

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

AMENDED APPLICATION PURSUANT TO THE ORDER OF
MR JUSTICE DAVID RICHARDS DATED 9 MARCH 2015

TAKE NOTICE that Anthony Victor Lomas, Steven Anthony Pearson, Paul David Copley, Russell Downs and Julian Guy Parr, in their capacity as the joint administrators of Lehman Brothers International (Europe) (in administration) ("**LBIE**") (the "**Joint Administrators**"), all of PricewaterhouseCoopers LLP, 7 More London Riverside, London SE1 2RT, intend to apply to the Judge on:-

Date: 25 June 2014

Time:

Place: Court , 7 Rolls Buildings, Fetter Lane, London EC4A 1NL

For directions, pursuant to paragraph 63 of Schedule B1 of the Insolvency Act 1986, determining the following issues which are to be read with reference to the definitions contained in the Schedule hereto:

Statutory Interest

Construction of Rule 2.88

- 1 Whether on the true construction of Rule 2.88(7) of the Rules, Statutory Interest is payable on a simple or compound basis where the rate applicable is the rate specified in section 17 of the Judgments Act 1838? If payable on a compound basis, with what frequency is it to be compounded?
- 2 Whether on the true construction of Rule 2.88(7) of the Rules, Statutory Interest is calculated on the basis of allocating dividends:
 - (i) first to the payment of accrued Statutory Interest at the date of the relevant dividends and then in reduction of the principal;
 - (ii) first to reduction of the principal and then to the payment of accrued Statutory Interest; or
 - (iii) on the basis of some other sequencing.
- 3 Whether the words "*the rate applicable to the debt apart from the administration*" in Rule 2.88(9) of the Rules refer:
 - (i) only to a numerical percentage rate of interest; or
 - (ii) also to a mode of calculating the rate at which interest accrues on a debt, including compounding of interest, such that where a creditor has a right

(beyond any right contained in Rule 2.88) to be paid compound interest, whether under an Original Contract or otherwise, the creditor is entitled to compound interest under Rule 2.88(7).

- 4 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.
- 5 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 comparison required is of:
 - (i) the total amounts of interest that would be payable under Rule 2.88(7) based on each method of calculation; or
 - (ii) only the numerical rates themselves,and in either case, how the total amount of interest is calculated when the *“rate applicable to the debt apart from the administration”* varies from time to time.
- 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.

Period during which the debts “have been outstanding since LBIE entered administration” for the purposes of Rule 2.88(7)

- 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.
- 9** Whether a creditor's accession to the CRA (and, in particular, the effect of clauses 20.4.3, 24.1, 25.1, 25.2 and 62.4 of the CRA) would impact upon the answers to questions 7 and 8 above, and if so, how.

Master Agreements

ISDA.

- 10** Whether, on the true construction of the term "Default Rate" as it appears in the ISDA Master Agreement, the "relevant payee" refers to LBIE's contractual counterparty or to a third party to whom LBIE's contractual counterparty has transferred (by assignment or otherwise) its rights under the ISDA Master Agreement.
- ~~**11** On the true construction of the term "Default Rate" as it appears in the ISDA Master Agreement, what meaning should be given to the expression "cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount"? In particular:~~
- ~~(i) can this cost:~~

- ~~(a) — only be ascertained with reference to the actual or asserted cost of the payee to fund or of funding the relevant amount by borrowing the relevant amount (and if so whether such borrowing should be assumed to have recourse solely to the claim that it is funding or to the rest of the relevant payee's unencumbered assets and, if the latter, whether the cost of funding should include the cost to the relevant payee of incurring additional debt against its existing asset base); or~~
- ~~(b) — be ascertained in other ways, including with reference to funds which might be raised by way of equity investment in the payee and, if so:

 - ~~(i) — in what ways might the costs be ascertained; and~~
 - ~~(ii) — how would the cost be calculated in such circumstances?~~~~
- ~~(ii) — should the cost of funds be calculated based on:

