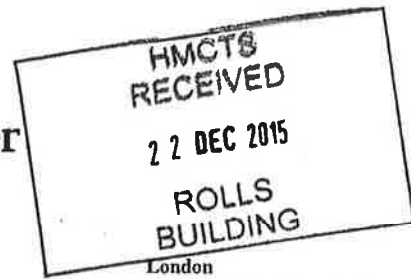




Freshfields Bruckhaus Deringer



By Email

Lisa Sanchez  
Clerk to The Rt. Hon. Lord Justice David Richards  
The Royal Courts of Justice  
7 Rolls Building  
Fetter Lane  
London EC4A 1NL

London  
Freshfields Bruckhaus Deringer LLP  
65 Fleet Street  
London EC4Y 1HS  
T +44 20 7936 4000 (Switchboard)  
+44 20 7785 5781 (Direct)  
F +44 20 7108 5781  
LDE No 23  
E christopher.robinson@freshfields.com  
www.freshfields.com

Doc ID  
LON39336545/2  
Our Ref  
163511-0001 CHWR

22 December 2015

Dear Ms Sanchez

**In The Matter of Lehman Brothers International (Europe) (In Administration) And In The Matter of the Insolvency Act 1986 (No. 7942 of 2008) (Waterfall II) – Parts A and B – Supplemental Issues**

This letter is sent on behalf of CVI GVF (Lux) Master Sarl, Hutchinson Investors, LLC, Burlington Loan Management Limited, and their relevant affiliates (the *Senior Creditor Group*) and has been approved by Ropes & Gray International LLP and Morrison & Foerster LLP.

1. We enclose copies of the Senior Creditors Group's written submissions in respect of Supplemental Issues 1(c), 2, 3, and 5. We would be grateful if you could place this letter and its enclosures before David Richards LJ.
2. Supplemental Issue 4 is "*Whether, to the extent that a creditor has a non-provable claim for interest, such non-provable claim has been released under the terms of the CRA and/or a CDD and if so, whether the Administrators would be directed not to enforce such release(s)*".
3. The parties have been asked to indicate in their written submissions where in their skeleton arguments for trial (and/or in the transcript) any submissions on Supplemental Issue 4 were made.

Freshfields Bruckhaus Deringer LLP is a limited liability partnership registered in England and Wales with registered number OC334789. It is authorised and regulated by the Solicitors Regulation Authority. For regulatory information please refer to [www.freshfields.com/support/legalnotice](http://www.freshfields.com/support/legalnotice).

A list of the members (and of the non-members who are designated as partners) of Freshfields Bruckhaus Deringer LLP is available for inspection at its registered office, 65 Fleet Street, London EC4Y 1HS. Any reference to a partner means a member, or a consultant or employee with equivalent standing and qualifications, of Freshfields Bruckhaus Deringer LLP or any of its affiliated firms or entities.



4. The annex to this letter sets out references to the extracts from the Senior Creditor Group's written and oral submissions on (i) construction and (ii) *ex Parte James* and paragraph 74 of Schedule B1 to the Insolvency Act 1986 relevant to Supplemental Issue 4. We have included both submissions dealing generally with the effect of the CRA and CDDs on non-provable claims, and submissions dealing specifically with the effect of the CRA and CDDs on non-provable interest claims.

Yours faithfully

*Freshfields Bruckhaus Deringer*

Freshfields Bruckhaus Deringer LLP

**Enclosures**

1. Senior Creditor Group's Written Submissions Supplemental Issue 1(c)
2. Senior Creditor Group's Written Submissions Supplemental Issue 2
3. Senior Creditor Group's Written Submissions Supplemental Issue 3
4. Senior Creditor Group's Written Submissions Supplemental Issue 5

**Annex**

- A. Waterfall II – Supplemental Issue 4: Written and Oral Submissions



WATERFALL II – SUPPLEMENTAL ISSUE 4

WRITTEN AND ORAL SUBMISSIONS

A. Construction arguments

Written submissions	
1.	Part B skeleton, para 8
2.	Part B skeleton, para 95
3.	Part B skeleton, para 108-111
4.	Part B skeleton, para 112-113
5.	Part B skeleton, para 120
6.	Part B skeleton, para 129-130
7.	Part B skeleton, para 135-139
8.	Part B skeleton, para 142-143
9.	Part B skeleton, para 151
10.	Part B skeleton, para 157-159
11.	Part B skeleton, para 161
12.	Part B skeleton, para 163-167
13.	Part B skeleton, para 174
14.	Part B skeleton, para 180
15.	Part B skeleton, para 188
16.	Part B skeleton, para 189
Oral submissions	
17.	Part B transcript, Day 2, page 118, lines 6-9
18.	Part B transcript, Day 2, page 121, lines 16-24
19.	Part B transcript, Day 3, page 33 line 2 – page 34 line 24
20.	Part B transcript, Day 3, page 36 line 1 – page 37 line 15
21.	Part B transcript, Day 3, page 42 line 20 – page 43 line 21
22.	Part B transcript, Day 3, page 44 lines 13-22



