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30 June 2017

BY EMAIL

Linklaters LLP
One Silk Street
London EC2Y 8HQ

Attention: Tony Bugg (tony.bugg@linklaters.com) and Euan Clarke (euan.clarke@linklaters.com)

Dear Sirs,

Lehman Bros. International (Europe) (In Administration) - Resolution of the LBIE administration

Following the recent judgment of the Supreme Court in Waterfall I, the number of outstanding issues in LBIE's estate has reduced substantially. Although there are remaining issues subject to appeals, the terms of the Supreme Court judgment and the focus on simplicity in the insolvency process make it extremely unlikely, in our view, that the High Court's decision in Waterfall IIA on *Bower v Marris* and compounding will be overturned. We also maintain that it is extremely unlikely that the High Court's decision in Waterfall IIC on the calculation of ISDA interest will be overturned and, in any event, there is no real basis for believing that a material number of creditors would be able to establish interest claims in excess of 8% p.a.

With this in mind, the administrators' attention should now be turned to an overall resolution of the LBIE estate that would settle the remaining Waterfall issues and allow for a distribution that goes well beyond the interim distribution of statutory interest previously contemplated by the administrators. Wentworth is the largest creditor and would therefore be most prejudiced by further delays to finalising LBIE's estate.

Wentworth would be amenable to discussing a final resolution which provides for the payment of statutory interest without credit for *Bower v Marris* or for the ISDA interest arguments that failed in Waterfall IIC, subject to a discount to account for the accelerated distribution to senior creditors and the risk that LBIE may enter liquidation (on which, see further below). Such a resolution of the estate and distribution of the surplus would be in the best interests of LBIE's creditors as a whole.

If the administrators choose not to take these steps, or if other creditors of LBIE should oppose them such that they fail, Wentworth would have to look to alternative approaches to finalising the LBIE estate, including compelling an application to court to be made for the termination of the administrators' appointment.

In light of the Supreme Court's decision that creditors' rights to interest for the administration period terminate upon the company's entry into liquidation, the remaining issues in dispute would fall away entirely if LBIE were to enter liquidation.

We note the interim update published on the PwC website on 23 June 2017, which stated that "the Joint Administrators will object to any attempt by any party to force the premature liquidation of LBIE, as they consider that this would not be in the interests of LBIE's creditors as a whole."

As you are aware, the administrators would be obliged to make an application to court for their appointment to cease if a creditors' decision required them to do so (paragraph 79(2)(c) of Schedule B1). The administrators would also be obliged to seek such a decision if requested to do so by creditors holding at least 10% by value of the total debts of the company (para 56(1) of Schedule B1). We believe that Wentworth is in a position to require the administrators to seek such a decision.

If the administrators sought such a decision, creditors' votes would be calculated according to the amount of each creditor's claim as at the date on which LBIE entered administration, less any payments made to the creditor after that date (rule 15.31). Since the majority of claims into LBIE have been paid dividends of 100p in the £, and since the right to statutory interest had a £nil value on the administration date, most creditors' votes would be valued at £nil. Indeed, Wentworth is one of the few creditors to hold valid claims which have not yet been paid at all, namely the senior and subordinated claims that were assigned by LBHI2. On Wentworth's analysis, it would be able to require the administrators to apply to court to request that their appointment be terminated and that liquidators be appointed in their place. Our clients reserve their rights to require the administrators to seek a decision from the creditors on this issue.

There are reasons why the administrators should consider a liquidation to be preferable to an extended administration, not least of which because it would ensure a swifter resolution of the remaining LBIE estate. The administrators are subject to a duty to perform their functions as quickly and efficiently as reasonably practicable (para 4 of Sch B1), and that translates into a duty to distribute as soon as they reasonably can: "*As it seems to me, it is the duty of the office holder to proceed to make distributions as soon as he reasonably can*" (per David Richards J at para 105 of Waterfall I).

We request that the administrators publish a copy of this letter on the PwC website. Wentworth, as always, remains available for further discussions. In the meantime, all of Wentworth's rights are reserved.

Yours faithfully,

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By Email

23 August 2017

Your Ref Partha Kar/Kon Asimacopoulos

Our Ref Tony Bugg/Euan Clarke/Jared Oyston

Dear Sirs

Lehman Brothers International (Europe) (in administration)

We refer to your letter dated 30 June 2017.

In your letter, you state your (and/or your client's) view that:

1. in light of the Supreme Court judgment in the Waterfall I Application, it is extremely unlikely that the High Court's decision that statutory interest under IR2.88 is not to be calculated on the *Bower v Marris* basis will be overturned on appeal;
2. it is highly unlikely that the decision of the High Court in relation to the calculation of default interest under the ISDA Master Agreement will be overturned on appeal; and
3. there is a prospect of LBIE being wound up, giving rise to the "lacuna" in relation to statutory interest.

You go on to say that, in light of this, the LBIE Administrators' attention ought to turn to an overall resolution of the remaining issues in the outstanding Waterfall litigation in order to facilitate further distributions in the LBIE estate, which resolution should, you suggest, effectively assume that your stated view on each of these issues is correct.

The *Bower v Marris* and ISDA interest issues referred to above are issues under appeal in proceedings which your clients assisted in formulating and in which they remain active participants. Most recently, in relation to Waterfall IIA, there was a hearing on 25 July, and judgment from the Court of Appeal is awaited. The LBIE Administrators – and indeed all relevant parties – are aware of your clients' position in relation to the issues in those appeals. Your suggestion that a resolution of the LBIE estate should proceed on the basis that your clients' position on those issues is correct of course begs the questions which the LBIE Administrators have – with your clients' cooperation – asked the Court and which remain unresolved pending the Court of Appeal's decisions.

You go on to say that, if the LBIE Administrators do not (or if other creditors of LBIE ensure that they do not) proceed in the way you suggest, Wentworth may seek to require the LBIE Administrators, under paragraph 79(2)(c) of Schedule B1 of the Insolvency Act 1986, to apply to Court seeking the termination of their appointment. As your clients are aware, further to the Supreme Court judgment in Waterfall I, the effect of any such termination of the administration would be to extinguish creditors' rights to statutory interest accrued but unpaid in the administration. As you are aware, the LBIE Administrators have been facilitating exchanges between Wentworth and the Senior Creditor Group in relation to potential options for resolving the LBIE estate and, as they have been throughout, the LBIE administrators remain willing to continue those efforts.