 - ~~(a) — the cost to the relevant payee of funding a claim against LBIE;~~
 - ~~(b) — an average cost of funding the relevant payee's asset base; or~~
 - ~~(c) — (if different) the cost of raising general corporate funding?~~~~

11 Is the meaning that should be given to the expression “cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount” capable of including:

- (1) The actual or asserted cost to the relevant payee to fund or of funding the relevant amount by borrowing the relevant amount; and/or
- (2) The actual or asserted average cost to the relevant payee of raising money to fund or of funding all its assets by whatever means, including any cost of raising shareholder funding; and/or
- (3) The actual or asserted cost to the relevant payee to fund or of funding and/or carrying on its balance sheet an asset and/or of any profits and/or losses incurred in relation to the value of the asset, including any impact on the cost of its borrowings and/or its equity capital in light of the nature and riskiness of that asset; and/or
- (4) The actual or asserted cost to the relevant payee to fund or of funding a claim against LBIE.

~~12~~ — Whether the “cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount” is to be calculated based on obtaining:

~~(i) — overnight funding;~~

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

~~(iii) — funding on some other basis (and if so, what basis).~~

12 If and to the extent that the “cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund ... the relevant amount” includes a cost of borrowing:

(1) Should such borrowing be assumed to have recourse solely to the relevant payee’s claim against LBIE or to the rest of the relevant payee’s unencumbered assets?

(2) the latter, should the cost of funding include the incremental cost to the relevant payee of incurring additional debt against its existing asset base or should it include the weighted average cost on all of its borrowings?

(3) Should such cost include any impact on the cost of the relevant payee’s equity capital attributable to such borrowing?

(4) Is the cost to be calculated based on obtaining:

(i) Overnight funding; or

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

(iii) Funding for some other duration?

13 Whether the “cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount” should be calculated:

(i) by reference to the relevant payee’s circumstances on a particular date; or

(ii) on a fluctuating basis taking into account any changes in the relevant circumstances (and if so, whether the benefit of hindsight applies when taking into account such changes),

in each case, whether or not taking into account relevant market conditions.

- 14 Whether a relevant payee's certification of its cost of funding for the purposes of applying the "Default Rate" is conclusive and, if not, to what it is subject. In particular whether, in order for a payee's certification to be deemed conclusive, a relevant creditor is under any duty to act:
- (i) reasonably;
 - (ii) in good faith and not capriciously or irrationally; or
 - (iii) otherwise than in its own interests.
- 15 If the answer to question 14 is that the relevant payee's certification of its cost of funding is not conclusive and one of the requirements (i) to (iii) set out in that question applies, where does the burden of proof lie in establishing, and what is required to demonstrate, that a relevant payee has or has not met such requirement?
- 16 Whether only the relevant payee (in accordance with the meaning of such term determined pursuant to question 10 above), or another party (whether authorised by the relevant payee or not) can provide certification of the cost of funding and, if the former, what the position should be if the relevant payee is not capable of providing such certification (for example because it has been wound up or dissolved).
- 17 ~~In circumstances where a relevant payee has not incurred any actual costs, what principles should be applied in determining the asserted costs "if it were to fund [...] the relevant amount".~~
- 18 Whether the power of a party under section 7(b) of the 1992 form ISDA Master Agreement to transfer any amount payable to it from a Defaulting Party under Section 6(e) without the prior written consent of that party included the power to transfer any contractual right to interest under that agreement.
- 19 Whether the answer to questions 10 to 18 above (or any of them) is different if the underlying Master Agreement is governed by New York rather than English law.

German

- 20 Whether, in calculating the amount of interest due under section 3(4) of the German Master Agreement, it is possible (and if so, in what circumstances and to what extent) to include an amount in respect of "further claims for damages" ("**Damages Interest Claim**") so that this would constitute part of "*the rate applicable to the debt apart from the administration*" for the purposes of Rule 2.88(9).