23.	Part B transcript, Day 3, page 52 lines 9-22
24.	Part B transcript, Day 3, page 63 lines 5-13
25.	Part B transcript, Day 3, page 73 lines 5-25
26.	Part B transcript, Day 3, page 74 line 10 – page 76 line 11; page 79 line 6 – page 80 line 20
27.	Part B transcript, Day 3, page 80 line 22 – page 81 line 8
28.	Part B transcript, Day 3, page 100 lines 1-7
29.	Part B transcript, Day 3, page 106 line 9 – page 107 line 4
30.	Part B transcript, Day 3, page 107 lines 5-23
31.	Part B transcript, Day 3, page 113 lines 8-17

**B. Ex parte James / unfair prejudice arguments**

Written submissions	
32.	Part B skeleton, paras 12-13
33.	Part B skeleton, para 14
34.	Part B skeleton, para 191-194
35.	Part B skeleton, para 208-219
36.	Part B skeleton, para 220-221
37.	Part B skeleton, para 226-228
38.	Part B skeleton, para 234-235
39.	Part B skeleton, para 236
Oral submissions	
40.	Part B transcript, Day 4, page 46 line 18 – page 47 line 4
41.	Part B transcript, Day 4, page 72 line 9 – page 73 line 12
42.	Part B transcript, Day 4, page 94 line 17 – page 96 line 8

HMCTS  
RECEIVED  
22 DEC 2015  
ROLLS  
BUILDING

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

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(c)  
SENIOR CREDITOR GROUP'S 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”).
2. Although the Senior Creditor Group has not been appointed as representatives of different classes of creditors, it is advancing arguments in effect on behalf of unsecured creditors to enable the Administrators to obtain directions and the Administrators are content to act on directions given by the court on this basis.
3. Supplemental Issue 1(c) asks:

*“In a case where contractual interest first starts to run on a provable debt at some point after the Date of Administration, is the “rate applicable” for the period from the Date of Administration to the date when contractual interest first starts to run:*

- i. the rate of interest which is payable once the interest is running (so that such rate is treated as being applicable for the whole of the post-administration period); or*
- ii. a zero rate*

*Further, for the purposes of Rule 2.88(9) should Statutory Interest be calculated by assessing the greater of the “rate applicable” and Judgments Act 1838 rate separately for the periods prior to and post the commencement of contractual interest or should such assessment be performed taking the periods together”.*

4. These submissions proceed on the basis that all David Richards J’s conclusions in relation to *Waterfall IIA* are correct. The Senior Creditor Group are, however, appealing certain of those conclusions, and nothing in this Skeleton Argument is intended to affect that appeal.
5. The Senior Creditor Group’s position is that, in the light of the court’s judgment on *Waterfall IIA*:
  - (1) In the case of proved debts which are future or contingent debts at the Date of Administration, the “rate applicable to the debt apart from the administration” includes any contractual rate applying to the underlying

future or contingent debt. The amount of interest accruing at that rate is in all cases calculated from the Date of Administration on the basis that that rate is treated as being applicable for the whole of the post-administration period, irrespective of whether the underlying debt has become payable during the period of administration.

- (2) In the case of proved debts which are due and payable as at the Date of Administration, the “*rate applicable to the debt apart from the administration*” includes any contractual rate applying to the underlying debt. The amount of interest is calculated from the Date of Administration at the rate applicable to the debt.
- (3) When assessing the greater of the “*rate applicable*” and the Judgments Act Rate for the purposes of Rule 2.88(9), statutory interest is calculated by reference to the total amounts of interest that would be payable based on each method of calculation for the entire period of the administration.

## **B. THE RATE APPLICABLE TO THE DEBT APART FROM THE ADMINISTRATION**

6. Rule 2.88(7) requires any surplus remaining after payment of debts proved to be “*applied in paying interest on those debts in respect of the periods during which they have been outstanding since the relevant date*”.
7. The rate of interest payable under Rule 2.88(7) is whichever is the greater of the rate specified in section 17 of the Judgments Act 1838 (the “Judgments Act Rate”) and “*the rate applicable to the debt apart from the administration*” (Rule 2.88(9)).

### *Future and contingent debts*

8. In light of the nature and effect of the rules governing the estimation of contingent debts and the payment of dividends on future debts and the court’s determination of Issues 6 – 8 in *Waterfall IIA*, the rate applicable to such contingent and future debts apart from the administration is calculated from the

Date of Administration for the purposes of the comparison required by rule 2.88(9).

9. By way of background:

- (1) Issues 7 – 8 were concerned with whether in relation to contingent and future debts, interest under Rule 2.88(7) and (9) at the Judgments Act Rate is calculated from the date of administration or the date that the contingent debt ceased to be subject to a contingency or the future debt became payable.
- (2) Issue 6 was concerned with whether in relation to contingent and future debts, the “*rate applicable to the debt apart from the administration*” is calculated from the commencement of administration or from the date on which the debt became due.

10. In the context of Issues 6 – 8, the Administrators argued that:

- (1) “*the start date for calculation of the amount of interest applicable to the debt apart from the administration is the date on which the creditor would have first become entitled to such interest apart from the administration*” (Administrators’ Skeleton Argument for Part A at [137]); and
- (2) The word “outstanding” in Rule 2.88(7) “*is the period since the date on which the creditor could first have sought interest at that rate, apart from the administration*” (Administrators’ Skeleton Argument for Part A at [161]).

