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) ANTHONY VICTOR LOMAS
(2) STEVEN ANTHONY PEARSON
(3) PAUL DAVID COPLEY
(4) RUSSELL DOWNS
(5) JULIAN GUY PARR
(THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION))

Applicants

-and-

(1) BURLINGTON LOAN MANAGEMENT LIMITED
(2) CVI GVF (LUX) MASTER SÀRL
(3) HUTCHINSON INVESTORS LLC
(4) WENTWORTH SONS SUB-DEBT SÀRL
(5) YORK GLOBAL FINANCE BDH LLC

Respondents

FURTHER WRITTEN SUBMISSIONS OF
YORK GLOBAL FINANCE BDH LLC ON SUPPLEMENTAL ISSUE 1(A)
IN RESPONSE TO QUESTIONS RAISED BY HILDYARD J
For the hearing on 24 June 2016

---

1. These further written submissions are made on behalf of York Global Finance BDH LLC (ñ**York**ò) in response to questions posed by Hildyard J in an email from the Judgeôs clerk on 27 May 2016.

Question 1

What if any reliance the parties respectively place on the Tael decision; whether a contractual right which is subject to a contingency which has not yet been and may never be fulfilled can be said to be an 'accrued right'; whether a rate of interest can

be said to "apply" (a) in the case of a right that has not yet accrued or (b) where the right can be said to have accrued, but the conditions to which it is subject before any entitlement crystallises have not been fulfilled.

2. In reaching his decision that a creditor who obtains a foreign judgment after the Date of Administration is not entitled to claim the foreign judgment rate of interest, David Richards J accepted the submission of counsel for Wentworth that ñ*it is as necessary for the operation of rule 2.88 as it is for the ascertainment of provable debts that there should be a single cut-off date for ascertaining the rights of creditors*ò and that the wording of rule 2.88 ñ*was not intended to include rates of interest for which no right existed at the commencement of the relevant insolvency proceeding*ò (para.180). Accordingly, a ñ*hypothetical rate which would be applicable to a debt if the creditor took certain steps*ò (para.177) or ñ*a contingent right to interest*ò does not fall within rule 2.88 (para.182).

3. Yorkôs position is that, if the judge was correct, then the same reasoning applies not only to an interest rate which would be applicable to a judgment obtained after the Date of Administration, but also to an interest rate which would only be applicable as a result of other action taken by a creditor after the Date of Administration.

4. In response, the Joint Administrators have argued, in short, that a rate of interest specified in a contract as being contingent on some event other than the obtaining of a judgment (such as the creditor taking steps under the ISDA Master Agreement) is different, because the right to interest *accrued* pre-administration when the parties entered into the relevant contract, whereas the right to interest under a judgment does not *accrue* until judgment is entered[1]. However, the proposition that any right to interest which arises under a contract *accrues* when the contract is entered into is directly contrary to the Supreme Courtôs decision in *Tael One Partners Ltd* v *Morgan Stanley & Co* [2015] Bus LR 278 **[Authorities bundle/tab 6].**

5. That case concerned, inter alia, the meaning of ñ*accrued*ò. In simple terms, the Court was required to determine whether a ñ*payment premium*ò payable by the

[1] Joint Administratorsô submissions para. 30 **[Bundle A/Tab 2]**.

borrower under a loan agreement upon repayment of the loan was ñ*expressed to accrue by reference to the lapse of time*ò, like interest.[2] The payment premium was only payable when the loan was finally repaid, although like interest, the quantum of the payment premium was determined in part by the time elapsed.

6. The Supreme Court held that although time elapsed was relevant to the calculation of the payment premium, the payment premium did not ñ*accrue*ò until the date on which it became payable.[3] The relevant part of the judgment is para.42:

> ñThe word "accrue" is generally used to describe the coming into being of a right or an obligation (as, for example, in *Aitken v South Hams District Council* [1995] 1 AC 262), so that the person in question then has an accrued right, or is subject to an accrued liability, as the case may be. That is the meaning which accrual usually bears, in particular, in relation to interest and other payments. The amount to which there is an entitlement may not be payable until a future date, but an entitlement may nevertheless have accrued. For example, under section 2 of the Apportionment Act 1870, rents, annuities, dividends and other periodical payments may be considered as accruing from day to day, although they may be payable at longer intervals (*In re Howell* [1895] 1 QB 844); and a bequest of an "accruing dividend" carried the dividend for the period during which the death occurred, although the dividend was not declared until a later date (*In re Lysaght* [1898] 1 Ch 115). Situations can readily be envisaged in which interest or fees might accrue, in that sense, by reference to the lapse of time: indeed, interest invariably accrues by reference to the lapse of time, as do recurring fees such as commitment fees. This is not however such a situation. An entitlement to a payment premium under the facility agreement accrues on a defined event.ò

7. In other words:

   (1) Even where a debt such as interest or rent is only payable at the end of a term, it can ñ*accrue*ò from day-to-day because it will definitely become due at some point in the future.

---

[2] The relevance of the point was that one of the initial lenders had sold part of its participation in the loan on the secondary market, but under the terms of the trade, was entitled to sums which had accrued to it prior to the sale.

[3] Accordingly, an initial lender which sold its participation in the loan prior to repayment of the loan would not have accrued any right to any part of the payment premium.

(2) Where, however, not only the quantum of the debt but the right to recover it at all is contingent on a defined event, that sum cannot ñ*accrue*ò until the occurrence of that event.