In the circumstances, therefore, your client's threat to seek the termination of the LBIE Administrators' appointment is unwelcome and unwarranted. Notwithstanding this, we address certain aspects of the remainder of your letter below, to ensure that the LBIE administrators' position is clear.

The LBIE Administrators remain of the view, as explained in their update to creditors dated 23 June 2017 (the "**Update**"), that it is in the interests of LBIE's creditors as a whole for LBIE to remain in administration. They take the view that the purpose of LBIE's administration (achieving a better result for LBIE's creditors as a whole) continues to be the achievable objective, and they continue in that pursuit, including proceeding to distribute statutory interest (and other entitlements) from the surplus when that is possible.

In this regard we note that, while your letter refers to "reasons" why a liquidation should be considered preferable to an extended administration, the only reason you identify is that it would ensure a swifter resolution of the LBIE estate. In addition to the points made by the LBIE administrators in the Update as to the reasons for LBIE remaining in administration, we note the following:

1. In its Waterfall I judgment the Supreme Court observed that forcing an administrator to move a company into liquidation without having first paid accrued statutory interest "*would potentially wreak real unfairness on all the other creditors of the company*".

2. The time taken so far in resolving the issues that stand in the way of the distribution of the surplus in the LBIE administration is entirely reasonable given the complexity of the issues, the sums at stake and the fact that, with the active involvement of the major stakeholders in the LBIE administration, it has required multiple sets of legal proceedings that have proceeded to appeals (where your client has of course itself been both appellant and respondent).

3. The LBIE Administrators do not consider that any swifter resolution that a liquidation might offer would justify the injustice of the loss of rights to statutory interest that would result.

4. Whilst your letter states that Wentworth would have sufficient votes to require the LBIE Administrators to make an application under paragraph 79(2)(c) (as to which the LBIE Administrators express no view), it says nothing about the approach the Court would take to such an application. The LBIE Administrators consider it inherently unlikely that the Court would, on such an application, view the LBIE Administrators' willingness (if necessary) to await the outcome of issues which are currently before the Courts as a compelling (or any) reason why the LBIE Administrators' appointment should be brought to an end.

5. In relation to the Court's likely approach on any such application, it is worth noting Mr Justice Hildyard's comments in his judgment dated 3 August 2017, giving permission for the Backstop settlement to go ahead: "*In light of the Supreme Court's decision in the Waterfall I appeal, any entitlement to statutory interest during the period of LBIE's administration would come to an end*

> *upon LBIE moving into liquidation. For that reason alone, it would be very difficult to justify moving LBIE into liquidation until such statutory interest (the precise quantum of which will not be known until the Waterfall II proceedings are finally determined) is paid in full.*" (emphasis added).

Finally, we note your request that your letter be posted on the LBIE administration website. The LBIE Administrators are not minded to use the administration website as a noticeboard on which to display creditor correspondence but they have informed your clients that the underlying content of your letter has been communicated to members of the SCG.

Yours faithfully

Linklaters LLP

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Wentworth Sons Sub-Debt S.à r.l.
Société à responsabilité limitée
Registered office: 6, rue Eugène Ruppert, L-2453 Luxembourg, Grand Duchy of Luxembourg
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BY POST AND EMAIL
The Joint Administrators of Lehman Brothers
International (Europe) (In Administration)
Level 23, 25 Canada Square
London E14 5LQ

Attn: Anthony Victor Lomas, Steven Anthony Pearson,
Russell Downs, and Julian Guy Parr

WITH A COPY TO:
Linklaters LLP
One Silk Street
London EC2Y 8HQ

Attn: Tony Bugg, Euan Clarke, and Jared Oyston

24 October 2017

Dear Sirs,

Lehman Brothers International (Europe) (In Administration) ("LBIE")

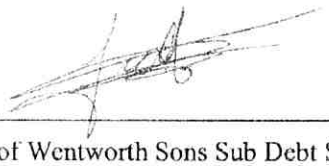
1. We, Wentworth Sons Sub Debt S.à r.l. ("**Wentworth**"), hereby request that, pursuant to paragraph 56(1)(a) of Schedule B1 of the Insolvency Act 1986, the joint administrators of LBIE seek a creditors' decision on the matter described below. We request that a creditors' decision is sought by the joint administrators as soon as possible.

2. The matter we request is put to a creditor vote is: "whether the joint administrators of LBIE should be required, pursuant to a creditors' decision in accordance with paragraph 79(2)(c) of Schedule B1 of the Insolvency Act 1986, to apply to the Court to terminate their appointment."

3. The purpose of this request for a creditors' decision is to facilitate the termination of the joint administrators' appointment and to facilitate the appointment of a liquidator of LBIE.

4. Wentworth confirms, for the purposes of this request, that it holds over 10% of the total claims in LBIE. Wentworth holds £1,242,162,409.78 in subordinated debt claims in LBIE.

Yours faithfully,



On behalf of Wentworth Sons Sub Debt S.à r.l.

Name: **Jérôme Devillet**

Title: Authorised signatory

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F.A.O. Partha Kar and Kon Asimacopoulos

By Email 30 October 2017

Your Ref Partha Kar/Kon Asimacopoulos

Our Ref Tony Bugg/Euan Clarke/Jared Oyston

Dear Sirs

Lehman Brothers International (Europe) (in administration) ("LBIE")

We refer to your letter dated 30 June 2017 and to our letter in response dated 23 August 2017. We also refer to the letter dated 24 October 2017, from Wentworth Sons Sub-Debt S.a.r.l. ("**Wentworth**") to the Joint Administrators (the "**Administrators**") of Lehman Brothers International (Europe) ("**LBIE**"), a copy of which you have also provided to us.

