

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

No. 7942 of 2008



Before the Honourable Mr Justice Hildyard

Friday the 9th day of October 2015

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
(6) GOLDMAN SACHS INTERNATIONAL

Respondents

ORDER

UPON THE APPLICATION of Anthony Victor Lomas, Steven Anthony Pearson, Paul David Copley, Russell Downs and Julian Guy Parr of PricewaterhouseCoopers LLP, 7 More London Riverside, London SE1 2RT, the administrators of Lehman

Brothers International (Europe) (“**LBIE**”) (the “**Administrators**”), dated 12 June 2014 (the “**Application**”) (as amended pursuant to the Order of Mr Justice David Richards dated 9 March 2015)

AND UPON READING the written submissions filed on behalf of the Administrators, the First to Third Respondents (the “**Senior Creditor Group**”), the Fourth Respondent (“**Wentworth**”) and the Sixth Respondent (“**Goldman Sachs**”)

AND UPON HEARING Mr William Trower QC, Mr Robin Dicker QC, Mr Antony Zacaroli QC and Mr Mark Howard QC (Leading Counsel respectively for the Administrators, the Senior Creditor Group, Wentworth and Goldman Sachs)

AND UPON READING the evidence

IT IS HEREBY ORDERED AND DIRECTED that:

Amendments to the Application Notice

1. The Administrators have permission to amend the Application Notice to effect the amendments ordered at paragraphs 2 and 3 of this Order.

Foreign law issues

2. Issues 22 to 26 be removed from the Application.
3. Issue 20 of the Application be amended as set out in Schedule A hereto.
4. Schedule C of the Order of Mr Justice David Richards dated 9 March 2015 (the “**9 March Order**”) (Questions for German Law Experts), be amended as set out in Schedule B hereto.
5. Paragraph 23 of the 9 March Order be amended to require such discussion between the experts to take place by 19 October 2015.

6. Paragraph 24 of the 9 March Order be amended to require the German law experts to prepare and file such Statement for the Court (in German) by 4.00pm on Thursday 22 October 2015, with an English translation to follow as soon as possible thereafter.
7. Paragraph 25 of the 9 March Order be removed.
8. Paragraphs 26 to 32 of the 9 March Order be removed.
9. Paragraph 37 of the 9 March Order be amended to require, in addition to the orders set out therein:
 - a. the Senior Creditor Group and Wentworth to, by 4.00pm on Monday 26 October 2015, lodge at Court, and serve on the Administrators and each other, their skeleton arguments in respect of Issues 20 and 21 of the Application;
 - b. the Administrators to, by 4.00pm on Monday 2 November 2015, lodge at Court, and serve on the Respondents, their skeleton argument in respect of Issues 20 and 21 of the Application, if so advised; and
 - c. the Senior Creditor Group and Wentworth to, by 4.00pm on Wednesday 4 November 2015, lodge at Court, and serve on the Administrators and each other, their supplemental skeleton arguments in respect of Issues 20 and 21 of the Application, if so advised.

Part C hearing

10. The Administrators and the Respondents do, by 4.00pm on Monday 26 October 2015, agree a timetable for the Part C hearing listed for 9 to 20 November 2015.

Miscellaneous

11. Liberty to apply.
12. Costs in the Application.

Service of the order

The Court has provided a sealed copy of this order to the serving party:
Linklaters LLP, 1 Silk St., London, EC2Y 8HQ

Schedule A – Amended Issue 20

Issue 20 of the Application Notice shall be amended as follows:

- 20.1 Whether and in what circumstances, following LBIE’s administration, a creditor would be entitled to make a “damages interest claim” within the meaning of section 288(4) of the German Civil Code (**BGB**) on any sum which is payable pursuant to clauses 7 to 9 of the German Master Agreement?
- 20.2 If the answer to question 20.1 is yes, whether (and if so, in what circumstances) all or part of such “damages interest claim” can constitute part of “*the rate applicable to the debt apart from the administration*” for the purpose of Rule 2.88(9)?

**Schedule B – Amended Schedule C to Order of Mr Justice David Richards dated
9 March 2015**

Schedule C to the Order of Mr Justice David Richards dated 9 March 2015 shall be amended to add the following questions to those originally listed in Schedule C:

Clauses 7 to 9 of the German Master Agreement (GMA)

1. On the true construction of clauses 7 to 9 of the GMA:
 - a. When does a close-out amount arising under clauses 7 to 9 of the GMA become due and payable?
 - b. Must a default have occurred within the meaning of section 286 of the BGB in order for there to be a claim for damages for late payment?
 - c. Is section 271 of the BGB relevant to the question in 1(a) above?

Section 286 of the German Civil Code (BGB)

2. What is the true construction of section 286? In particular:
 - a. Can a default occur including by the service by the non-defaulting party of a “warning notice” on a defaulting party once the defaulting party has entered into, and remains in, administration in England & Wales?
 - b. What are the formal and substantive requirements for a “warning notice” (as the phrase is used in section 286 of the BGB)?
 - c. Could: (1) the filing of a proof of debt in the LBIE administration and/or (2) the service of a termination notice pursuant to the GMA by a non-defaulting counterparty to LBIE, constitute the service of a “warning notice” for the purposes of section 286(2) BGB?

- d. Can a non-defaulting party serve a “warning notice” on the defaulting party after the defaulting party has repaid the principal debt owing to the non-defaulting party? If so, would its damages interest claim relate back to the period prior to the defaulting party making payment in full of the principal debt?

- e. What are the exceptions to the need for a “warning notice” in order for default to occur? Having regard to the Administration Summary, would there have been a serious and definitive refusal of performance by LBIE within the meaning of 286(2) no. 3 of the German Civil Code or would there have been special reasons, weighing the interests of both parties, justifying the immediate commencement of default within the meaning of the 286(2) no. 4 the German Civil Code when: (a) an administration application was made by or in relation to LBIE; and/or (b) LBIE went into administration, in each case meaning that there was no need for a warning notice?