11. The Administrators submitted<sup>1</sup>:

*“The joint administrators say that the start date is the date at which the debt falls due in relation to both contingent debts and future debts ... We also say that where the applicable interest is payable at the rate applicable to the debt, apart from the administration ... it must also be the case that interest has become payable”.*

---

<sup>1</sup> The Administrators’ submissions, at trial: Part A Transcript, 18.2.15, p.24 lines 14 – 23.



12. Those submissions were rejected by David Richards J, who held that for the purposes of entitlements to interest under rule 2.88(7):

- (1) All proved debts are “*outstanding*” from the Date of Administration, whether they are present or future, certain or contingent; and
- (2) All proved debts are entitled to have their entitlements to interest calculated from the Date of Administration, whether at the Judgments Act Rate or at the rate applicable to the debt apart from the administration, irrespective of whether interest had started to accrue on the underlying debt.

13. In particular, David Richards J held that “*in the case of both future and contingent debts, interest is payable under rule 2.88(7) from the date that the company entered into administration, not from the date (if any) on which any such debt fell due for payment in accordance with its terms. The parties are agreed that it follows that the comparison under Issue 6 is between judgment rate and the rate applicable apart from the administration, in each case from the date of administration*” (*Waterfall IIA* at [225]).

14. The reasoning which led to this conclusion can be summarised as follows:

- (1) The purpose of Rule 2.88(7) is to compensate creditors for the delay in the payment of their proved debts (as ascertained or estimated in accordance with the legislation) since the commencement of the administration, and not for the delay in the payment of their underlying claims. In *Waterfall IIA* David Richards J held at [207]:

*“What they are being compensated for by the payment of interest under rule 2.88(7) is the delay since the commencement of the administration in the payment of their admitted “debts”, as ascertained or estimated in accordance with the legislation. It is not, in my judgment, compensation for the non-payment of the underlying debt...”* (see, also, *Waterfall IIA* at [212])

- (2) Proved debts are ascertained as at the Date of Administration so as to ensure the *pari passu* distribution of the debtor's assets. In the case of future and contingent debts, this requires a present value to be put on such debts<sup>2</sup>:
- a. Debts which are not payable at the Date of Administration (i.e. future debts) are admitted to proof in full (Rule 2.89) and, if they have not fallen due for payment before the date a dividend is declared, are discounted back to the Date of Administration for the purposes of such dividend (Rule 2.105): *Waterfall IIA* [197].
  - b. Where a debt does not bear a certain value, by reason of it being subject to a contingency or for any other reason, the value of the debt as at the Date of Administration is estimated for the purposes of proof (Rule 2.81). Such an estimate may include an element of present-value discounting in order to approximate the value, as at the Date of Administration, of a contingent debt which can only fall due for payment in the future: *Waterfall IIA* [198].
- (3) For the purposes of entitlement to interest under Rule 2.88(7), all proved debts (as ascertained or estimated in accordance with the legislation) are "*outstanding*" from the date of administration. Interest is therefore paid on all proved debts at the greater of the Judgments Act Rate and the "*rate applicable to the debt apart from the administration*" from the Date of Administration, irrespective of whether such debts were future or contingent as at that date: *Waterfall IIA* [225]; Rule 13.12(3).
- (4) In the case of future and contingent debts, the "*rate applicable to the debt apart from the administration*" includes a contractual rate which applies to those debts. The amount of interest is calculated at such rate from the Date of Administration (on the basis that such rate is treated as being

---

<sup>2</sup> Unless the debt is no longer still contingent or future by the date of the relevant dividend.

applicable for the whole of the post-administration period) and not from the date on which such debts fell due for payment: *Waterfall IIA* [225].

- (5) This is justified in light of the nature and effect of the rules governing the estimation of contingent debts and the payment of dividends on future debts. It ensures that future and contingent creditors receive compensation for the time value of money lost as a result of their claims having been given a present value as at the date of administration for the purposes of proof (in the case of contingent debts which remain contingent at the date of dividend) or for the purposes of dividends (in the case of future debts).

*Debts which are due and payable as at the Date of Administration*

15. In the case of proved debts which are due and payable as at the Date of Administration, the “*rate applicable to the debt apart from the administration*” includes any contractual rate applying to the underlying debt. The amount of interest is calculated from the Date of Administration at the rate applicable to the debt.

**C. THE RELEVANT COMPARISON**

16. When assessing the greater of the “*rate applicable*” and the Judgments Act Rate for the purposes of Rule 2.88(9), statutory interest is calculated by reference to the total amounts of interest that would be payable based on each method of calculation for the entire period of the administration (see paragraph (xi) of the *Waterfall IIA* Order).

**ROBIN DICKER QC**

**RICHARD FISHER**

**HENRY PHILLIPS**

South Square

22 December 2015

Gray's Inn

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

WATERFALL II DIRECTIONS APPLICATION

SENIOR CREDITOR GROUP'S SKELETON

ARGUMENT

FOR TRIAL (PART C)

**Freshfields Bruckhaus Deringer LLP**

65 Fleet Street, London, EC4Y 1HS

Tel: 0207 9364000

Solicitors for CVI GVF (Lux) Master S.a r.l.