Your 30 June letter referred to what has become known as the "statutory interest lacuna" – the loss of statutory interest that has not yet been paid in the LBIE administration – that could result from LBIE going into liquidation. You went on to threaten, on behalf of your client, to take steps designed to bring about a liquidation of LBIE, so triggering the statutory interest lacuna.

1. Previous Correspondence and the Administrators' Position

In our letter of 23 August, we made a number of observations on behalf of the Administrators in relation to your client's position. Without repeating the contents of that letter, we would emphasise certain points in particular:

1. It is in the interests of LBIE's creditors as a whole for LBIE to remain in administration. Conversely, it would be contrary to those interests to take steps that would have the effect of depriving LBIE's creditors of their unpaid statutory interest entitlements.

2. The Administrators have been seeking to achieve the purpose of administration with the objective of achieving a better result for LBIE's creditors as a whole than would be likely if LBIE were wound up (without first being in administration). That objective is capable of further achievement, in particular, by the Administrators distributing the surplus in accordance with the insolvency waterfall – which involves distributing more than £5 billion (based on the current position, pending appeals

in the ongoing Waterfall II proceedings) by way of paying statutory interest on the debts proved in the administration.

3. Indeed, Hildyard J, on an application to extend the Administrators' term of office to 30 November 2022, reached precisely that view. The Judge stated ([2016] EWHC 3379 (Ch) at [9]) "*Whilst the [A]dministrators have things to do to complete their mandate and effect the final distribution, the working assumption, at least, should be that, unless good cause is shown for some specific advantage of the liquidation route over the administration distribution route, the implication of the courts granting the distribution status is that the administration should be maintained for as long as is reasonably necessary to complete the process of distribution*". Hildyard J further noted (at [7]) that "*unless there is good reason shown why in those circumstances or envisaged circumstances a liquidation process is or may become more appropriate in the interests of creditors, the prima facie approach should be that the distributing administrators should be permitted the extension to enable them to complete the job with which they have been entrusted*".

4. Any perceived advantage of placing LBIE into liquidation – of bringing a swifter end to the administration – is clearly outweighed by the injustice that would be caused by it triggering the statutory interest lacuna.

5. Your letter of 30 June made no attempt to explain on what basis you or your client considers that the Court, on any application made pursuant to paragraph 79(2)(c) of Schedule B1 to the Insolvency Act 1986 ("**Schedule B1**"), would conclude that to bring the administration to an end would be in the interests of LBIE's creditors or otherwise appropriate.

6. In fact, the Court has already specifically indicated that it would be wrong to place LBIE into liquidation before statutory interest is paid. At paragraph [185] of Lord Neuberger PSC's judgment in Waterfall I ([2017] UKSC 38), he said that LBIE going into liquidation without having paid statutory interest "*would potentially wreak unfairness on all the other creditors of the company*". On the application to approve the recent Waterfall III settlement, Hildyard J stated that "*any entitlement to statutory interest during the period of LBIE's administration would come to an end upon LBIE moving into liquidation. For that reason alone it would be very difficult to justify moving LBIE into liquidation until statutory interest [...] is paid in full*" ([2017] EWHC 2032 (Ch) at [48]). Those remarks are plainly right.

You have not responded to our 23 August letter, neither has your client, in the intervening period, or in its letter of 24 October, made any attempt to engage with these points, less still to explain why what it proposes would not be contrary to the interests of LBIE's creditors as a whole. In fact, the objective of your client's intended action is to bring about a situation in which the Sub-Debt is repaid in full and the members of LBIE receive billions of pounds at the expense of the general body of creditors and notwithstanding that your client and the members of LBIE rank below the creditors in the insolvency waterfall – not only as regards provable debts but also as regards statutory interest.

2. Purported Paragraph 56(1) Request

Your client's 24 October letter purports to be a request pursuant to paragraph 56(1) of Schedule B1 to seek a creditors' decision, i.e. to call a creditors' meeting, or otherwise invite LBIE's creditors, to vote upon a resolution designed to bring about the termination of the administration of LBIE and the commencement of a liquidation. In other words, your client wishes to take action to bring about the very injustice identified in our letter and by the Courts.

As you may be aware, although the Insolvency Act imposes upon officeholders in certain circumstances a duty to convene creditors' meetings (or otherwise seek a creditors' decision), that obligation is not an

absolute one. For instance, in *Re Barings Plc; Hamilton v Law Debenture Trustees Ltd* [2001] 2 B.C.L.C. 159, the liquidators sought an order that they were not obliged to comply with a request to convene a creditors' meeting, which certain creditors had made for the purposes of removing the liquidators from office. The liquidators considered that such a step would not be in the best interests of all the estate's creditors. The Judge in that case (Morritt VC) applied a two-stage process to consider whether the meeting should be convened, assessing: (1) whether the requested meeting would further the proper operation of the liquidation; and (2) whether such meeting would be conducive to the aim of doing justice as amongst all parties interested in the insolvency. He concluded that the proper operation of the process of the liquidation, and justice to all those interested in its assets, required him to direct the liquidators not to convene the requested meeting.

While creditors (holding a sufficient percentage of the total debts of the company) have the power to request the Administrators to seek a creditors' decision, that power is qualified and cannot be exercised other than for a proper purpose. The Court will not insist on the office holder seeking such creditors' decision where the request has not been made for a proper purpose.

It is the Administrators' view that the creditors' decision, and the steps that Wentworth is seeking to take as a result thereof, would neither further the proper operation of the LBIE administration, nor be conducive to the aim of doing justice among those interested in the LBIE administration. As noted above, a strategy that resulted in forcing LBIE into liquidation prior to the distribution of statutory interest would "*wreak unfairness*" on all of LBIE's other creditors and is improper.

Further, even if an application were made for an order terminating the appointment of the Administrators and bringing the LBIE administration to an end, it is inconceivable that the Court would conclude that it is in the interests of LBIE's creditors for such an order to be made.

Indeed, if the Administrators were themselves to seek to put LBIE into liquidation, with the purpose (or even merely the effect) of triggering the statutory interest lacuna, those creditors adversely affected by such action (i.e., broadly, all ordinary unsecured creditors) would doubtless argue that the Administrators should be directed not to do so because it would unfairly harm their interests within the meaning of paragraph 74 of Schedule B1.

