IN THE HIGH COURT OF JUSTICE **No. 7942 of 2008**

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

Respondents

WENTWORTH'S SUPPLEMENTAL REPLY POSITION PAPER ON QUESTION 36A

This position paper is filed on behalf of the Fourth Respondent ("**Wentworth**") by way of supplement to Wentworth's Position Paper and Reply Position Paper. It is filed pursuant to paragraph 4(2) of the Order of David Richards J dated 9 March 2015.

1. The rule in *ex parte James* is a rule which permits the Court to control the conduct of its officer. It is based upon the actual or anticipated conduct of that officer. The threshold is conduct so unfair as to be contrary to standards of natural justice and capable of description as dishonourable or dishonest: *T H Knitwear (Wholesale) Ltd* [1988] Ch 275; *Re Thullusson; ex p Abdy* [1919] 2 KB 735; *Re Wigzell; ex p Hart* [1921] 2 KB 835.

2. On any view the conduct of the Administrators complained of by the SCG does not approach the threshold for the application of the rule in *ex parte James*. If the rule does not apply directly, there is no scope for its application 'by analogy'.

3. The rule in *ex parte James* is incapable of application to restrain the enforcement by the Administrators of releases freely agreed between LBIE and creditors, the terms of which releases, objectively construed, compromise claims to Statutory Interest, Currency Conversion Claims and other non-provable claims. This is particularly so in the case of sophisticated and well-resourced creditors such as the counterparties to the CRA and CDDs in this case. In particular:

   (1) Absent facts sufficient to support a claim for mistake, misrepresentation, duress, undue influence or other vitiating factor, the necessary starting point is a series of release provisions freely agreed between the relevant creditors and LBIE by a series of bilateral agreements;

   (2) Such agreements were within the capacity and powers of the parties, both of the creditors and of the Administrators with regards to their powers and functions;

   (3) In each case, the release of claims by creditors was given for proper consideration, being part of a set of rights agreed by way of compromise in respect of proofs and other rights which were previously not agreed.

4. Contrary to the assertion of the SCG:

   (1) There is no inconsistency between, on the one hand, the duties of the Administrators or the purpose of the administration and, on the other hand, the

Administrators' conduct in entering into the CRA or CDDs with creditors, including language releasing some or all non-provable claims;

(2) The Administrators' conduct in entering into the CRA or CDDs with creditors, including language releasing some or all non-provable claims, furthered the purpose of the administration;

(3) Wentworth does not accept that the entry into the CRA or CDDs, including the language releasing some or all non-provable claims, was not "necessary" for the purpose of the administration but, in any event, the necessity or otherwise of entering into bilateral agreements with creditors, which are within the powers of the Administrators and are consistent with and further the purpose of the administration, is irrelevant to the application of the rule in *ex parte James*.

5. The SCG is wrong to conflate the application of the rule in *ex parte James* with the so-called principle of "members come last":

(1) The residual nature of members' rights relative to creditors' rights has nothing whatsoever to do with a rule based upon the conduct of an officeholder and cannot drive the application of such a rule;

(2) In any event, non-enforcement of the releases contained in the CRA and/or CDDs would, if the insolvency surplus is insufficient to satisfy all non-provable claims, materially and adversely affect the rights of other unsubordinated creditors.

6. The fact that the terms of agreement reached with some creditors differed from the terms of agreement reached with others, including creditors who entered into CDDs at different times, provides no basis for concluding that the Administrators' conduct reached the threshold required by *ex parte James*. The fact that some creditors might have better rights than others by reason of having agreed different release provisions is fair and flows from the objective meaning of the respective agreements reached.

7. The SCG is wrong to assert that the consequences of enforcement of the releases would deprive creditors of non-provable claims without conferring any benefit on the

creditors. The creditors received valuable consideration upon entering into the CRA and/or CDDs, including mutual releases of claims, certainty as to their admitted claims and early resolution of their claims.

8. The lack of subjective appreciation by the Administrators of, or of the possibility of, certain claims after the payment of proved debts is irrelevant:

   (1) The relevant creditors were sophisticated, well-resourced and with access to legal advice. Indeed, it was one such creditor that identified the possibility of the Currency Conversion Claim, having taken appropriate legal advice;

   (2) The CDDs expressly released claims whether known or unknown and irrespective of whether such claims were in the contemplation of the parties or not;

   (3) The lack of subjective appreciation by the Administrators of, or of the possibility of, certain claims is not sufficient to found a common mistake, and it is not an induced mistake, as might justify avoidance of a contract or support a claim for unjust enrichment.

9. There is no evidence to support the SCG's assertion that enforcement of the releases creates a loss which arose as a consequence of a mistake of fact or law. In any event:

   (1) The language of the releases is plain and unambiguous, and as noted above includes claims whether or not in the contemplation of the parties; and

   (2) The creditors expressly represented in the CDDs that they had made their own independent decision to enter into the CDD and were not relying on any communication from (inter alios) the Administrators.

10. Insofar as the SCG would rely on Paragraph 63 of Schedule B1 to the Act in addition to or in the alternative to the rule in *ex parte James*:

   (1) Paragraph 63 of Schedule B1 to the Act is a power to direct an administrator;

   (2) Without more however that power does not provide a reason for its exercise.