Waterfall II Application

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

(1) ANTHONY VICTOR LOMAS

(2) STEVEN ANTHONY PEARSON

(3) PAUL DAVID COPLEY

(4) RUSSELL DOWNS

(5) GUY JULIAN PARR

(as the joint administrators of the above named company)

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

RESPONSE POSITION PAPER ON BEHALF OF THE FOURTH RESPONDENT

Capitalised terms used but not otherwise defined herein are defined in the Waterfall II Application dated 12 June 2014 (the "Application") or the Waterfall II Order sealed on 26 June 2014, unless the context requires otherwise.

1. This reply position paper deals only with those Issues in respect of which a reply from Wentworth is required, together with the new sub-issues identified in the Administrators' position paper.

Issue 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. In relation to the sub-issue at paragraph 8 of the Administrators' position paper, Wentworth contends that the Administrators' proposed approach (to convert the 8% per annum rate into a daily rate by dividing it by however many days there happen to be in a calendar year) is correct.

Issue 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. The Creditor Funds' argument is premised in part on the assertion (at paragraph 2(1) of their position paper) that the policy underlying Rule 2.88 is to ensure that no person is prejudiced by the effect of the insolvency proceedings. This premise is wrong. As noted in Wentworth's position paper, Rule 2.88 effects substantive changes to creditors' rights in respect of interest relating to their debts in the period after the commencement of the administration (in ways both beneficial and prejudicial to the creditors). In fact, the policy of Rule 2.88 (as the Creditor Funds themselves assert, at paragraph 28(2) of their position paper) is to compensate creditors for being kept out of their money: see the judgment in Waterfall I [2014] EWHC 704 (Ch), at [86].

4. For the same reason, the assertion by York, at paragraph 17(1) and (2) of its position paper, that the process of administration does not create new rights or destroy old ones is, so far as concerns interest accruing post-insolvency, wrong. The fact that the insolvency legislation is capable of substantively altering rights of creditors was recognised in the judgment in Waterfall I, at [77] (referring to contingent and prospective creditors).

5. The fact (as relied on by the Creditor Funds and York) that the principle in *Bower v Marris* has been applied for 150 years in England (prior to 1986) and is still applied in various commonwealth jurisdictions, is irrelevant, since the statutory provisions relating to interest in England pre-1986, and in the relevant commonwealth jurisdictions, are materially different from the statutory provisions governing interest payable in liquidation and administration since 1986.

6. Moreover, the pre-1986 and Commonwealth authorities cited by the Creditor Funds and York demonstrate that the rationale for applying the principle in *Bower v Marris* is that in the event of a surplus arising, before making any distribution to the shareholders, creditors are remitted to their rights under contract.

7. In contrast, Rule 2.88(7) has created a statutory right to post-administration interest, which is neither dependent upon, nor operates on the basis of, a remission to contractual rights or any other pre-administration right to interest.

8. Although Rule 2.88(9) incorporates the *"rate applicable to the debt apart from administration"* this requires reference to be made to the creditors' contractual rights only for the limited purpose of applying the *rate* of interest provided for in the contract. It does not require, or permit, the creditor to appropriate, in accordance with *Bower v Marris*, dividends paid to the repayment of interest that would have accrued but for the insolvency in priority to the provable debt.

9. Two of the objectives of the new regime for post-insolvency interest introduced by the Insolvency Act 1986 were simplicity and certainty: see the Cork Report, paragraph 1392 ("*We consider that there should be one set of rules relating to interest on debts in all forms of insolvency proceedings. In preparing the rules, simplicity and certainty are essential*"). If *Bower v Marris* were to apply for the purposes of calculating Statutory Interest, then the aims of simplicity and certainty would be lost. The task of reserving for future distributions of interest would, in particular, be considerably more difficult.

