No. 7942 of 2008

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

JOINT ADMINISTRATORS' SKELETON ARGUMENT (for pre-trial review on 21 April 2015)

Suggested pre-reading:

If time permits, the Court is invited to pre-read the following documents:

(1) The parties' skeleton arguments;
(2) The draft minute of order for the directions given by the Court on 9th March 2015 (the "**Draft March Order**");
(3) The two statements of facts for Issue 36A filed and served by the SCG and Wentworth;
(4) The draft of the statement of agreed facts for Issues 34 and 35 circulated by the Administrators to the Respondents on 15 April 2015; and
(5) The correspondence between the parties.

Estimated pre-reading time: 2 hours
Estimated hearing time: Half a day

Introduction

1. This skeleton argument is filed on behalf of the Administrators of Lehman Brothers International (Europe) ("**LBIE**") (the "**Administrators**") in advance of the pre-trial review on 21 April 2015 (the "**PTR**"), listed pursuant to paragraph 18 of the directions given by the Court on 21 November 2014 (the "**November Directions**").

2. This pre-trial review has been listed in advance of the trial provided by paragraph 8 of the November Directions (the "**Tranche B Trial**"). This and other provisions of the November Directions, together with paragraphs 1 and 4 to 8 of the directions given by the Court on 9 March 2015 (the "**March Directions**"), set out the directions for the determination of Issues 9, 34, 35, 36A and 38 at the Tranche B Trial.

3. The parties have complied with the provisions of the March Directions and made progress in reaching agreement on those issues requiring to be settled prior to the Tranche B Trial. However, as can be seen from the Draft March Order, there remain certain provisions of the Draft March Order on which the parties have yet to agree a finalised form such that an agreed draft minute of order can be lodged at Court.

4. Further, it appears there may remain certain outstanding issues among the parties which the Administrators invite the Court to determine at the PTR.

5. First, as addressed in detail in Section A below, there appear to be some outstanding points in relation to the "statements of facts" (required to be served by the parties pursuant to paragraphs 4, 5 and 7 of the March Directions) on which the Administrators may need to seek the Court's determination.

6. Secondly, as addressed in detail in Section B below, there appears to be an outstanding point as to whether the possible application of paragraph 74 of Schedule B1 to the Insolvency Act 1986 ("**Paragraph 74**") should be included as part of Issue 36A.

7. Further, there are certain issues relating to the trial of Issues 10 to 27 (the "**Tranche C Trial**") and the finalisation of those parts of the March Directions relating to the Tranche C Trial which have yet to be agreed among the parties. It is hoped that these issues will be resolved by agreement before the PTR. However, in the event that agreement cannot be reached in this regard, it may be necessary for the Court to resolve these outstanding issues at the PTR. A summary of the position in respect of Tranche C is contained in Section C below.

A. The parties' "statements of facts"

8. Certain points appear to remain outstanding between the parties in relation to the "statements of facts" (required to be served by the parties pursuant to

paragraphs 4, 5 and 7 of the March Directions) on which the Court's determination may be required.

9. Paragraph 4 of the March Directions provides as follow:

> "*The SCG, by 4.00pm on 6 April 2015:*
>
> *(1) Do file and serve on the other parties a position paper articulating the grounds on which they say (in the context of Issue 36A) that the releases (if they are held to be effective in the sense relevant to Issues 34 and/or 35) should not be enforced;*
>
> *(2) Do file and serve a statement particularising the relevant facts of general application to creditors upon which they intend to rely in their argument on Issue 36A.*"

10. On 6 April 2015, the SCG filed and served a position paper and a statement pursuant to paragraph 4 of the March Directions.

11. Further, paragraph 5 of the March Directions provides as follows:

> "*Wentworth, by 4.00pm on 15 April 2015:*
>
> *(1) Do file and serve on the other parties a reply position paper in relation to Issue 36A;*
>
> (2) *Do file and serve on the other parties a statement setting out comments on the facts upon which the SCG intend to rely in respect of Issue 36A and particularising the facts which Wentworth accepts and any additional facts of general application to creditors upon which it intends to rely in respect of Issue 36A.*"

12. On 15 April 2015, Wentworth filed and served a reply position paper and a statement of facts pursuant to paragraph 5 of the March Directions (although there has been some dispute between the SCG and Wentworth as to whether this statement is in compliance with paragraph 5(2) of the March Directions).