In those circumstances, the Administrators are not prepared to accede to your client's request without first seeking directions from the Court. On such an application, the Administrators would contend that the Court should direct them not to accede to the request.

3. Wentworth's Standing and Related Issues

The Administrators would, on such an application, also raise, as additional issues for determination, the following subsidiary issues (which will be academic in the event that the Court agrees with the Administrators' position on the primary issue).

a. *Paragraph 56 of Schedule B1*

The 24 October letter states that Wentworth holds over 10% of the total claims in LBIE, being the subordinated debt (the "**Sub-Debt**"). Presumably that statement is intended to satisfy Rule 15.18(3)(b) of the Insolvency Rules 2016 (the "**Rules**") and demonstrate Wentworth's entitlement pursuant to paragraph 56 of Schedule B1. It is not immediately clear by reference to what sum it is said the quantum of the Sub-Debt (said to be some £1.242 billion) exceeds 10% of the total claims in LBIE. That sum is less than 10% of the total debts of LBIE.

Although Rule 15.11 of the Rules excludes from those to whom notice of a decision procedure is to be given those creditors who have been paid in full (and leaving aside the true meaning of that

provision), that rule does not apply to paragraph 56 of Schedule B1. Please explain on what basis it is said that Wentworth is entitled to request the Administrators to seek a creditors' decision.

b. *Breach of the Sub-Debt Agreement*

Clauses 7(d) and (e) of the agreement constituting the Sub-Debt provide that steps shall not be taken without the consent of the FSA to "*attempt to obtain repayment of the Subordinated Liabilities otherwise than in accordance with the terms of this Agreement*" or to "*take or omit to take any action whereby the subordination of the Subordinated Liabilities or any part of them to the Senior Liabilities might be terminated, impaired or adversely affected*". Having held that the Sub-Debt is subordinated to statutory interest, the Supreme Court in Waterfall I (*supra*) agreed with the decision of David Richards J at first instance that the lodging of a proof in respect of the Sub-Debt prior to the payment in full of the Senior Liabilities (including statutory interest) is precluded by Clauses 7(d) and/or (e).

It seems to the Administrators that the steps currently sought to be taken by Wentworth – the purpose (and in any event effect) of which is to cause the Sub-Debt and, thereafter LBIE's members, to be paid out of the surplus out of funds currently otherwise payable to unsecured creditors by way of statutory interest – would similarly fall foul of those provisions of the Sub-Debt agreement (we assume that no consent has been sought from the FCA). The steps precluded by those provisions would include a request to call for a creditors' decision in the terms your client proposes, your client voting in favour of a resolution that the Administrators apply to the Court under paragraph 79(2)(c) of Schedule B1 and your client taking steps on any such application to trigger the statutory interest lacuna. The Administrators will, if necessary, invite the Court to determine this issue on their application for directions.

c. *Rights of Sub-Debt Holder*

Whether or not Wentworth is entitled to request the Administrators to seek a creditors' decision (or the other steps that might follow thereafter), there is doubt as to whether the Sub-Debt, being a claim in respect of which (pursuant to the Supreme Court's decision in Waterfall I (*supra*)) its holder is not entitled to prove, is in any event capable of founding a right to request the Administrators to seek a creditors' decision (for the purpose of paragraph 56 of Schedule B1) and/or to vote in respect of such creditors' decision. This would have to be resolved by the Court.

d. *Wentworth as a Connected Party*

Rule 15.34(2) of the Rules provides that a creditors' decision "*is not made if those voting against it include more than half in value of the creditors to whom notice of the decision procedure was delivered who are not [...] connected with [LBIE]*". A connected party for these purposes includes one under common control with LBIE. In circumstances where Wentworth is part of a joint venture structure that includes the holder of 100% of the shares in LBIE, it appears that Wentworth would constitute a person connected with LBIE. Whether or not Wentworth is a connected person may therefore also need to be determined.

4. Conclusion

It is clear that there is considerable doubt not only about the propriety of what your client is seeking to do but also, putting that to one side, whether it is entitled to take the actions it has taken and proposes to take.

The Administrators consider that it would not be appropriate for them to accede to the request made by Wentworth in its 24 October letter and they invite Wentworth to withdraw its request by 4pm on Friday 3 November 2017.

In the event that Wentworth is not prepared to withdraw the request, the Administrators invite Wentworth, by that same date, instead to explain:

i. on what basis Wentworth says that placing LBIE into liquidation would be in the best interests of LBIE's creditors as a whole and/or would further the operation of the administration or be conducive to the aim of doing justice as amongst all parties interested in the LBIE estate;

ii. if it would not be in the best interests of LBIE's creditors, on what basis it is said that an application pursuant to paragraph 79(2)(c) would succeed;

iii. how it is said that the Sub-Debt constitutes 10% or more of the total value of the debts of LBIE;

iv. on what basis it is said that Wentworth is entitled to make the request and take the further steps envisaged by it notwithstanding clauses 7(d) and (e) of the Sub-Debt agreements;

v. whether, and on what basis, Wentworth considers it is entitled to vote in respect of the Sub-Debt where it is not entitled to prove in respect of it; and

vi. whether Wentworth accepts that it would be a connected party for the purposes of Rule 15.34(2) and, if not, on what basis it rejects that analysis.

If the request is not withdrawn by that date:

- absent an adequate and timely explanation, the Administrators anticipate applying to Court, on notice to LBIE's creditors generally, for directions in respect of your client's request, including a direction that the Administrators should not be obliged to seek a creditors' decision; and
- the Administrators intend to ensure that all of LBIE's creditors are fully aware of the position by placing an update on the LBIE website, including Wentworth's letter, this response and the other correspondence referred to above.

All of LBIE's and the Administrators' rights are expressly reserved and nothing in this letter waives any such rights.