10. In addition, it would be inconsistent with the requirement, clearly stated in Rule 2.88(7), that Statutory Interest be paid on the proved debts only for the period during which the proved debts were outstanding. This requirement echoes a further recommendation of the Cork Report (at paragraph 1394) that in the event of a surplus, interest should run on all proved debts "*until a final dividend is declared*". The principle in *Bower v Marris* is inconsistent with that requirement because it requires interest to be paid referable to the period after the whole of the principal has been repaid, which period is, potentially, indeterminate in length: see for example the calculation applied in *Re Lines Bros Ltd* [1984] 1 Ch 438. Had the draftsman intended that these requirements (simplicity, and the payment of interest until the final dividend is declared) were to be departed from in such a substantial way (by the contrary application of the *Bower v Marris* calculation) then there would surely have been express incorporation of the calculation into the drafting of Rule 2.88.

11. The fact that the *Bower v Marris* principle is based upon a remission to contractual rights demonstrates that it can, in any event, have no application to a creditor with no contractual right to interest (contrary to the position adopted by the Creditor Funds

and York). It thus has no application where the rate of interest is the Judgments Act Rate in accordance with Rule 2.88(6) and (9).

12. Moreover, the fact that the *Bower v Marris* calculation can have no application to a creditor without a contractual right to interest provides support for the conclusion that it does not apply at all under Rule 2.88(7). To do otherwise would create inequality among creditors by requiring dividend payments to be treated as discharging Statutory Interest first, in relation to some creditors, but requiring dividend payments to be treated as discharging the provable debt first, in relation to other creditors, with the result, in some cases, that only some of the creditors receive full payment on their provable debt. Rule 2.88(9) provides no support for such a conclusion because the "*rate applicable apart from administration*" identifies only that which can be described as a rate. The calculation pursuant to *Bower v Marris* is independent from, and forms no part of, the identification of a rate of interest.

13. At paragraph 18(2) of its position paper, York suggests that neither the Act nor the 1986 Rules provide for the appropriation of dividend payments to principal (i.e. the proved debt) in advance of interest accruing post-administration. This is wrong. Since Rule 2.88(7) applies only when all provable debts have been paid, it necessarily follows that dividends are appropriated – when they are made – to the payment of provable debts (i.e. principal and pre-administration interest).

14. At paragraph 24 of its position paper, York claims that the terms of Rule 2.88(7) are in the same form as previous statutory provisions governing post-insolvency interest, including s.132 of the Bankruptcy (England) Act 1825 and later bankruptcy statutes. This is also wrong. Under s.132 of the Bankruptcy (England) Act 1825 (current at the time of *Bower v Marris*) if any surplus arose, then that surplus was used, first, to pay interest on any debts which carried an entitlement to interest (e.g. pursuant to contract) and, to the extent any of the surplus then remained, second, in payment of interest to all other creditors at the rate of 4% per annum, in each case interest being paid from the date of commission (i.e. the commencement of the bankruptcy).

15. Accordingly, s.132 did not limit the payment of post-insolvency interest to the period ending with payment of the proved debt, did not entitle a creditor without a contractual entitlement to interest to recover any interest unless and until all creditors with a contractual (or other) entitlement to interest were paid in full, and did not entitle a creditor with a contractual right to interest at less than 4% to receive interest at a higher rate.

Issue 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).

16. In relation to the sub-issue at paragraph 31.1 of the Administrators' position paper, and on the assumption that the words "*the rate applicable to the debt apart from administration*" can refer to a compounding rate of interest, Wentworth contends that Statutory Interest does not continue to compound following payment in full of the principal amount (i.e. of the provable debt).

17. It is Wentworth's position (as explained in its first position paper) that interest is payable (whether at a simple or compound rate) only for the period up to the date upon which a final dividend is paid to the creditor in respect of its provable debt.

18. In relation to the sub-issue at paragraph 31.2 of the Administrators' position paper, Wentworth contends that the creditor does not have a non-provable debt in respect of interest that would have continued to compound on a contractual basis following the payment in full of the principal amount.

19. It is Wentworth's position, in relation to this sub-issue and in relation to Issue 39, that Rule 2.88 provides a statutory entitlement to post-administration interest which substantively alters creditors' rights in respect of interest accruing after the date of administration, and that there is thus no scope for remitting creditors to contractual rights in the event that the statutory regime gives them less in respect of interest accruing post-administration than they would have recovered had there been no insolvency.