13. Further, paragraph 7 of the March Directions provides as follows:

> "*The Administrators, by 4.00pm on 24 April 2015, do file a document identifying:*
>
> *(1)* *Those facts, agreed between the parties, of general application to creditors, which are contended by one or more of the parties to be admissible and relevant to Issues 34 and 35 (indicating, if necessary, those facts in respect of which there is a dispute as to admissibility or relevance); and*
>
> (2) *Those facts, agreed between the parties, of general application to creditors, which are contended by one or more of the parties to be admissible and relevant to Issue 36A (indicating, if necessary, those facts in respect of which there is a dispute as to admissibility or relevance).*"

14. On or before 24 April 2015, the Administrators intend to file and serve a statement of agreed facts in respect of Issues 34, 35 and 36A (pursuant to paragraph 7 of the March Directions), as well as a position paper on Issue 36A (pursuant to paragraph 6 of the March Directions).

15. However, certain points appear to remain in dispute among the parties in relation to the parties' statements of facts, in particular as regard paragraphs 5 and 7 of the March Directions.

(a) Paragraph 5 of the March Directions

16. First, Freshfields in their letter of 15 April 2015 indicate that the statement of facts served by Wentworth on 15 April 2015 in purported compliance with paragraph 5 of the March Directions does not set out any comments on the facts upon which the SCG intend to rely in respect of Issue 36A. In their further letter of 18 April 2015 Freshfields have developed their criticism of what they say is Wentworth's non-compliance with paragraph 5 of the March Directions and suggested that Wentworth rectify this non-compliance.

17. Leaving aside whether Freshfields are correct in pointing out that Wentworth have failed to comply with paragraph 5 of the March Directions, the Administrators consider that this issue (subject to one possible exception) has now been supervened by the parties' agreement going forward to work from the documents that are to be filed and served by the Administrators pursuant to paragraph 7 of the March Directions (see below).

18. The one possible issue flowing from Wentworth's statement of facts which the Court may need to determine in due course is whether, if Wentworth in fact disagree with the factual accuracy of any of the statements contained in the SCG's statement of facts (and it is unclear to the Administrators whether Wentworth do so disagree on any point), any dispute needs to be resolved and if so how. However the Administrators consider that it would be premature at this stage for the Court to determine whether (and if so how) any factual disputes are to be determined, given that the Administrators are still in the process of finalising the documentation required by paragraph 7 of the March Directions (see below) and it will not be clear until after this exercise has been completed whether this issue in fact arises.

(b) Paragraph 7 of the March Directions

19. On 15 April 2015, the Administrators served (under cover of a letter to the parties) on the other parties a draft statement of facts in respect of Issues 34 and

35, with a view to being able to comply with paragraph 7 of the March Directions.

20. In the 15 April 2015 covering letter, the Administrators notified the other parties of their intention (after consultation with the Respondents) to adopt the following approach in respect of paragraph 7(1) of the March Directions:

    (1) All statements contained in the draft served by the Administrators that are agreed by both the SCG and Wentworth will be included in the Issues 34 and 35 statement of agreed facts (the "**Issues 34 and 35 SAF**"); and

    (2) To the extent: (i) that a statement contained in the draft is not agreed by either the SCG or Wentworth; or (ii) a revision is proposed by one of the SCG or Wentworth that is not agreed by both the other party and the Administrators, it will be omitted from the Issues 34 and 35 SAF.

21. In the same letter the Administrators indicated that they intend to include in a separate Issue 36A statement of agreed facts (the "**Issue 36A SAF**") only those facts agreed between the parties that are relevant solely to Issue 36A (and incorporating by reference the agreed facts articulated in the Issues 34 and 35 SAF). In other words, it is proposed that the Administrators will serve two SAFs (or a single SAF made up of two parts) pursuant to paragraph 7 of the March Directions:

    (1) The Issues 34 and 35 SAF which will include all facts relevant to Issues 34 and 35 (some of which may be relevant to Issue 36A also); and

    (2) The Issue 36A SAF which will only include those facts that are relevant solely to Issue 36A (and incorporating by reference the agreed facts articulated in the Issues 34 and 35 SAF).

22. The reason for the Administrators' suggested approach is that there is significant overlap (particularly in relation to background topics) between: (a) the SCG's statement of facts for Issue 36A; and (b) the Administrators' draft

Issues 34 and 35 SAF and it appears unlikely that, between them, the SCG and Wentworth will be able to agree the Issue 36A SAF without the Administrators taking control of the process. Accordingly, it seems to the Administrators that it would be more efficient for the material relevant to each of Issues 34, 35 and 36A to be included in a single document.

23. The parties have yet to respond to in writing the Administrators' proposed approach to the two SAFs. However, it is understood that the SCG and Wentworth are content with the Administrators' proposed approach.