Yours faithfully

Linklaters LLP

Linklaters LLP

KIRKLAND & ELLIS INTERNATIONAL LLP

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6 November 2017

BY EMAIL

Linklaters LLP
One Silk Street
London EC2Y 8HQ

Attention: Tony Bugg (tony.bugg@linklaters.com) and Euan Clarke (euan.clarke@linklaters.com)

Dear Sirs,

Lehman Brothers International (Europe) (In Administration)

We refer to your letter of 30 October 2017.

The Joint Administrators ("**the Administrators**") of Lehman Brothers International (Europe) ("**LBIE**") are in receipt by letter of 24 October 2017 of a request by our client Wentworth Sons Sub-Debt S.a r.l ("**Wentworth**") to convene a meeting of the creditors of LBIE. The proposed meeting would enable LBIE's creditors to consider whether to require the Administrators to request the Court to terminate LBIE's administration pursuant to paragraph 79 of Schedule B1 to the Insolvency Act 1986 (references to "**Paragraphs**" are to Paragraphs of this Schedule) and place it in winding-up. Having received this request, it is now incumbent upon the Administrators pursuant to Paragraph 56(1) to call the meeting as requested.

We are therefore disappointed to learn by your letter of 30 October 2017 that the Administrators refuse to call the requested meeting, and propose instead to add to the already extensive litigation in which they have engaged to date by applying to the Court for directions.

You put several questions to us in your letter. We address these below in the hope that instead of incurring further costs and delay, the Administrators may be persuaded to comply with the mandatory requirement of Paragraph 56(1), thereby facilitating (among other things) a duly quick and efficient conclusion to LBIE's administration: see Paragraph 4.

Wentworth's position, in brief, is that the administration should be brought to a conclusion since its continuation does not help achieve a better result for creditors as a whole compared to

a winding-up commencing at this time. In the context of a solvent administration such as LBIE's, a better result for creditors as a whole is achieved when a greater proportion of them receive payment on a greater proportion of the principal amount of their claims. Continuation of administration is no longer in creditors' interests in this sense, and they should have the opportunity of considering whether to require the Administrators to seek to bring it to an end.

1. Continuation of administration is not in the interests of creditors as a whole

You ask us to specify the basis on which placing LBIE in liquidation would be in the best interests of LBIE's creditors as a whole. This wrongly reverses the statutory burden of justification. LBIE's administration is being undertaken with the objective of achieving a better result for its creditors as a whole than would be likely if LBIE were to be wound up (Paragraph 3(1)(b)). Pursuit of this objective is the administration's *sine qua non*, and without it, continuation of the administration is not justifiable. This is reinforced by the Administrators' "*overriding legal obligation*" to perform their functions in the interests of LBIE's creditors as a whole (Paragraph 3(2) and *Key2Law v De'Antiquis* [2011] EWCA Civ 1567, [101]). The onus is thus on the Administrators to justify the continuation of the administration by reference to the interests of creditors as a whole, and in particular, to whether continuation would achieve a better result for creditors as a whole than would occur if the administration were now to be concluded and LBIE placed in winding-up.

You also ask how placing LBIE in liquidation "*would further the operation of the administration or be conducive to the aim of doing justice as amongst all parties interested in the LBIE estate*". You purport to derive this requirement from *Hamilton v Law Debenture Trustees Ltd* [2001] 2 BCLC 159. That judgment, on an application to convene a meeting to consider removal of liquidators, is manifestly inapposite here. It could not be a requirement for a party seeking to bring an administration to a conclusion to demonstrate that to do so would "*further the operation*" of the very administration sought to be concluded. Nor is there any room for the Judge-made requirement of "*doing justice as amongst all parties*", since the statute itself provides a framework setting out the correct approach.

The contents of your 23 August 2017 letter, rehearsed in your 30 October letter, suggest that the Administrators believe that the fact that certain creditors would not receive statutory interest to which they are only entitled in administration means that termination of administration would not be in creditors' interests until those creditors have received that interest. This is a misunderstanding of the statutory imperative, endemic in administration, to promote the interests of creditors as a whole, which may necessitate some creditors being less well off (e.g. *O'Connell v Rollings* [2014] EWCA Civ 639, [70]), harmed (e.g. *In re Coniston Hotel (Kent) LLP* [2013] 2 BCLC 405, [36]), or even legally wronged (e.g. *BLV Realty Organisation v Batten* [2009] EWHC 2994 (Ch), [20]). It is only if a creditor satisfies the Court that the harm it would suffer is unfair that it may have a remedy: see Paragraph 74.

The requirement to promote creditors' interests as a whole also governs the decision whether creditors' claims should be addressed in administration or winding-up. The mere fact that a class of claim enjoys explicit statutory priority in one proceeding that it would lose if dealt with in another is not decisive. This is *a fortiori* in relation to the priority of the claim for statutory interest in administration, which derives from judicial interpretation of the relevant Insolvency Rules ('**IRs**') stated by Lord Neuberger in "*a generalised summary of the distribution priorities in insolvency*" and "*not intended to be treated as some sort of quasi-statutory statement of immutable legal principle*"; *Waterfall I* [2017] UKSC 38, [17]. What matters to the question whether administration should be continued is overall value returned to creditors as a whole, and the value that in administration would be paid to one subcategory of creditor (statutory interest) would simply be distributed amongst others (including to subordinated creditors). LBIE's exit from administration and entry into winding-up would thus not cause any net loss of value on this account to creditors as a whole.

This conclusion is supported by the observation that in identifying the creditors whose interests should be taken into account in ascertaining what best serves creditors' interests as a whole, a discount should be applied *pro tanto* for payments received on the debts proved for. This holds with particular force in relation to those who have been paid in full on the debts for which they proved: "*a proving creditor should be treated as having had his contractual rights fully satisfied once he is paid out in full on his proof*"; *Waterfall I* [2017] UKSC 38, [105] (Lord Neuberger).

Parliament has expressly set this out in IRs 15.11(1) and 15.31: creditors can only vote to the extent of their unpaid principal. That this is a clear expression of Parliamentary intention as to the way in which to measure creditors' interests for voting purposes is further supported by the fact that the same approach was extended by the 2016 IRs to CVAs (IR 15.31(d)(ii)), when there was no similar provision in the 1986 IRs.