20. Moreover, on a true construction of Rule 2.88(7) it precludes any non-provable claim in respect of interest, because:

    (1) Rule 2.88(7) requires the surplus to be used in payment of post-administration interest before being applied for "*any purpose*".

    (2) In context, "*any purpose*" must mean any purpose *other* than that provided by Rule 2.88(7) itself.

    (3) The purposes for which the surplus can be applied after payments under Rule 2.88(7) have been made thus exclude any further payments in respect of interest.

    (4) In other words, Rule 2.88(7) wholly 'covers the ground' in respect of post-administration interest, and does not leave room for any further, subsequent payments to creditors in respect of interest falling due post-administration.

Issue 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 rate.

21. It is unclear whether the Creditor Funds intend to argue that a creditor that had not obtained, by the Date of Administration, a foreign judgment which carried a rate of

interest higher than 8% would be entitled to claim post-administration interest at that higher foreign judgment rate. Both York and the Administrators do so contend.

22. For the reasons set out in its first position paper, Wentworth contends that a foreign judgment rate of interest will only be relevant where a creditor has obtained the judgment prior to the Date of Administration.

23. Wentworth adds the following points to those made in its first position paper.

24. First, Rule 2.88(9) potentially applies (where it is higher) the rate applicable to "*the debt*" apart from the administration. This is a reference to the 'provable debt' ascertained as at the Date of Administration – i.e. to the same "*debts*" as are referred to in Rule 2.88(7). Where a creditor has not yet obtained a judgment as at the Date of Administration, its provable debt will consist only of its original claim, e.g. for payment under a contract, and will not include any future judgment debt that it might later obtain. Accordingly, on the true construction of Rule 2.88(9), the rate at which post-administration interest is payable to a creditor can never include a rate of interest under a judgment which has not been obtained as at the Date of Administration.

25. Second, if interest payable under a judgment which the creditor might obtain in a foreign jurisdiction qualified as the "*rate applicable to the debt apart from administration*" then it follows that interest payable under a judgment which the creditor might obtain in England would equally qualify. That would mean that every creditor could, by relying upon the rate "*apart from administration*", claim Statutory Interest at the Judgments Act Rate. Such a construction cannot have been intended, however, since it would render otiose the entitlement to interest, in the alternative to the rate "*apart from administration*", at the Judgments Act Rate.

26. Third, any other answer introduces substantial uncertainty, and the need to engage in speculation as to the jurisdiction or jurisdictions in which a creditor could in theory

have brought proceedings, the relevant court in the respective jurisdiction, [1] whether the matter would have proceeded to judgment at all and, if so, the date on which it might have obtained such judgment, as recognised by the Administrators' supplemental sub-issues at paragraph 34.5 of their position paper.

27. For the reasons set out above, the supplemental sub-issues at paragraph 34.5 of the Administrators' position paper do not arise.

Issue 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 to be calculated when the "*rate applicable to the debt apart from the administration*" varies from time to time.

28. In relation to the sub-issue at paragraph 40 of the Administrators' position paper, Wentworth assumes that the Administrators have in mind a proved debt which consists of a number of independent debts combined for the purposes of proof, where either some only of the underlying debts carry a right to interest, or the applicable interest rate varies as between the underlying debts.

29. In that case, Wentworth contends that it is necessary to disaggregate the proved debt, such that the comparison between the judgment rate and the rate applicable apart from

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1 Wherever a creditor might have brought proceedings in New York, then the rate of interest applicable to a judgment varies greatly depending on whether the claim was brought in the State Court or the Federal Court.

administration is carried out separately in relation to each underlying independent debt.

30. If the Administrators have in mind some different fact pattern, then they are invited to clarify the circumstances in which this sub-issue could arise, and Wentworth reserves the right to comment further in light of such clarification.

Issue 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.

31. In relation to the sub-issue identified at paragraph 52 of the Administrators' position paper, Wentworth contends that the correct comparison differs depending on whether the debt is contingent or future.

32. In the case of a contingent debt, the comparison is between:

(1) the interest which would have accrued at the contractual rate from the date upon which the debt became due; and

(2) the sum of the Judgments Act Rate interest that accrued for the same period.