**Ropes & Gray International LLP**

60 Ludgate Hill, London, EC4M 7AW

Tel: 0203 2011500

Solicitors for Hutchinson Investors, LLC

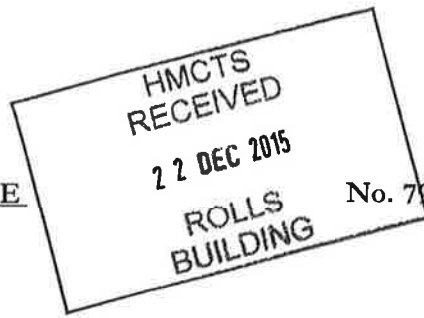
**Morrison Foerster**

City Point, One Ropemaker Street London, EC2Y 9AW

Tel: 0207 79204000

Solicitors for Burlington Loan Management Limited

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

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 2  
SENIOR CREDITOR GROUP'S SUBMISSIONS

1. Supplemental Issue 2 asks:

*“Whether and (if so) in what circumstances and in what manner a Currency Conversion Claim can arise from the discharge of a debt by way of set-off pursuant to Rule 2.85(3).”*

2. The Senior Creditor Group set out a preliminary position on the substance of Issue 2 in paragraphs 442 and 443 of its Part A skeleton argument at the request of the Administrators.
3. Issue 2 was not the subject of written or oral submissions from any other parties at the Part A hearing, and consequently was not addressed in the Part A Judgment. Although the Administrators raised in correspondence on 30 June 2015 certain reasons why a Currency Conversion Claim may be said not to be capable of arising in respect of a claim paid by way of set-off, neither Wentworth nor the Administrators have, to date, formally set out their positions with respect to Issue 2.
4. In the light of this, and the fact that the Senior Creditor Group has already set out a preliminary position on Issue 2 in circumstances where the other principal parties to these proceedings have not yet done so, the Senior Creditor Group proposes to develop its position on this issue after reviewing the arguments advanced by the other parties.

**ROBIN DICKER QC**

**RICHARD FISHER**

**HENRY PHILLIPS**

South Square

Gray's Inn

22 December 2015

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

WATERFALL II DIRECTIONS APPLICATION

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

**Freshfields Bruckhaus Deringer LLP**

65 Fleet Street, London, EC4Y 1HS

Tel: 0207 9364000

Solicitors for CVI GVF (Lux) Master S.a r.l.

**Ropes & Gray International LLP**

60 Ludgate Hill, London, EC4M 7AW

Tel: 0203 2011500

Solicitors for Hutchinson Investors, LLC

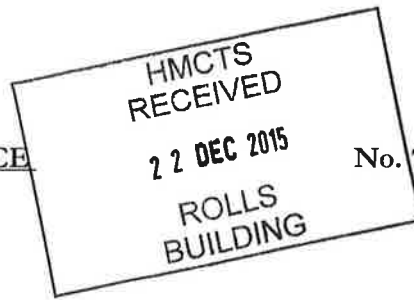
**Morrison Foerster**

City Point, One Ropemaker Street London, EC2Y 9AW

Tel: 0207 79204000

Solicitors for Burlington Loan Management Limited

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 3

SENIOR CREDITOR GROUP'S 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”).
2. Although the Senior Creditor Group has not been appointed as representatives of different classes of creditors, it is advancing arguments in effect on behalf of unsecured creditors to enable the Administrators to obtain directions and the Administrators are content to act on directions given by the court on this basis.
3. Supplemental Issue 3 asks:

*“Whether, and if so to what extent, a non-provable claim to interest on a currency conversion claim can be reduced by interest received by the creditor pursuant to Rule 2.88 on its proved debt”*
4. The Issue arises from paragraph 169 of the Waterfall IIA judgment, where David Richards J held that, if the contract between the company and a foreign currency creditor provides for interest on any unpaid part of a foreign currency debt, that creditor is entitled to include such interest as part of his non-provable claim.
5. The Senior Creditor Group’s position is that there is no scope for off-setting interest received pursuant to Rule 2.88 on an admitted debt against that creditor’s non-provable contractual (or other) entitlement to interest on any unpaid part of a foreign currency debt.
6. This is the effect of the court’s determination of Issue 28 in *Waterfall IIA* and, in particular, the reasons given for its rejection (at [228] – [230]) of Wentworth’s contention that the calculation of a Currency Conversion Claim should take into account statutory interest paid under Rule 2.88.

## **B. CURRENCY CONVERSION CLAIMS**

7. A currency conversion claim arises if (a) a creditor has a claim enforceable against the company denominated in a foreign currency; (b) that claim is converted into sterling at the prevailing rate as at the date of administration under Rule 2.86; (c) between that date and the date or dates of the dividends, sterling depreciates against the foreign currency, with the result that (d) the debt due to the creditor is not fully discharged by the dividend payments.
8. In those circumstances, the foreign currency creditor is entitled to payment of such part of his contractual entitlement to be paid in a foreign currency as remains unpaid before distributions are made to shareholders, since “*it would be contrary to principle and justice that the debtor, or the shareholders receiving the surplus, should be able to deny the foreign currency claimants their full contractual rights*”: *Waterfall I* [2015] Ch 1 at [110]; and “*it is not part of the purpose of that policy [of admitting to proof as many liabilities as possible] to disentitle a creditor from the enforcement of a contractual right to the fullest extent where the debtor company has a relevant surplus after payment of provable debts and statutory interest*”: *Re Lehman Bros International (Europe) (in administration)(No 4)* [2015] 3 WLR 1205 *per* Briggs LJ at [154].
9. Currency conversion claims therefore reflect the fact that once the process of proof (and the payment of statutory interest) has run its course, the foreign currency creditor reverts to his contractual rights: see *Waterfall IIA* at [168] “*It is a case where the creditor is remitted to his contractual rights*”.