- 21** If the answer to question 20 is that a further claim for damages can be included as part of the “*rate applicable to the debt apart from the administration*” for the purposes of Rule 2.88(9), how in such circumstances is the relevant rate to be determined? In particular:
- (i) in circumstances where the relevant claim under the German Master Agreement has been transferred (by assignment or otherwise) to a third party, is it the Damages Interest Claim which could be asserted by the assignor or the assignee which is relevant for the purposes of Rule 2.88(9)?
 - (ii) where the relevant claim under the German Master Agreement has been acquired by a third party, in what circumstances (if any) is such a third party precluded from asserting a Damages Interest Claim under principles of German law?
 - (iii) where does the burden of proof lie in establishing a Damages Interest Claim, and what is required to demonstrate, that a relevant creditor has or has not met such requirement?

FBF

- 22** Whether each of:
- (i) default interest pursuant to clause 9.1 of the FBF Master Agreement and the AFB Master Agreement;
 - (ii) the “*Late Interest Rate*” as such term is defined in the AFTB Master Agreement; and/or
 - (iii) “*Late Payment Interest*” as such term is defined in the AFTI Master Agreement,
- are capable of being a “*rate applicable to the debt apart from the administration*” for the purposes of Rule 2.88(9).
- 23** Whether the “party” that receives the interest referred to in question 22 above pursuant to the FBF Master Agreement, the AFB Master Agreement, the AFTB Master Agreement and the AFTI Master Agreement refers to LBIE’s original contractual counterparty or to a third party to whom LBIE’s original contractual counterparty has transferred (by assignment or otherwise) its rights under the relevant agreement.
- 24** Whether the terms:

- (i) “*overnight financing rate of the Party*” in clause 9.1 as it appears in the FBF Master Agreement and the ABF Master Agreement;
- (ii) “*average overnight rates that would be offered to the beneficiary*” as it appears in the AFTB Master Agreement;
- (iii) “*the average of the daily rates to which the recipient of the payment has access during the relevant period*” as it appears in the AFTI Master Agreement,

should only be ascertained with reference to the actual or asserted cost of the payee or may be ascertained in other ways.

- 25** Whether only the “party” pursuant to question 23 or another party authorised to act on behalf of the “party” can provide determination and notification of its cost of funding.
- 26** What is the applicable standard, if any, by reference to which any statement by the party as to its “*overnight refinancing rate*”, “*average overnight rates*” and “*average of daily rates to which it has access*” is constrained?

Status of Payee

- 27** Whether, and if so how, the answers to questions 10 to 26 would be impacted where the “relevant payee” is:
 - (i) a Credit Institution or Financial Institution;
 - (ii) a Fund Entity; or
 - (iii) a corporate or other type of counterparty.

Currency Conversion Claims

- 28** Whether, and if so how, the calculation of a Currency Conversion Claim should take into account the Statutory Interest paid to the relevant creditor by the Joint Administrators.
- 29** Whether there exists a non-provable claim against LBIE where the total amount of interest received by a creditor applying the Judgments Act Rate on a sterling admitted claim, when converted into the relevant foreign currency on the date of payment, is less than the amount of interest which would accrue applying the Judgments Act Rate to the original foreign currency claim.

- 30** Whether there exists a non-provable claim against LBIE where the total amount of interest received by a creditor applying a "*rate applicable to the debt apart from the administration*" on a sterling admitted claim, when converted into the relevant foreign currency on the date of payment, is less than the amount of interest which would accrue applying the "*rate applicable to the debt apart from the administration*" to the original foreign currency claim.
- 31** Whether:
- (i) in relation to a GMSLA for which the "Base Currency" is a currency other than sterling, a Currency Conversion Claim can arise in respect of the "Base Currency" if the schedule to that agreement states that paragraph 10 of that agreement will only apply if LBIE's counterparty is the "Defaulting Party";
 - (ii) in relation to a GMRA for which the "Base Currency" (as distinct from the "Contractual Currency") is a currency other than sterling, a Currency Conversion Claim can arise in respect of the "Base Currency" if the schedule to that agreement states that paragraph 10 of that agreement will only apply if LBIE's counterparty is the "Defaulting Party"; and
 - (iii) in relation to other master agreements, a Currency Conversion Claim can arise if the relevant contractual terms state that the termination and close-out netting provisions which would result in a payment obligation in a non-sterling currency by one party to the other do not apply other than upon the default of LBIE's counterparty.
- 32** If the answer to question 31 (i), (ii) and/or (iii) is in the negative, whether a Currency Conversion Claim can arise (and if so in what circumstances) in respect of such a GMSLA, GMRA or other master agreements.
- 33** Whether a Currency Conversion Claim can be established by a creditor where the creditor's right is derived from a transfer (whether or not by way of legal assignment) by LBIE's original counterparty (or any assignee of the original counterparty) which only transferred:
- (i) the provable debt;
 - (ii) the right to receive a dividend on the provable debt; or
 - (iii) the Agreed Claim Amount defined as a numerical amount in a CDD
- and if not, whether either the original counterparty or the assignee is capable of having a valid Currency Conversion Claim.