33. In the case of a future debt, the comparison is between:

(1) the interest which would have accrued at the contractual rate from the Date of Administration; and

(2) the sum of the Judgments Act Rate interest that accrued for the same period.

Issue 9

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

34. Issue 9 asks simply as to the impact of entry into a CRA on Issues 7 and 8 (which relate to the time from which interest accrues). Wentworth has set out its position on this question at paragraph 56 of its first position paper. At paragraph 55.4 of their position paper, the Administrators consider whether entry into a CRA might impact upon a creditor's entitlement to Statutory Interest at the rate provided for in its original contract. Wentworth has dealt with that issue at paragraph 164 of its first position paper. For the reasons there set out, Wentworth contends that a creditor who entered into a CRA has released its right to claim Statutory Interest at the rate provided for in its original contract.

35. In relation to the sub-issue identified at paragraph 56 of the Administrators' position paper, Wentworth has addressed this at paragraph 56 of its first position paper. Statutory interest is payable only from the date of accession to the CRA.

Issue 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.

36. Contrary to the position adopted by the Creditor Funds (at paragraph 10 of their position paper), the use of the word "*payee*" is not used in deliberate contradistinction to "*party*".

37. In the 1992 ISDA Master Agreement, the reason "*payee*" is used, as opposed to "*party*" is because the Default Rate could, depending on circumstances, be required to be paid by either the Defaulting Party or the Non-Defaulting Party. The word "*payee*" is thus simply a shorthand to identify whichever of the Defaulting Party or the Non-Defaulting Party is entitled to receive the amount under Section 6(e). The word "*party*" would not do so.

38. The fact that the Termination Rate uses the word "*party*" as opposed to "*payee*" provides no support for the Creditor Funds. The word "*party*" is there used simply because it is more economical and less cumbersome than the phrase '*the payor and payee respectively*'.

39. It would in any event make no commercial sense for the word "*party*" in the definition of Termination Rate and the word "*payee*" in the definition of Default Rate to be given different meanings, in particular since the two rates are required to be applied in tandem to the amount payable under Section 6(e). Thus, following a Termination Event, interest is payable on the amount due under Section 6(e) from the Early Termination Date. From the Early Termination Date until the date upon which notice of the amount due is effective, interest is payable at the Termination Rate (Section 6(d)(ii) and the sub-paragraph (d) of the definition of Applicable Rate). From the date upon which notice of the amount due is effective until payment, interest is payable at the Default Rate.

40. This suggests that the draftsman of the ISDA Master Agreement intended the undefined terms "*payee*" and "*party*" to be used interchangeably.

41. There would also be substantial practical difficulties (whenever the paying party was insolvent) because no distributions on account of interest could safely be made when (by definition) the rate of interest due on each debt could not be known for certain until the last payment in respect of interest had been made, given the possibility of the rate altering due to the transfer of the debt to a third party with a different cost of funding.

Issue 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 phrase "*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?

42. The Creditor Funds contend that the words "*to fund*" and "*funding*" in the definition of Default Rate encompass the concept of being forced to fund the Defaulting Party, and this includes the relevant payee's "*loss of opportunity to derive an alternative return*" from the relevant amount and "*any other economic cost*" to the relevant payee: paragraphs 11(2)(b) and 11(5) of their position paper.

43. On the true construction of the ISDA Master Agreement none of these concepts fall within the "*cost ... if it were to fund or of funding*" the relevant amount.

44. First, the relevant payee's "*cost*" of funding, or if it were to fund, implies either an actual, or hypothetical, transaction – i.e. a transaction whereby the relevant payee actually raised the relevant amount, or a transaction by which it would have raised the relevant amount had it sought to do so. A lost opportunity to derive an alternative return involves no transaction at all.

45. Second, "*cost*" does not naturally include the amount which the relevant payee would have made by way of investment return on the assumption that it had been paid the amount due from the Defaulting Party or other consequential losses. It would require an expansive definition to be given to the term "*cost*" of funding, if it were to include a loss of the opportunity to derive an alternative return.