## **C. INTEREST ON CURRENCY CONVERSION CLAIMS**

10. In circumstances where (a) a creditor is entitled to be paid in a foreign currency; (b) the creditor is entitled, apart from the administration, to receive interest on the foreign currency debt and (c) the foreign currency debt has not been discharged by the dividend payments received in the administration, that creditor is entitled to be paid the interest to which it is contractually entitled on the amount of the unpaid foreign debt.

11. In these circumstances, the creditor is remitted to his underlying rights and is entitled to exercise them to the fullest extent where the debtor company has a surplus after payment of provable debts and statutory interest. There is no scope for off-setting statutory interest received pursuant to Rule 2.88 on a foreign currency creditor's admitted sterling claim against that creditor's contractual entitlement to interest on a non-provable currency conversion claim.
12. This is the effect of the court's reasoning in respect of Issues 2A and 28 as part of *Waterfall IIA*.
13. The court held in *Waterfall IIA* in respect of Issue 2A (at [169]):

*"If the contract between the company and the 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 payment of post-administration interest does not, in my judgment, interfere with the enforcement of his 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.** The 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"* (emphasis added).

14. In short:
  - (1) A creditor has a statutory right to interest on his admitted claim (converted into sterling) pursuant to Rule 2.88, *pari passu* with all other creditors.
  - (2) A creditor with a claim denominated in a foreign currency may also have a contractual right to interest on the unpaid amount of his non-provable currency conversion claim.
  - (3) The creditors' statutory right to interest under Rule 2.88 in respect of his admitted claim does not interfere with the creditor's contractual right to interest on his non-provable debt.

15. This is also the effect of the court's reasoning in respect of Issue 28:

- (1) Issue 28 was concerned with whether the calculation of a currency conversion claim should take into account statutory interest paid to the relevant creditor pursuant to Rule 2.88.
- (2) In that context, Wentworth argued that the calculation of the currency conversion claim should take into account the payment of statutory interest and that the currency conversion claim should be calculated by comparing the aggregate of the creditor's contractual rights to both principal and interest expressed in the relevant foreign currency with the aggregate amount of such foreign currency resulting from a conversion of the sterling amounts received by it in respect of both principal and interest at the exchange rates prevailing on the date of payment: see *Waterfall IIA* [227].
- (3) In rejecting that argument, the court held:

*“Rule 2.88 is a complete code for the payment of post-administration interest and it replaces all prior rights, including contractual rights. The only right of the creditor, whether its original debt was in sterling or in a foreign currency, is to receive interest in accordance with rule 2.88(7) – (9) on its admitted debt, which necessarily is expressed in sterling, from the date of administration. **The creditor is not receiving that interest in or towards satisfaction of its contractual right to interest and there is no comparison to be made between the foreign currency equivalent of the statutory interest and the foreign currency interest to which it was entitled under its contract.**”*  
*Waterfall IIA* at [228] (emphasis added).

16. The contention that a claim to interest on a non-provable currency conversion claim is to be reduced by statutory interest received in respect of an admitted debt pursuant to Rule 2.88 should be rejected.

17. In particular:

- (1) Sums paid pursuant to Rule 2.88 are paid pursuant to statute as compensation for the delay caused by the insolvency process in discharging a creditor's admitted debt, which is necessarily in sterling.
- (2) They are not paid in respect of (and provide no compensation for) a creditor's contractual (or other) entitlement to interest on the unpaid part of a non-provable foreign currency debt.

18. This is correct as a matter of principle. If a foreign creditor has to give credit for interest received under Rule 2.88 in calculating its non-provable claim for interest on a currency conversion claim, then either it will not receive the full amount of statutory interest on its admitted debt to which it is entitled in accordance with Rule 2.88 *pari passu* with all other creditors, or it will not receive full satisfaction of its contractual (or other) entitlements to interest on the unpaid part of its non-provable foreign currency debt.

**ROBIN DICKER QC**

**RICHARD FISHER**

**HENRY PHILLIPS**

South Square

22 December 2015

Gray's Inn

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

WATERFALL II DIRECTIONS APPLICATION

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

**Freshfields Bruckhaus Deringer LLP**

65 Fleet Street, London, EC4Y 1HS

Tel: 0207 9364000

Solicitors for CVI GVF (Lux) Master S.a r.l.

**Ropes & Gray International LLP**

60 Ludgate Hill London, EC4M 7AW

Tel: 0203 2011500

Solicitors for Hutchinson Investors, LLC

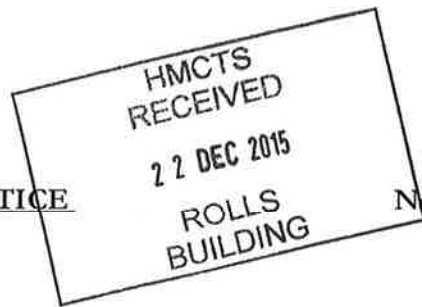
**Morrison Foerster**

City Point, One Ropemaker Street London, EC2Y 9AW

Tel: 0207 79204000

Solicitors for Burlington Loan Management Limited

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 5  
SENIOR CREDITOR GROUP'S SUBMISSIONS