Effect of Post-Administration Contracts

- 34** Whether (as a matter of construction) a creditor's Currency Conversion Claim and/or any other non-provable claim has been released in circumstances in which the creditor entered into either:
- (i) a Foreign Currency CDD incorporating a Release Clause;
 - (ii) a Sterling CDD incorporating a Release Clause; or
 - (iii) the CRA.
- 35** Whether (as a matter of construction) a creditor's claim to Statutory Interest has been released in whole or in part in circumstances in which the creditor entered into either:
- (i) a CDD incorporating a Release Clause; or
 - (ii) the CRA.
- 36** If a CDD or the CRA has the effect of releasing a Currency Conversion Claim, Statutory Interest claim or other non-provable claims, whether such release(s) should in the circumstances be enforced.
- 36A** If (as a matter of construction) a CDD or the CRA has the effect of releasing a Currency Conversion Claim, Statutory Interest claim or other non-provable claims, whether, by reason of, or by analogy with, the rule in *Ex parte James* (1874) LR 9 Ch App 609 and/or because to enforce such release(s) would unfairly harm creditors who have entered into a CDD or the CRA within the meaning of paragraph 74 of Schedule B1 to the Insolvency Act 1986, in all the circumstances, the Administrators should be directed not to enforce, or to cause LBIE to enforce, such release(s).
- 36B** If (as a matter of construction) a CDD or the CRA has the effect of releasing a Currency Conversation Claim, Statutory Interest claim or other non-provable claim, whether or not there are any bases (other than those of general application to all CDDs or the CRA considered by the Court in the context of Issue 36A) for the Court to determine that the releases should not in the circumstances be enforced or are not in the circumstances effective (such as rectification, estoppel and/or relief from the consequences of a common or unilateral mistake).
- 37** How are claims to be calculated where a CDD (or any other agreement pursuant to which an unsecured claim is agreed or admitted) compromises a number of claims, with differing rates of interest applicable or in different currencies, without indicating

how the agreed or admitted claim amount in the CDD (or any other agreement) derives from and relates to those underlying claims?

- 38** Whether (and if so in what circumstances) Part VII of the CRA, which specifies that claims of acceding creditors are to be calculated in US dollars, is capable of giving rise to a Currency Conversion Claim.

Compensation for Time Taken to Discharge Non-Provable Claims

- 39** Whether a creditor entitled to Statutory Interest, Currency Conversion Claims and/or other non-provable claims is entitled to any form of compensation for or in respect of the time taken for such claim to be discharged and, if so, whether such compensation is taken into account as part of the correct methodology for calculating Statutory Interest and/or the distribution of the surplus, or should take the form of interest at the Judgments Act Rate, damages for loss, restitution or another form.

And for:

- 40** Such further or other relief as the Court thinks fit; and
- 41** An order that the Joint Administrators' costs of the Application be paid as an expense of the administration.

Dated this ^{13th}..... day of May 2015~~June 2014~~

Signed: .....