46. Third, the context in which the definition appears does not support such an expansive definition. The context is the payment of interest, i.e. a payment to compensate for being kept out of the time-value of the relevant amount. The expansive definition of cost would only be appropriate in a context such as the calculation of loss flowing from the loss of an investment. Where the ISDA Master Agreement provides for such loss to be claimed, it uses a much broader definition: see, for example, the expansive definition of "*Loss*" in the 1992 ISDA Master Agreement, and the equivalent expansive definition of "*Close-out Amount*" in the 2002 ISDA Master Agreement.

47. Fourth, the concept of lost opportunity to derive an alternative return, if it were to apply at all, would permit of no distinction between the cost "*of funding*" and the cost "*if it were to fund*". That is because the expansive definition of cost on which the Creditor Funds rely is *always* a hypothetical, as opposed to an actual, cost.

48. Fifth, the concept of "*cost ... of funding, or if it were to fund*" must be interpreted consistently wherever it appears in the ISDA Master Agreement, and in other contexts it can only have the narrower meaning for which Wentworth contends. Thus, for example, the definition of Termination Rate refers to the arithmetic mean of the cost to each party of funding, or if it were to fund, the relevant amount. There is no sense in which the paying party could claim to be the unwilling lender to the payee, and thus no room for implying that the "*cost*" to it if it were to fund the relevant amount could be based on a lost investment opportunity.

Issue 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.

49. The Creditor Funds (at paragraph 14(1) of their position paper) rely on the decision in *Finance One Pub Co. v Lehman Brothers Special Financing Inc* [2003] WL 21638214 for the proposition that the definition of Default Rate precludes any issue of fact with regard to the proper default rate with the phrases "*without proof or evidence of any actual cost*" and "*as certified by it*".

50. There was, however, no contention made in the *Finance One* case, that the relevant payee had failed to comply with the relevant standard in certifying its cost of funding. The Court in the *Finance One* case merely held that, in the absence of such challenge, there could be no issue of fact.

51. The Creditor Funds (at paragraph 14(2) of their position paper) agree, in any event, that the relevant payee's certificate can be challenged if it is not made in good faith or rationally. Accordingly, the bald statement in paragraph 14(1) of their position paper is inconsistent with paragraph 14(2) and wrong.

52. The words "*without proof or evidence of any actual cost*" are intended solely to relieve the relevant payee from any obligation to show that it has actually incurred a cost, and entitle it instead to rely on a hypothetical cost of funding where it has chosen not, in fact, to fund.

53. Wentworth, as set out in its first position paper, contends that the relevant payee's certificate is challengeable if it is not a good faith and rational certification of its actual, or hypothetical, *cost* of funding, where cost means the lowest amount which the relevant payee would be required to pay over the relevant period.

Issue 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.

54. Wentworth notes the contention that "*a cession de contrat under French law (but not otherwise)*" would permit a claim based on the refinancing rate of the third party after the date of the relevant transfer (at paragraph 23(1) of the Creditor Funds' position paper). Wentworth notes that a *cession de contrat* under French law would have required the consent of LBIE.

Issues 28-30

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 that the amount of interest which would accrue applying the "rate applicable to the debt apart from the administration" to the original foreign currency claim.**

55. The Creditor Funds and the Administrators both contend that payments in respect of Statutory Interest do not reduce the amount of a Currency Conversion Claim. The Administrators contend (paragraphs 113-115 of their position paper) that this is because such payments discharge a separate and distinct debt.

56. There is, however, only one debt: the right to be paid principal (and, where applicable interest) in the foreign currency. Although the currency of the debt is converted into sterling for the purposes of proof (including for the purposes of paying Statutory Interest on the proof), any and all payments from the insolvency process can only be applied in reduction of that single debt.

57. The Currency Conversion Claim can only become payable once all other payments to creditors, including by way of all claims to interest, have been paid in full (because it is only then that the Currency Conversion Claimants cease to be in competition with any other creditors of the estate).

58. Thus, no separate Currency Conversion Claim can ever arise in respect of the provable debt alone, since the claim is premised upon all principal and interest having first been discharged in full.