## **A. INTRODUCTION**

1. Supplemental Issue 5 asks:

*“Whether, to the extent that a creditor has a non-provable claim for interest on a Currency Conversion Claim, such non-provable claim has been released under the terms of the CRA and / or a CDD and if so, whether the Administrators would be directed not to enforce such release(s)”*

2. Supplemental Issue 5 arises from the court’s finding at [169] of *Waterfall IIA* that:

*“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...”*

3. The Senior Creditor Group’s position is that:

- (1) Neither the CRA nor any of the various forms of CDD had the effect of releasing a creditor’s right to include interest on any unpaid part of a foreign currency debt as part of his non-provable currency conversion claim.
- (2) If, contrary to the Senior Creditor Group’s position, the CRA or a CDD has the effect of releasing a creditor’s right to include interest on any unpaid part of a foreign currency debt as part of his non-provable claim, the Court should direct the Administrators not to enforce such releases on the basis of the rule in *ex parte James, Re Condon* (1874) LR 9 Ch App 60, alternatively paragraph 74 of Schedule B1 to the Insolvency Act 1986.

## **B. BACKGROUND TO THE CRA AND CDDs**

4. The relevant background to the CRA and CDDs is set out in *Waterfall IIB* at [20] – [56], [64] – [76]. By way of summary:



- (1) The purpose of the CRA was primarily to simplify and accelerate the resolution of trust asset claims and the return of trust assets to the claimants entitled to them: *Waterfall IIB* [69]. To this end, the CRA provided a uniform set of rules for the return of trust assets and a standard methodology for the valuation of financial claims: *Waterfall IIB* at [37].
- (2) Similarly, the purpose of the CDDs was to simplify and accelerate the ascertainment of provable claims against LBIE and the payment of dividends in respect of them: *Waterfall IIB* [69].
- (3) A release or modification of the rights of creditors to statutory interest or a release of currency conversion claims were wholly irrelevant to the achievement of these purposes: *Waterfall IIB* [69]. The same is true of claims to interest on any unpaid part of a foreign currency debt in respect of which the creditor has sought to prove:
  - (i) Like claims to statutory interest and currency conversion claims, claims to interest on any unpaid part of a foreign currency debt in respect of which the creditor has sought to prove are unconnected to the return of trust assets.
  - (ii) Similarly, the ascertainment of provable claims against LBIE for the purposes of a more accelerated payment of dividends has no connection with entitlements to interest on the unpaid part of a foreign currency debt in respect of which the creditor has sought to prove. Like currency conversion claims, such claims are payable only if there is a surplus remaining after the payment of all proved debts and after the payment of all claims to interest under rule 2.88.
- (4) Like currency conversion claims, claims to interest on any unpaid part of a foreign currency debt are qualitatively different from other claims. They arise exclusively out of or in relation to the claims admitted to

proof and share a close connection with the proved debt, as opposed to any other claims which the creditor has not asserted and sought to prove for: *Waterfall IIB* [70].

- (5) In proposing and entering into the CRA and CDDs, the Administrators were acting in accordance with their statutory duties as administrators of LBIE, which means that the CRA and CDDs are in a very different position from an ordinary bilateral contract between parties with competing commercial interests: *Waterfall IIB* [65], [69]. Such duties include:
  - (i) A duty to administer and realise the property of LBIE and to distribute the proceeds of sale, after expenses, in accordance with the statutory scheme;
  - (ii) A duty to act in the interests of the general body of creditors while their legitimate claims remained unsatisfied;
  - (iii) A duty to act fairly as regards creditors; and
  - (iv) A duty to administer the trusts of trust assets and client money on behalf of LBIE.
- (6) Such duties did not require the Administrators to enter into agreements with creditors that would have had the effect of releasing a creditor's right to claim interest on any unpaid part of a foreign currency debt in respect of which the creditor sought to prove, any more than they required the Administrators to enter into agreements that would have had the effect of releasing a creditor's entitlement to recover the full amount of any foreign currency debt in respect of which the creditor sought to prove.
- (7) There is no indication in the circular containing the CRA and sent to creditors that the CRA would have any effect on currency conversion

claims, or any effect on an entitlement to interest on those claims. Nor was there any such indication when draft CDDs were sent to creditors: *Waterfall IIB* [71].

**C. CLAIMS TO INTEREST ON CURRENCY CONVERSION CLAIMS HAVE NOT BEEN RELEASED**

5. The Waterfall IIB Judgment did not consider whether the CRA or any CDD released a creditor's right to include interest on any unpaid part of a foreign currency debt as part of his non-provable claim. None of the agreements had that effect any more than they had the effect of releasing a creditor's right to recover the full amount of any foreign currency debt in respect of which the creditor sought to prove.

*The CRA*

6. The terms of the CRA are explained in the *Waterfall IIB* judgment at [77] – [113]. In summary:
- (1) As set out above, the primary purpose of the CRA was to facilitate the return of trust assets.
  - (2) To achieve this, it was necessary to include terms providing for the quantification and agreement of all claims as between LBIE and the beneficiary at a particular date in order to ascertain whether LBIE had any claims against the beneficiary in respect of which it held trust property as security.
  - (3) As a consequence, the CRA contains a uniform set of rules for the ascertainment of net balances due to and from creditors. Where the CRA process gives rise to a net balance in favour of a creditor (a "Net Financial Claim") this reflects the amount due to the creditor, is admissible to proof and can be fed into the distribution process at a later date.