8. This point is also made clearly in the first instance judgment of Popplewell J [2012] EWHC 1858 (Comm) at para.29 (a part of the judgment unaffected by the subsequent appeals[4]):

> ñThe natural meaning of a fee which has accrued by a certain date is that it comprises a vested right to a sum which is ascertained, or ascertainable by reference to past events é It also extends, in my view, to a sum which will undoubtedly be payable at a future date, but the time for payment of which is uncertain. For example, two weeks into a three month interest period, two weeks' interest would still have accrued é It may perhaps extend to a sum which is to be ascertained in the future by reference to past events (e.g. a reasonable sum for work done, the amount to be determined by an expert). But a fee cannot be said to have accrued if the *existence* of the right to payment is contingent upon the occurrence of an uncertain future event, as distinct from the time at which it may be enforced. This is just as much so if the uncertain future event affects the amount of any payment obligation as it is if the uncertainty affects the existence of any obligation at all. Accrual is concerned with the vesting of rights, albeit that it can include those which are not immediately enforceable. Rights cannot be said to vest in the abstract, divorced from definition of the content of the righté ò

9. The significance of the judgments in *Tael* is that it is wrong to say[5] that a right to interest has ñ*accrued*ò when a contract is entered into, even though the right to a particular rate of interest is contingent on some event which may never take place. As the judgments in *Tael* confirm, the law distinguishes between two types of right:

(1) Accrued rights to payment of sums which will definitely fall due at some point in the future, even though the timing is not certain. For example, a creditor whose contract always entitles him to interest on his debt at 10% accrues interest for the whole period that his debt is outstanding.

[4] The subsequent appeals concerned whether the payment premium had accrued within the terms of condition 11.9(a) of the LMA standard terms and conditions. In this paragraph, Popplewell J held that the payment premium had not accrued within the terms of condition 11.3(a), a finding which was not challenged on appeal.

[5] As the Joint Administrators do at para.30 of their written submissions **[Bundle A/Tab 2].**

(2) On the other hand, if a creditor is entitled to interest on his debt only upon the occurrence of a contingency, he does not have an ñ*accrued*ò right to interest at all until the contingency occurs.

10. Accordingly, the Joint Administrators are wrong to say that a contractual right to interest which is itself contingent accrues when the contract is first entered into.

11. York therefore submits that:

(1) A contractual right which is subject to a contingency which has not yet been and may never be fulfilled cannot be said to be an ñ*accrued right*ò.

(2) A rate of interest does not ñ*apply*ò in the case of a right to interest that has not yet ñ*accrued*ò. Although the Insolvency Rules r.13.12 permit a creditor to prove for a contingent debt which has not accrued as at the Date of Administration, David Richards J has held that this does not extend to permitting a creditor to claim a rate of interest which is contingent and has therefore not accrued as at the Date of Administration. As David Richards J held at para.182 of the Part A judgment **[Bundle A/Tab 19]** that:

> ñThe determination of the existence of debts and liabilities for the purposes of proof, governed by rule 13.12, is irrelevant to the meaning of the phrase ñthe rate applicable to the debt apart from the administrationò in rule 2.88(9).ò

Moreover, quite apart from any insolvency process, where a contract provides that a default rate of interest will apply on the occurrence of an event of default, it would be a misuse of language to say, before any event of default had occurred, that the default rate ñ*applied*ò, simply because a contract provided that it might or might not apply in the future.

(3) If the conditions to which a right is subject before any entitlement crystallises have not been fulfilled, the right cannot be an ñ*accrued right*ò. As Popplewell J said in the extract quoted at paragraph 8 above, rights ñ*cannot be said to vest in the abstract, divorced from definition of the content of the right*ò. As long as there is some unfulfilled condition before

an entitlement to interest crystallises, the interest does not *accrue,* and the rate cannot be said to *apply.*

12. Ultimately, as York said in its Reply Submissions **[Bundle A/Tab 5]** paras 5-7, the question in relation to Issue 1(a) is what the draftsman intended when requiring a comparison to be made under rule 2.88(9) between the Judgments Act rate and a ñ*rate applicable to the debt apart from the administration*ò. The fact that the Judgments Act rate is fixed as at the date of Administration (rule 2.88(6)) strongly militates in favour of the ñ*rate applicable to the debt apart from the administration*ò being a rate to which there is an existing right as at the Date of Administration.

13. As to the second part of the question, namely, whether a rate of interest can be said to ñapplyò (a) in the case of a right that has not yet accrued or (b) where the right can be said to have accrued, but the conditions to which it is subject before any entitlement crystallises have not been fulfilled, Yorkôs position is that:

(1) a rate of interest cannot be said to ñ*apply*ò in the case of a right which has not yet accrued; but

(2) it can be said to apply where the right itself has accrued but no entitlement to *payment* has arisen.

Question 2

Whether, to constitute "the rate applicable to the debt apart from the administration", the rate to which the creditor is contractually entitled must be one that would have been available at the Date of Administration had any contingencies to which the contractual entitlement is subject been fulfilled at that time.

14. Yorkôs position is that the rate must be one to which the creditor has an existing right as at the Date of the Administration to have applied to his debt as at that date such that any contingencies to which the contractual entitlement is subject must in fact have been fulfilled at that date.

Question 3

Whether "the rate applicable to the debt apart from the administration" may be a floating or variable rate, or whether the actual rate must be fixed as at the Date of Administration.

15. York accepts that a rate applicable to the debt apart from the administration may be a floating or variable rate. However, it is necessary for the creditor to have an existing accrued right as at the Date of the Administration to have that floating or variable rate applied to his debt.

Tom Smith QC
Robert Amey

South Square
Gray's Inn
London
WC1R 5HP

23 June 2016