Bearing these points in mind, therefore, your question as to "*the propriety*" of what Wentworth is seeking to do has to be considered in the context of the Act and Rules that Parliament has enacted (in line with the approach of the Supreme Court in *Waterfall I*). The Act and Rules:

a) permit creditors to require the administrators to apply to court to end the administration;

b) provide that creditors should vote on any such resolution according only to the extent of their unpaid principal; and

c) provide that upon entry into liquidation any unpaid administration statutory interest will be lost.

It would be wrong to use a general concept of fairness, or an interpretation of the general provisions in Paragraph 3 of Schedule B1, to second-guess these specific provisions in the Act and Rules.

The Supreme Court's *Waterfall I* judgment, together with that of the Court of Appeal in *Waterfall II*, have significantly reduced the number of outstanding issues preventing an overall resolution of LBIE's estate. The remaining issues are already subject to first instance or appellate decisions, so that there is judicial guidance on how they ought to be addressed. Most of these issues would be as readily susceptible to settlement or final judicial resolution in LBIE's winding-up as in the administration. Indeed, the requisitioning of a decision regarding a move from one to the other would likely focus minds and heighten the appetite for bringing them to commercially reasonable conclusions. It is unfair to permit speculative appeals by erstwhile creditors who have received payment in full on their claims and who now seek to maximise their statutory interest recoveries at the expense of subordinated creditors yet to be paid anything on their principal. This speculative extension of the duration of administration proceedings is eroding value to the detriment of the interests of creditors as a whole.

2. Wentworth has standing to call a meeting

We do not understand your objection to Wentworth's standing to call a meeting. Wentworth estimates LBIE's currently outstanding total debts (i.e. unpaid principal) to be between £1.39 billion and £1.82 billion. Of that, Wentworth holds the £1.242 billion in subordinated debt, which far exceeds the 10% threshold.

Pursuant to Paragraph 56(1)(a), the Administrators must summon a meeting if requested to do so by "*creditors*" whose debts amount to at least 10% of LBIE's "*total debts*". Since LBIE's total debts undoubtedly include its subordinated debt, its subordinated creditors are "*creditors*" for this purpose.

It is trite that a discharged debt is no longer a debt, so that creditors who have received payment on their claims are not, *pro tanto* to the extent of the payment, "*creditors*". Any suggestion to the contrary would be inconsistent with Lord Neuberger's observation in *Waterfall I* [2017] UKSC 38, [105], as to the effect of payment of proved debts on creditors' rights, and would fly in the face of the statutory scheme.

In this regard, the reference to "total debts" in Paragraph 56 has to be read in light of IR 15.18(3)(b), which implements it. IR 15.18(3)(b), in turn, has to be read consistently with IR 15.31, which provides for creditors' votes to be calculated according to their notional value, less payments since the administration date. In order for these provisions to work together in a rational way, they must all be referring to the value of creditors' claims less payments since the administration date. Otherwise:

a) a creditor could requisition a decision even if he had been paid statutory interest and had no further interest in the administration at all (and could not vote); and

b) a late-proving creditor might fail to reach the 10% threshold for calling for a creditor decision by virtue of the nominal claim values of creditors who had already been paid and who thus retain no economic stake in LBIE or in its administration.

In the event that the Court holds that Wentworth does not have standing to requisition a creditor decision, however, Wentworth reserves its right to arrange for other creditors to join it in the requisition.

3. No violation of the subordinated debt agreements

You express the view that Clauses 7(d) and (e) of the agreements ("**the Agreements**") pursuant to which Wentworth's subordinated claims arise would be breached by Wentworth's request to call a meeting and its voting in favour of the making of a Paragraph 79 application, among other steps.

Your interpretation of the Agreements is mistaken. As we have noted above, Wentworth considers that continuation of administration no longer serves the interests of LBIE's creditors as a whole. Wentworth therefore seeks a creditors' decision in order to ascertain whether fellow creditors are of the same view.

Wentworth has an undeniable and legitimate interest in a duly speedy and efficient conclusion to the administration so it may, in LBIE's winding-up, obtain timeous payment of the principal sums it is owed.

In seeking a creditors' decision and proposing to vote in favour of the making of a Paragraph 79 application, Wentworth pursues this legitimate interest in timely repayment of (on any view) substantial sums. Nothing in the Agreements precludes it from doing so. To the contrary, in seeking to place LBIE in winding-up, Wentworth is acting according to Clauses 4(4) and (7) of the Agreements, which require it to seek to enforce payment only through insolvency proceedings.

4. Wentworth's entitlement to prove and to vote

You assert that Wentworth is not entitled to prove or vote in right of its subordinated claims. You rely on Lord Neuberger's judgment in *Waterfall I*. You misunderstand the statutory scheme, which recognises that creditors may have interests in influencing the course of the administration by voting at a meeting which are not identical with their interests in receiving payment.

In his judgment in *Waterfall I* [2017] UKSC 38, [68] to [72], Lord Neuberger was concerned solely with proof for the purpose of payment from the administration estate. Proof for this purpose bears no necessary connection with proof for the purposes of voting at a creditors' meeting, as is clear, for example, from the fact that creditors can file proofs for the purposes of voting in an administration which is not a distributing administration. Indeed, this is almost invariably what happens for the purposes of voting on the administrators' proposals. This is a clear demonstration that all creditors, including subordinated creditors, can prove for the purposes of voting even when they are not entitled to prove for the purposes of payment.

The provision relevant to the present matter, IR 15.28(1), explicitly restricts itself to the entitlement to vote. The correct approach would be for the Administrators to admit Wentworth's proof for the purposes of voting pursuant to this provision. If "in any doubt" on this score, the Administrators "*must mark [Wentworth's proof] as objected to and allow votes to be cast in respect of it, subject to such votes being subsequently declared invalid if the objection to the claim is sustained*"; IRs, 15.31(4) and (5).