24. In the circumstances the Court is invited to approve the Administrators' proposed approach and, to the extent necessary, direct that it be followed.

25. Finally, the Administrators note that they intend to provide an updated draft of the Issues 34 and 35 SAF and a first draft of the Issue 36A SAF prior to the PTR, with a view to the SCG and Wentworth providing comments by Wednesday 22 April 2015. It is understood that the Administrators' proposed approach in this regard is acceptable to the other parties.

B. Whether the possible application of Paragraph 74 should be included as part of Issue 36A

26. Subject to some outstanding points which remain in dispute (addressed below), the parties have substantially agreed the draft minute of order from the 9th March 2015 CMC (the "**Draft March Order**").

27. One point which appears to remain in dispute relates to the reformulation of Issue 36A.

28. In their Issue 36A position paper the SCG did not address the possible application of Paragraph 74. However, Freshfields (for the SCG) stated in their

letter dated 6 April 2015 that the SCG reserves its rights in this regard should the Court reject the position it is adopting in respect of Issues 34 and 36A.

29. Further, in the SCG's proposed version of the wording for the reformulation of Issue 36A, as circulated under cover of a letter dated 1 April 2015, it is suggested that the words "*by analogy with*" be reinserted into the reformulated Issue 36A (these having been removed by Wentworth) such that Issue 36A reads (emphasis added):

> "*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 or not such release(s) should 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 (1874) LR 9 Ch App 609.*"

30. In their letter dated 17 April 2014, Freshfields (on behalf of the SCG) have now confirmed that they consider that the generic fact pattern giving rise to the *Ex Parte James* argument also gives rise to a generic Paragraph 74 argument. The SCG are also content for the Paragraph 74 argument to be dealt with in the Tranche B Trial, on the basis that the generic Paragraph 74 argument does not require additional evidence.

31. On this basis (and as is apparently now agreed among the parties), the Administrators consider that Issue 36A should be amended to include the phrase "*or by analogy with*" (see the draft provision cited at paragraph 28 above), so that the SCG's Paragraph 74 argument may be determined as part of Issue 36A. The Administrators invite the Court to give directions accordingly.

C. The Tranche C Trial

32. Since the last CMC, Wentworth has abandoned its case in respect of the 'market usage' arguments. As a result, the parties are agreed that expert 'market usage' evidence of the type formerly envisaged is not required. The Administrators are of the view that the time estimate for the Tranche C trial can be reduced to 5-7

days in consequence and that the Tranche C trial should be listed for a date in November 2015 on the basis of this revised time estimate.

33. Kirkland & Ellis have confirmed that Wentworth agree with this revised time estimate. Freshfields (on behalf of the SCG) have indicated that they believe that such a reduction in the time estimate is premature, pending receipt of further information requested from Wentworth on its cost of funding case, and the matter should be listed on the basis of the original time estimate of 7-10 days.

34. Given the recent developments and the outstanding disagreement on the listing of the Tranche C trial (which is delaying agreement being reached on the timetable for the necessary pre-trial steps in respect of Tranche C), it may be convenient to ask the Court to resolve any outstanding difficulties in respect of the Tranche C timetable at the forthcoming PTR for Tranche B.

35. Similarly, the formulation of the terms of Issues 11 and 12 is also being agreed. Whilst the parties have made substantial progress in this regard, and whilst it is hoped that agreement will be possible, there are a number of points which are still being discussed. Again, in the event that agreement cannot be reached, it may be convenient to ask the Court to resolve any outstanding issues in respect of the revised wording of these two Issues at the PTR for Tranche B.

36. Whilst the Administrators appreciate that the PTR has been listed in order to deal with Tranche B issues, it would seem sensible to use the opportunity of the PTR in order to resolve any outstanding points in respect of Tranche C.

Conclusion

37. In light of the above, the Administrators respectfully request that the Court determine the issues identified in the paragraphs above.

38. Finally, it is noted that Linklaters (acting for the Administrators) contacted the Listing Office to see whether it might be possible for the Judge to pre-read on Friday 15 May 2015, so that the trial might start on Monday 18 May 2015 and that Friday 22 May 2015 might then be used only in the event that the trial overruns. However the response was that the Listing Office had already marked Friday 15 May 2015 as a reading day and Monday 18 May 2015 as the first day of the hearing. Subject to this being convenient to the parties (and remaining convenient to the Court), the Administrators' proposal is that these details of the listing of the Tranche B Trial should remain in place.

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20 April 2015