59. Since the Currency Conversion Claim can only arise once all payments in respect of principal and interest have been made, and any such payments can only be applied in reduction of the single foreign currency debt, it follows that dividends on the provable debt and Statutory Interest should be taken to reduce the quantum of the Currency Conversion Claim.

60. As noted in Wentworth's first position paper, a foreign currency creditor who has in fact received from the insolvent estate a total sum, once converted at the date of payment back into the relevant foreign currency, more than its contractual entitlement to principal and interest cannot sensibly be regarded as having suffered any loss by reason of the conversion of its claim into sterling for the purposes of proof.

Issues 31 and 32

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.

61. Wentworth has identified the relevant master agreements which give rise to this issue, and awaits a response from the Creditor Funds.

Issue 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.

62. We are exploring ways to provide a sample agreement that falls within the parameters of this question, taking into consideration certain confidentiality restrictions.

Issue 34

Whether a creditor's Currency Conversion 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.

63. Wentworth's position differs from that of the Creditor Funds only in relation to a Sterling CDD. In relation to the points made in paragraph 34(2) of the Creditor Funds' position paper:

(1) The assertion at (a) as to the purpose of the CDDs is unsupported by the evidence (in particular, paragraphs 47 and 48 of Lomas 10).

(2) It is not true that the CDDs were non-negotiable, and various creditors negotiated amendments, which gave rise to changes in the templates from time to time: see paragraph 58 of Lomas 10.

(3) The conclusion that the CDDs released Currency Conversion Claims does not involve any improper action, action inconsistent with the purpose of the administration or unequal treatment of creditors: agreement of a CDD is a bi-lateral matter between the Administrators and each creditor. Each relevant creditor benefitted from agreeing to the wide release wording, in ensuring certainty and an earlier distribution. In many cases, the creditor benefited from an agreed termination of its open positions, which it otherwise had no right to do. The estate as a whole benefitted from the wide release wording, through certainty as to the estate's overall obligations.

(4) In summary, the various alleged aspects of the factual matrix are in any event insufficient to overcome the express wide language of release, which includes

claims both within and outside the contemplation of the parties, and claims that may come into existence at some point in the future pursuant to a change in the law.

64. Wentworth shares the Administrators' view that the alternative claim for rectification (paragraph 34(4) of the Creditor Funds' position paper) is not suitable for determination on this application.

Issue 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.

65. It is for the Creditor Funds to demonstrate the factual basis for the various assertions set out in paragraph 36 of their position paper, which underpin their claim that the releases created by the CDDs and/or CRA ought not to be enforced. The Creditor Funds have not as yet provided any evidence in support of those assertions.

66. If and to the extent that such evidence is provided, then Wentworth will respond to it.

67. Wentworth in any event shares the Administrators' view that this is likely to be a fact specific issue, dependent upon establishing an appropriate factual foundation on a creditor by creditor basis, and thus unsuitable for determination on this application.

68. In any event, Wentworth contends that the principle in *Ex parte James* (1874) LR 9 Ch App 609 has no application where CDDs/the CRA were freely entered into by sophisticated creditors acting with the benefit of legal advice, and those agreements contained very clear and very wide words of release.

Issue 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 to be 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.

69. Nothing in the Creditor Funds' position paper provides any legal basis for recovery of compensation for the time between payment of dividends in respect of proved debts and the date on which Statutory Interest is paid.

70. There is no non-provable claim to interest on the basis of *Bower v Marris* because (as noted in relation to Issue 2 above) the statutory rules after 1986 for payment of interest accruing post-insolvency provide a self-contained and exhaustive code in relation to the payment of interest accruing post-insolvency, and thus leave no room for any further non-provable claim to interest.

71. There is no non-provable damages claim to interest on the basis of *Sempra Metals* because there is no relevant breach of any obligation. Statutory Interest is not payable on any particular date, and thus there can be no claim for damages because it is paid on date A as opposed to date B.

72. Moreover, a foreign currency creditor has no claim for damages resulting in the delay in payment of its claim, and is in no different position to the sterling creditors in this respect. The loss suffered by all creditors arising from non-payment of their debts on the due date is fully compensated by the provisions in the Insolvency Act and Rules relating to interest. These do not leave room for any further claim for damages based on late payment.

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