5. Wentworth is not a connected party

Your reasoning and question regarding IR 15.34(2) are puzzling. Prior to the commencement of LBIE's administration, Wentworth had no relevant connection with LBIE's shareholders. Subsequent to commencement, LBIE is controlled by the Administrators, not by those holding its shares. It is thus quite obvious that Wentworth is not a connected party for the purposes of IR 15.34(2).

In light of these comments and observations, we trust that the Administrators will reconsider their position and call a meeting as required by Paragraph 56(1). The question whether the time has now come for LBIE's administration to be brought to a conclusion has not been considered by the Court with the benefit of full, or indeed any, adversarial argument. Wentworth's request for a creditors' meeting is intended to enable the Court to do precisely that, with the added benefit of the views of the requisite majority of the very parties in whose interests the administration is being conducted (assuming, of course, that the majority does vote in favour of the making of a Paragraph 79 application).

You have indicated an intention to post the correspondence relating to this issue. Wentworth has no objections to this.

Yours faithfully,

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F.A.O. Partha Kar and Kon Asimacopoulos

By Email 10 November 2017

Your Ref Partha Kar/Kon Asimacopoulos

Our Ref Tony Bugg/Euan Clarke/Jared Oyston

Dear Sirs

Lehman Brothers International (Europe) (in administration) ("LBIE")

We refer to your letter dated 6 November 2017 and the previous correspondence in relation to the statutory interest lacuna. Unless otherwise defined in this letter, capitalised terms bear the same meaning as in that previous correspondence.

In your 6 November letter, you express disappointment that the Administrators do not agree to accede to Wentworth's request to seek a creditors' decision. Our 30 October 2017 letter clearly explains the issues that arise in relation to that request (none of which is adequately addressed by your response). You and your clients should have been in no doubt for several months that the Administrators consider the steps that you wish to take to be contrary to the interests of LBIE's creditors as a whole. In the circumstances, and where your letter is unpersuasive on each point raised, it can have come as no surprise that the Administrators remain of that view.

You refer in your letter to the Administrators adding "*to the already extensive litigation in which they have been engaged to date by applying to the Court for directions*". To the extent that is intended to be a criticism of the Administrators' decision to apply for directions in relation to previous issues, that criticism is unwarranted and is rejected. In several of those applications, your clients (and the parties associated with the Wentworth joint venture) have actively participated in, and have of course themselves contributed to the length and complexity of, those proceedings by seeking the inclusion of issues (some of which were not ultimately pursued), and appealing decisions, including to the Supreme Court. In any event, your clients have not suggested before – nor could they sensibly have suggested – that any such proceedings were unnecessary or that the Administrators could reasonably have proceeded without the Court's directions given the differences in views expressed on key issues by the different constituencies among LBIE's creditors, including your clients themselves.

To the extent those comments are intended to be a criticism of the Administrators' decision to apply for directions in relation to the present issues, that too is without justification. It is clear from the correspondence between us that there are issues that arise in relation to: (i) the appropriateness of any creditors' decision being sought; (ii) Wentworth's standing to request such a decision; and (iii) the conduct of the voting in respect of any such decision.

In circumstances where your 6 November letter did not dissuade the Administrators of the need to seek the Court's directions – rather it served to illustrate the nature and extent of the issues that arise – we do not propose to continue the debate in correspondence on each of the issues. Indeed, as noted previously and explained further below, the Administrators intend now to issue an application for directions. However, there are certain matters arising from your letter that we note below, to ensure that the position is clear:

1. The Interests of LBIE's Creditors as a Whole

You suggest that our request that your client explains the basis upon which placing LBIE into liquidation would be in the best interests of LBIE's creditors as a whole "*wrongly reverses the statutory burden of justification*". We do not agree. Where your client seeks to take steps that to any objective observer would have the effect of damaging the interests of all of LBIE's un-subordinated creditors in their capacity as such, it is clearly appropriate for your client to explain, if it can, why it considers the position is otherwise; that it cannot adequately do so is of course telling. In any event, when this matter comes before the Court (which even on your client's case it must do at some stage), in circumstances where the Court relatively recently concluded that a continuation of the LBIE administration to 2022 to complete the outstanding tasks including the distribution of the Surplus was in the interests of LBIE's creditors, it is implausible to imagine that the Court will not look to Wentworth to explain precisely this point.

You refer to a number of cases said to substantiate the notion that promoting the interests of creditors as a whole may necessitate some creditors being less well off. While true as an abstract proposition in certain circumstances, none of the cases referred to assists with your client's arguments in this case. Indeed, you accept that the issue of unfairness is relevant, seemingly however ignoring the tension inherent in the fact that what your client is suggesting is designed to assist only it (and its associated companies), to the detriment of all of LBIE's un-subordinated creditors in their capacity as such.

You go on to cite extracts from certain cases (including the Supreme Court's decision in Waterfall I) apparently to support your client's position, but none of them in fact does so and you conspicuously ignore the statements – relating directly to the impact of the statutory interest lacuna, and referred to in our previous correspondence – of both the Supreme Court (LBIE going into liquidation without having paid statutory interest "*would potentially wreak unfairness on all the other creditors of the company*") and Mr Justice Hildyard ("*any entitlement to statutory interest during the period of LBIE's administration would come to an end upon LBIE moving into liquidation. For that reason alone it would be very difficult to justify moving LBIE into liquidation until statutory interest [...] is paid in full*".)

You note, towards the end of section 1 of your letter, that the Act and the Rules (a) permit creditors to require the Administrators to apply to Court to end the administration, (b) provide that creditors should vote to the extent of their unpaid principal and (c) have the effect that on going into liquidation unpaid statutory interest will no longer be payable. What (among other things) you fail to note in that regard is the requirement for a creditor with standing to be able to seek a creditors' decision, the limitations on voting and, most importantly, that the Court is bound to reject any attempt to force LBIE into liquidation prior to the payment of statutory interest.

Your comment in relation to "speculative" appeals ignores the fact that appellants have to obtain permission to appeal before they can proceed and, of course, the repeated (and unsuccessful) appeals by your own client and its associated companies, for instance in Waterfall I (e.g., the arguments on the priority of the Sub-Debt), and in Waterfall II (e.g., the date issue).