- (4) The Net Financial Claim under the CRA reflects and is calculated primarily by reference to a signatory's existing contractual entitlements, subject to a number of overriding valuation principles. Although the Net Financial Claim is described as a "*new obligation of LBIE*" (Clause 4.4.2(ii)), it is not an entirely new right arising out of the CRA but is a compromise of existing claims: *Waterfall IIB* [115],[126].
  - (5) In return for having their Net Financial Claim calculated in accordance with the CRA, CRA signatories agree to provide releases of certain claims (see e.g. Clause 4.2).
7. The releases in the CRA do not affect a creditor's right to include interest on any unpaid part of a foreign currency debt, as part of his non-provable currency conversion claim:
  - (1) The primary purpose of the CRA was to expedite the return of trust property.
  - (2) It was not necessary, in order for the CRA process to achieve its purpose, for the Administrators to require creditors to release their rights to interest on any unpaid part of a foreign currency debt.
  - (3) There was no proper reason for the Administrators, acting consistently with the statutory purpose of the administration and their duties, to have required creditors to release their right to include interest on any unpaid part of a foreign currency claim as part of a non-provable currency conversion claim.
  - (4) Any construction which results in a release of such rights would result in the Administrators not treating creditors equally. The entitlement would be preserved or lost by a creditor depending solely on whether or not the creditor had a trust claim and, if it did, whether it agreed to enter into the CRA in circumstances where no party, creditor or administrator, had any understanding or appreciation that this could

be the effect of the CRA. There is no justification whether in the interests of creditors generally or in the purposes of the CRA why this discrimination should occur: *Waterfall IIB* [130], [166].

- (5) The court's determination in *Waterfall IIB* at [131] that it would "*require clear words in the CRA to have the effect of releasing currency conversion claims*" applies with equal force to a release of a right to claim interest on any unpaid part of a foreign currency claim. No such words exist in the CRA.
- (6) The court's *dicta* at [116] to the effect that clause 25.1 of the CRA precludes a creditor from recovering a non-provable claim to interest to the extent that they had not made a full recovery of contractual rights to interest under rule 2.88 are beside the point. Those comments were directed at non-provable entitlements to interest arising in respect of a creditor's *provable* claims and not at a creditor's right to interest on any unpaid part of a foreign currency debt as part of a *non-provable* claim.

#### *The CDDs*

8. The terms of the CDDs are explained in *Waterfall IIB* at [136] – [170]. In summary:
  - (1) CDDs were designed to deal with unsecured claims arising out of financial trading contracts. The principal objective of the CDDs was to simplify and accelerate the claims determination and distribution process through the use of an alternative mechanism to the statutory regime for proof of debts in chapter 10 of Part 2 of the Insolvency Rules: *Waterfall IIB* at [136].
  - (2) Agreed Claim CDDs were used where a creditor asserted a claim against LBIE in respect of client money. Under an Agreed Claim CDD, a creditor's unsecured claims against LBIE "*under and in connection with [a] Creditor Agreement*" (an "Agreed Claim") were

quantified and agreed before being admitted for dividends at a later date, after any claim to client money had been resolved.

- (3) Admitted Claim CDDs were used where the Administrators considered that there was little or no possibility of the creditor having a client money claim. In those circumstances, the combined two-stage process of agreeing and admitting claims under Agreed Claim CDDs was not necessary and the amount of a creditor's claim under and in connection with the relevant Creditor Agreement was admitted to proof (the "Admitted Claim Amount").
- (4) One of the purposes of the CDD process was to enable LBIE and the Administrators to achieve a degree of finality as to the claims LBIE should admit from creditors and thereby facilitate the making of earlier distributions in respect of such claims. CDDs achieved this by agreeing the amount of creditors' provable claims against LBIE and releasing all other claims which might otherwise be relied on by creditors to vary the amount of the proof or to assert further provable claims: *Waterfall IIB* at [165].

9. Releases contained in the CDDs do not affect a creditor's right to include interest on any unpaid part of a foreign currency claim as part of a currency conversion claim:

- (1) The purpose of the CDDs was to accelerate the payment of dividends on proved debts. An important part of that process was that the amount admitted should not be subsequently supplemented by further claims which could be subject of proof. A release of a right to include interest on unpaid parts of a foreign currency claim as part of a currency conversion claim is wholly irrelevant to those considerations for exactly the same reason that a release of currency conversion claims is irrelevant to those considerations: see *Waterfall IIB* at [165].
- (2) Any construction which results in a release of those rights would result in the Administrators not treating creditors equally. The entitlements

would be preserved or lost by a creditor depending solely on whether or not the creditor agreed to enter into a CDD in circumstances where no party, creditor or administrator had any understanding or appreciation that this could be their effect. There is no justification whether in the interests of creditors generally or in the purposes of the CDD process why such discrimination should occur: *Waterfall IIB* [166], [130].