Joint Administrators' solicitors: Linklaters LLP

Position held: Partner

The Joint Administrators' address for service is:

Linklaters LLP, One Silk Street, London EC2Y 8HQ

Reference: Tony Bugg / Euan Clarke / Jared Oyston

It is intended to serve this Application on:

CVI GVF (Lux) Master S.à.r.l., c/o Freshfields Bruckhaus Deringer LLP

Hutchinson Investors LLC, c/o Ropes & Gray International LLP

Burlington Loan Management Limited, c/o Schulte Roth & Zabel LLP

Wentworth Sons Sub-Debt S.à.r.l., c/o Kirkland and Ellis International LLP

York Global Finance BDH, LLC, c/o Michelmores LLP

IF YOU DO NOT ATTEND, THE COURT MAY MAKE SUCH ORDER AS IT THINKS FIT.

SCHEDULE
DEFINITIONS

<u>Term</u>	<u>Meaning</u>
Act	The Insolvency Act 1986
AFB Master Agreement	French Derivatives Master Agreement
AFTB Master Agreement	French Repurchase Master Agreement
AFTI Master Agreement	French Securities Lending Master Agreement
CDD	A Claims Determination Deed entered into between LBIE and a creditor
CRA	The Claim Resolution Agreement which was declared effective on 29 December 2009 by LBIE in respect of certain of its clients and counterparties (as modified from time to time)
Credit Institution	As defined in the Capital Requirements Regulation
Currency Conversion Claim	A non-provable claim against LBIE arising out of the difference between: (i) the amount of the creditor's entitlement to payment in a foreign currency; and (ii) the amount received by it in respect of its proved debt, converted into the foreign currency as at the date of payment
Date of Administration	The date on which LBIE entered into administration, being 15 September 2008
FBF Master Agreement	French Banking Federation Master Agreement
Financial Institution	As defined in accordance with the Capital Requirements Directive (2006/48/EC and 2006/49/EC) but excluding a Fund Entity as defined herein
Foreign Currency CDD	A CDD in which the Agreed Claim Amount is expressed in a currency other than Pounds Sterling
Fund Entity	A fund or fund manager primarily operating hedge and credit fund strategies, including, but not limited to, Alternative Investment Funds (AIFs) and Alternative Investment Fund Managers (AIFMs) as defined in accordance with the Alternative Investment Fund Managers Directive

	(2011/61/EU)
German Master Agreement	The German Master Agreement for Financial Derivative Transactions
GMRA	Global Master Repurchase Agreement
GMSLA	Global Master Securities Lending Agreement
ISDA Master Agreement	The 1992 or 2002 International Swap Dealers Association Multicurrency-Cross Border Master Agreement
Judgments Act Rate	The interest rate of eight per cent. per annum set out in section 17 of the Judgments Act 1838
Original Contract	A contract entered into between LBIE and a creditor prior to LBIE's entry into administration
Release Clause	A clause in a CDD in, or materially in, the following form: <i>"the Creditor and (i) the Company and (ii) the Administrators are hereby each irrevocably and unconditionally released and forever discharged from any and all losses, costs, charges, expenses, Claims (including all Claims for interest costs and orders for costs), demands, actions, causes of action, Liabilities, rights and obligations (including those which arise hereafter upon a change in the relevant law) to or against each other and howsoever arising in equity or under common law or any statute or by reason of breach of contract or in respect of any tortious or negligent act or omission (whether or not loss or damage caused thereby has yet been suffered) or otherwise, whether arising under the Creditor Agreements or not, whether in existence now or coming into existence at some time in the future, and whether or not in the contemplation of the Creditor and/or the Company and/or the Administrators on the date hereof"</i>
Rules	The Insolvency Rules 1986
Statutory Interest	Interest payable pursuant to rule 2.88(7) of the Rules
Sterling CDD	A CDD in which the Agreed Claim Amount and/or the Admitted Claim Amount (as defined therein) are expressed in Pounds Sterling

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

COMPANIES COURT

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ACT 1986

AMENDED APPLICATION
PURSUANT TO THE ORDER OF
MR JUSTICE DAVID RICHARDS
DATED 9 MARCH 2015

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