IN THE COURT OF APPEAL **No. A2/2015/3753**
ON APPEAL FROM THE HIGH COURT
CHANCERY DIVISION
COMPANIES COURT
DAVID RICHARDS J
[2015] EWHC 2269 (Ch)

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) YORK GLOBAL FINANCE BDH LLC

Appellant

-and-

(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))

(6) BURLINGTON LOAN MANAGEMENT LIMITED
(7) CVI GVF (LUX) MASTER SÀRL
(8) HUTCHINSON INVESTORS LLC
(9) WENTWORTH SONS SUB-DEBT SÀRL

Respondents

YORK'S FURTHER WRITTEN SUBMISSIONS
Following the Supreme Court's judgment in Waterfall I

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1. These further written submissions follow the Supreme Court's judgment in Waterfall I (the "**SC Judgment**", reported at [2017] 2 WLR 1497).

2. York's approach throughout these proceedings has been to seek to minimise duplication and the incurring of unnecessary costs. Following receipt of Wentworth's submissions dated 16 June 2017 ("**Wentworth's Further Submissions**"), the only points on which York wishes make further submissions are Item 1 (Declaration (iii): application of the rule in *Bower* v *Marris*) and Item 11 (Declaration (x): foreign judgment rate of interest).

Item 1 - The Relevant Issue

3. It is important to have in mind that the key issue for present purposes is as to the manner in which the amount of statutory interest payable under rule 2.88 is to be *calculated*.

4. It is not disputed by York that rule 2.88 is a complete code so far as establishing the *rights* of creditors to statutory interest is concerned. However, the question at hand is as to how the interest to which a creditor is entitled by virtue of his rights rule 2.88 is to be *calculated*.

5. Contrary to the impression sought to be given in Wentworth's Further Submissions, there is little if anything in the SC Judgment which answers this question. In substance, Wentworth's Further Submissions are little more than a repetition of the submissions which it has already made as to the correct construction of rule 2.88.

6. Neither Wentworth's Further Submissions, nor the SC Judgment, bear on the central point which is that, in circumstances where rule 2.88 is effectively silent on the method of calculation of interest, it is logical and appropriate to apply the usual, and commercially sensible, method of calculating interest (i.e. by treating payments received as applied first to interest then principal) which allows for the creditor to be compensated properly for a delay in payment of money. Indeed, commercially, it is difficult to see why anyone would devise a rule with the ostensible purpose of compensating a creditor for a delay in payment by allowing the creditor interest at the judgments debt rate (as the Cork Committee clearly recommended) but then draft the implementing rule for that recommendation so as to deny any compensation for a delay in the payment of that interest (as would apply in the case of a normal judgment debt where there is a delay in payment).

Wentworth's Further Submissions

7. At paras 5-10, Wentworth cautions against overreliance on pre-1986 authority when construing rule 2.88. However:

   (1) This point simply goes to support the contention that there is no right to post-administration interest apart from under rule 2.88 (a proposition which York has not ever disputed). It tells one nothing about how to calculate interest under rule 2.88.

(2) As the extracts quoted by Wentworth demonstrate, while "*the 1986 legislation represents a comprehensive overhaul of insolvency legislation*", "*fundamental principles apply just as they always have done*" (para.12 of the SC Judgment).

(3) The rule in *Bower v Marris* (or, more accurately, the underlying method of calculating interest which is common to insolvency proceedings, testamentary estates and payment of interest-bearing debts by solvent debtors) is one such fundamental principle.

8. At paras 11-12, Wentworth emphasises the importance of the words actually used by the legislature. However:

(1) There is nothing in rule 2.88 to indicate one way or another how the interest is to be calculated. Rule 2.88(7) simply provides that:

> "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 periods during which they have been outstanding since the relevant date."

(2) This rule simply provides that interest is payable following payment of dividends amounting to 100% of the debts proved. It says nothing whatsoever about how to calculate that interest.

(3) York does not dispute that where legislative language is clear, then it must be followed unless it is absurd or unworkable. But there is no indication in rule 2.88(7) one way or the other as to how interest should be calculated. Accordingly, there is no need to demonstrate that there is anything "*absurd or unworkable*" about rule 2.88 or the Judge's construction of it.

(4) Notably, Wentworth accepts that compound interest is payable under rule 2.88(7). This is because, although compound interest is sometimes characterised as "*interest on interest*" (which would not be permitted by rule 2.88, which only provides for interest on the principal amount of "*debts proved*"), this is only a convenient shorthand way of describing how the interest is calculated. Similarly, although a calculation in accordance with *Bower* v *Marris* might be described as appropriating dividends to interest first, then to principal, this is simply a convenient shorthand way of describing how the calculation is performed. Calculation of interest in accordance with *Bower* v

Marris does not involve paying interest before principal, any more than paying compound interest involves paying interest on interest.

(5) Wentworth has sought to place reliance upon para.142 of the SC Judgment, which states that the direction to pay interest after proved debts is more than just "*a convenient way of identifying liabilities which fall lower than other liabilities in the priorities encapsulated in the waterfall*". Wentworth argues that, by including the words "*after payment of the debts proved*", the draftsman has subtly indicated that the rule in *Bower v Marris* should no longer apply.

(6) However, Wentworth has taken para.142 of the SC Judgment out of context. The SC there was concerned with whether s.74 of the 1986 Act (liability of members to contribute in a winding up) could be used to generate a surplus from which statutory interest could then be paid. The SC noted that there was only a liability to pay interest if there was a surplus (in which case there could be no s.74 liability) and that if there was no surplus, then no interest was payable (in which case there could be no s.74 liability in respect of it). Nothing in that reasoning has any application to the question presently before the Court.

(7) Accordingly, interest should be calculated in the way that interest is typically calculated in English law: in the manner it was calculated in *Bower v Marris*, and in every other decision of a common law court considering the point.

9. At paras 13-16, Wentworth again emphasises that rule 2.88 is a complete code. York agrees, but for reasons already stated, this is irrelevant. York does not seek to recover a greater sum of interest than that allowed by rule 2.88, but simply invites the court to calculate its entitlement under rule 2.88 in the way in which interest has always been calculated, in a way which is commercially sensible and in a way that gives proper effect to the Cork Committee recommendation to allow interest on proved debts in an insolvency calculated in the same way as interest on judgment debts..

Item 11 – Inconsistent application of simplicity

10. At para 31, Wentworth contends that the legislative objective of simplicity prevents creditors from obtaining statutory interest at a rate that is hypothetical, in the sense of not already applicable to the debt as at the Date of Administration.

11. However, no explanation is given as to why it is apparently simple for some creditors to certify an equally hypothetical contractual rate as being a rate applicable when creditors, prevented from obtaining foreign judgments by the statutory scheme, cannot certify a foreign judgments rate as being such a rate. York submits that all creditors should be treated equally in any application of "*simplicity*".

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30 June 2017