- (3) Admitting claims to proof through the CDD process only on terms that creditors would release their claims to interest on any unpaid part of a foreign currency claim as part of a non-provable currency conversion claim would be inconsistent with the purposes of the administration and with the duties of the Administrators. Such a result is not necessary to achieve the purpose of facilitating earlier or higher distributions to creditors. There is no proper reason for the Administrators to have intended such a result, as it only benefits subordinated creditors and shareholders at the expense of other creditors.
- (4) The court's determination in *Waterfall IIB* at [131] that it would "*require clear words in the CRA to have the effect of releasing currency conversion claims*" applies with equal force to a release by the CDDs of a right to include interest on any unpaid part of a foreign currency claim as part of a currency conversion claim. No such words exist in the CDDs.
- (5) The court's *dicta* to the effect that the release in clause 2.1.1 of the CDDs of "*all claims to interest*" means that it "*would be difficult to argue*" that non-provable claims to interest are not released (*Waterfall IIB* at [147]) are beside the point:
  - (i) Those comments were directed at entitlements to interest arising in respect of the creditor's provable claims and not at a creditor's right to interest on any unpaid part of a foreign currency debt as part of a *non-provable* claim.

- (ii) The phrase “*all Claims for interest*” cannot be read literally, since it does not extend to a release of a creditor’s claim for statutory interest under rule 2.88 (*Waterfall IIB* [164]).
- (iii) The proper scope of that phrase needs to be understood in the context in which the CDDs were concluded, including their communicated purpose and the duties of the Administrators. Against that background, they should not be read as extending to a release of creditor’s right to interest on any unpaid part of a foreign currency debt as part of a *non-provable* claim.

**D. EX PARTE JAMES / PARA 74 SCH. B1 INSOLVENCY ACT 1986**

- 10. If, contrary to the Senior Creditor Group’s position, the CRA or a CDD has the effect of releasing a creditor’s right to interest on unpaid parts of a foreign currency claim as part of a currency conversion claim, then such an effect was an inadvertent consequence of a process initiated by and (until 2014) required by the Administrators.
- 11. The Administrators should be directed not to enforce such releases and should instead, to the extent there are funds available to do so, meet such claims on the basis of the rule in *ex parte James, Re Condon* (1874) LR 9 Ch App 60, alternatively paragraph 74 of Schedule B1 to the Insolvency Act 1986.
- 12. In *Waterfall IIB*, the court held (at [171] – [189]) that, if the effect of the CRA or any of the CDDs was to release currency conversion claims, the Administrators would have been directed, under the principle in *Ex parte James* and under paragraph 74 of Schedule B1 to the Insolvency Act, not to enforce such releases. The reasoning of the court applies with equal force to a release of creditor’s entitlement to claim interest on unpaid parts of a foreign currency claim, or any other non-provable claim:



- (1) Unfairness is a sufficient ground for the application of the principle in *Ex parte James* if the court thinks that, in all the circumstances, it is right to apply the principle: *Waterfall IIB* [183].
- (2) The agreements were not ordinary commercial bilateral agreements but were made by the Administrators in pursuance of their statutory duty to act in the interests of the creditors as a whole: *Waterfall IIB* [184].
- (3) The release of a right to claim interest on unpaid parts of a foreign currency claim was entirely irrelevant to the purposes for which the CRA and CDDs were proposed: *Waterfall IIB* [184].
- (4) The release of such a right would be an entirely unintended effect of the agreements. If the Administrators had considered that the CRA and CDDs could have this effect, they would have drawn attention to it in the circular which accompanied the CRA and in their website postings concerning the CDDs: *Waterfall IIB* [184].
- (5) The enforcement of any releases of a right to include interest on unpaid parts of a foreign currency claim as part of a currency conversion claim would involve an unintended discrimination between different creditors for no reason in any way connected with the purposes of the administration or the best interests of creditors as a whole: *Waterfall IIB* [184].
- (6) If the releases in respect of non-provable rights are enforced, the estate will benefit. The consequence will be that the estate does not have to pay claims that, but for the releases, would have had to have been met before any surplus could be returned to subordinated creditors or shareholders. The unfair harm suffered by certain creditors therefore translates directly into an unjustified windfall to subordinated creditors and shareholders which is contrary to that stipulated for in the statutory regime and which they have no entitlement to expect under that regime.

13. In light of the above, enforcing any such release would be regarded by a reasonable member of the public, knowing all of the facts, as unfair, inappropriate and unbecoming of an office of the court, would harm the interests of creditors and would confer an unfair benefit or enrichment on the estate and a windfall to the subordinated creditors and shareholders. Therefore, if the Senior Creditor Group is wrong on its primary case, the Administrators should be directed, under the principle in *Ex parte James* and under paragraph 74 of Schedule B1 to the Insolvency Act, not to enforce such releases.

**ROBIN DICKER QC**

**RICHARD FISHER**

**HENRY PHILLIPS**

South Square

22 December 2015

Gray's Inn

**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**

**WATERFALL II DIRECTIONS APPLICATION**

**SENIOR CREDITOR GROUP'S SKELETON**

**ARGUMENT**

**FOR TRIAL (PART C)**

**Freshfields Bruckhaus Deringer LLP**

65 Fleet Street, London, EC4Y 1HS

Tel: 0207 9364000

Solicitors for CVI GVF (Lux) Master S.a r.l.

**Ropes & Gray International LLP**

60 Ludgate Hill, London, EC4M 7AW

Tel: 0203 2011500

Solicitors for Hutchinson Investors, LLC

**Morrison Foerster**

City Point, One Ropemaker Street London, EC2Y 9AW

Tel: 0207 79204000

Solicitors for Burlington Loan Management Limited