) and a creditor who did not or could not acquire a right to interest after the commencement of Administration. However, this example merely illustrates the fact that the entitlement to claim interest on a Currency Conversion Claim is determined by reference to (and dependent on) whether interest in fact accrued during the period of the Administration.

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<sup>2</sup> For the avoidance of doubt, the position is different in the context of Issue 4 (which is currently under appeal). Issue 4 is concerned with the construction and ambit of Rule 2.88(6) whereas the entitlement to claim interest on a Currency Conversion Claim is not dependent on Rule 2.88(6), but on a remission to contractual or other rights apart from the administration.

**ROBIN DICKER QC**

**RICHARD FISHER**

**HENRY PHILLIPS**

13 January 2015

South Square

Gray's Inn

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**WATERFALL II DIRECTIONS APPLICATION**

**SENIOR CREDITOR GROUP'S SKELETON**  
**ARGUMENT**  
**FOR TRIAL (PART C)**

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