In short, nothing in your letter explains on what basis it can reasonably be said that Wentworth's proposed course of action would be in the interests of LBIE's creditors in any relevant sense. The objective of the LBIE administration remains that of achieving a better result than would have been achieved on a winding up of LBIE. That objective will not be fully achieved until the statutory interest to which LBIE's creditors are entitled is paid, and would be thwarted by putting LBIE into liquidation at this stage. Had LBIE's insolvency instead been conducted in a liquidation, any surplus would have been applied in paying statutory interest, in precisely the way it will be in administration (the only difference having been the loss of the advantages of administration). Going into liquidation now would do nothing but prevent the full achievement of the statutory objective and materially harm the interests of LBIE's ordinary unsecured creditors.

2. Wentworth's Standing – Paragraph 56 of Schedule B1

We asked in our 30 October letter on what basis it is said that Wentworth is entitled to request the Administrators to seek a creditor decision in light of the claim it holds (in the value of some £1.24bn) relative to the total debts of LBIE. We note your response, which appears to suggest not that your client holds a sufficient proportion of the debts, but instead that the Administrators should ignore the fact that your client does not hold 10% of the total debts of LBIE, and take what seems to be a purposive approach to statutory interpretation based on some alleged general principles about the nature of creditors' rights.

There are provisions of the Rules (for instance Rules 15.11 and 15.31) that make express reference to taking into account payments received by creditors during the administration for certain purposes in specific circumstances. There is no such provision that relates to the entitlement of a creditor to request the Administrators to seek a creditors' decision (see Paragraph 56 and Rule 15.18). While you refer, again, to the decision of the Supreme Court in Waterfall I (but not for any relevant support) you fail, again, to note what the Supreme Court relevantly held in relation to attempts to argue that the Court should find in the Act or the Rules guidance that is not expressly set out therein. Where the Rules expressly make provision in respect of a matter in certain circumstances, but do not in others, the Court cannot be expected to fill in what one party argues is a gap or to achieve some perceived (but at best implicit) purpose; indeed, quite the contrary.

3. Breach of the Sub-Debt Agreement

In our 30 October letter, we noted the effect of Clauses 7(d) and (e) of the Agreement constituting the Sub-Debt, which prohibit steps to "*attempt to obtain repayment of the Subordinated Liabilities otherwise than in accordance with the terms of this Agreement*" or to "*take or omit to take any action whereby the subordination of the Subordinated Liabilities or any part of them to the Senior Liabilities might be terminated, impaired or adversely affected*".

In response, you suggest that Wentworth is acting in accordance with Clauses 4(4) and (7) of the Agreement, which refer to enforcement of payment by instituting insolvency proceedings. However, you once more fail to take into account relevant aspects of those Agreements, and the Supreme Court's decision in relation to them. In particular, you omit any reference to (and fail completely to deal with) the fact that Clause 4 is itself expressly subject in all respects to Clause 5, i.e. the subordination provisions themselves.

4. Rights of Sub-Debt Holder

We note what you say in relation to the entitlement of a holder of the Sub-Debt to vote where that holder is not entitled to prove. You point to Rule 15.28(1) for support, noting that it is restricted to entitlements to vote (albeit it does of course refer to the requirement to deliver a proof, which must be a reference to a valid proof). You, once again, fail to note the more relevant aspect of the provision, i.e. Rule 15.28(3), which refers to debts claimed (being those in respect of which the holders of such claimed debts can vote) as being those "*claimed as due from [LBIE]*" (emphasis added).

The Supreme Court's decision in Waterfall I in respect of the Sub-Debt, including that the holder of the Sub-Debt is not entitled to prove, is based on the fact that the Sub-Debt is not due until the Senior Liabilities (as defined in the Sub-Debt Agreement) have been paid in full. On any view, therefore, and in light of the terms of Rule 15.28, it is not accepted that someone claiming to be a creditor in respect of a debt which is not yet due from LBIE, and in respect of which it cannot lodge a proof, is entitled to vote at all in respect of a creditors' decision.

We assume your reference to Rule 15.31 is intended to be to Rule 15.33. In the light of the uncertainty as to whether Wentworth's claim should, for the purposes of voting, be admitted at all, such that the issue would need to be determined if a creditors' decision is sought, and where other issues are to be referred to the Court for determination in any event, it is plainly appropriate to seek the Court's directions in this regard at this stage rather than having to make a further application at a future point.

5. Wentworth as a Connected Party

You suggest that what we say about Rule 15.34(2) is "puzzling". You refer to the situation prior to the commencement of LBIE's administration and to the fact that LBIE is "*controlled by the Administrators*". We do not understand your contentions which appear to be incorrect.

As to the first point, Rule 15.34(2) makes no reference to the position prior to administration; it simply provides that a creditors' decision "*is not made if those voting against it include more than half in value of the creditors to whom notice of the decision procedure was delivered who are not [...] connected with [LBIE]*" (emphasis added). The words are in the present tense; in other words, the issue of connection is assessed at the point of the relevant vote (it would otherwise have used the words "*were not at the date of administration connected with...*").

As to the second point, if the appointment of administrators to administer a debtor's estate (with the "control" that such administration involves over its property and affairs) means that the debtor's 100% shareholder (and those associated with that shareholder) is not connected to that debtor, that would mean that Rule 15.34(2) would have no application in any administration. That is clearly nonsensical where Rule 15.34(2) only applies in an administration.

We note that you do not otherwise suggest that Wentworth is not connected to LBIE in the sense required by the Rules, e.g. being under common control.

6. Conclusion

The Administrators' concerns, explained in our letter of 30 October 2017, have not been addressed. Accordingly, and as explained in that letter, the Administrators intend:

- to place an update on the LBIE website, including this exchange of correspondence; and
- to issue an application to Court for directions in respect of your client's request, including a direction that the Administrators should not be obliged to seek a creditors' decision.

As to the application for directions, please confirm that your firm is instructed to accept service on behalf of Wentworth.

All of LBIE's and the Administrators' rights remain expressly reserved and nothing in this letter waives any such rights.

Yours faithfully

Linklaters LLP

Linklaters LLP