

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**COMPANIES COURT**

**No. 7942 of 2008**



**The Honourable Mr Justice Hildyard**  
**Tuesday the 29<sup>th</sup> day of November 2016**

**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) RUSSELL DOWNS**
- (4) JULIAN GUY PARR**

**(in their capacity as the joint administrators of the above-named company)**

**Applicants**

**-and-**

- (1) BARCLAYS CAPITAL INC**
- (2) WENTWORTH SONS SUB-DEBT SARL**

**Respondents**

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**ORDER**

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**UPON** the application of the joint administrators of Lehman Brothers International (Europe) (“LBIE”) (the “Administrators”) against Barclays Capital Inc (“Barclays”) by an

application notice dated 5 September 2016 (the “**Application**”), identifying 19 issues for determination by the Court (the “**Issues**”)

**AND UPON** the application of Wentworth Sons Sub-Debt SARL (“**Wentworth**”) dated 23 November 2016 to be joined as a second respondent to the Application

**AND UPON** reading the evidence filed

**AND UPON** hearing Daniel Bayfield QC (leading counsel for the Applicants), Martin Pascoe QC (leading counsel for Barclays) and David Allison QC (leading counsel for Wentworth)

**IT IS ORDERED THAT:**

**(A) Joinder**

1. Wentworth shall be joined as the second respondent to the Application.

**(B) The Issues**

2. The Application shall be amended in the manner set out in the Annex hereto.
3. Issues 1, 2, 7(5) and 7A shall be stayed generally. Each party shall have liberty to apply for further directions in relation to those Issues on not less than 14 days’ written notice to the other parties.
4. All of the other Issues (the “**Initial Issues**”) shall be determined together at a single trial (the “**Initial Trial**”).

**(C) Position Papers**

5. The Administrators shall file and serve a position paper (in respect of the Initial Issues only) by 4pm on 20 January 2017.

6. Barclays and Wentworth shall each file and serve a position paper (in respect of the Initial Issues only) by 4pm on 3 March 2017.
7. The Administrators shall, if so advised, file and serve a position paper in reply by 4pm on 31 March 2017.

**(D) Evidence of fact**

8. The parties shall file and exchange witness statements from any witnesses of fact by 4pm on 28 April 2017.
9. The parties shall, if so advised, file and exchange witness statements in reply by 4pm on 26 May 2017.

**(E) Expert evidence**

10. The parties shall have permission to adduce expert evidence on New York law from one such expert per party.
11. The parties shall agree a list of issues to be addressed in their expert reports by 4pm on 2 June 2017.
12. The parties shall file and exchange their expert reports by 4pm on 7 July 2017.
13. By 4pm on 28 July 2017, the parties shall (if so advised) file and exchange their supplemental expert reports.
14. By 4pm on 14 August 2017, the parties' experts shall meet for the purpose of: (a) identifying the issues in dispute between them; and (b) where possible, reaching agreement on those issues.
15. By 4pm on 28 August 2017, the experts shall file a joint memorandum identifying the points of agreement and disagreement between them.

**(F) The Initial Trial**

16. The Initial Trial shall be heard by the Honourable Mr Justice Hildyard (if available) or (if the Honourable Mr Justice Hildyard is unavailable) it shall be released to another High Court Judge, in either event, with a time estimate of 8 days (including 2 days' pre-reading).
17. The parties shall attend before a Listing Officer of the Chancery Division by 4pm on 12 December 2016 to fix a date for the Initial Trial for the first available date after 23 October 2017.
18. The parties shall keep the time estimate of the Initial Trial under review, and will inform the Court if (and as soon as) it becomes clear that the time estimate requires adjustment.

**(G) Pre-trial review**

19. A pre-trial review (the "**PTR**"), with a time estimate of half a day, shall be listed for a date falling no less than 3 weeks prior to the first reading day of the Initial Trial.
20. The date of the PTR shall be fixed by a Listing Officer of the Chancery Division in conjunction with counsel's clerks.
21. Unless the Court orders otherwise, the PTR may be vacated upon receipt of a certificate from all of the parties' solicitors, not less than 3 days before the PTR, stating that the parties have agreed an indicative trial timetable and that no further directions are required.

**(H) Trial bundles**

22. The parties shall agree the contents of the bundles for the Initial Trial not less than 10 business days before the PTR.

23. Linklaters LLP shall produce the bundles for the Initial Trial (in accordance with the agreed contents). Linklaters LLP shall lodge a copy of the bundles at Court, and shall provide copies to the other parties, not less than 5 business days before the PTR.

**(I) Skeleton arguments and authorities**

24. Each party shall lodge its skeleton argument not less than 10 business days before the first reading day of the Initial Trial.
25. The parties shall agree and lodge a consolidated bundle of authorities not less than 5 business days before the first reading day of the Initial Trial.

**(J) General**

26. The Administrators' costs of the Application shall be paid as an expense of LBIE's administration.
27. All other parties' costs shall be in the Application.
28. Each party shall have liberty to apply for further directions.

**Service of this order**

The Court has provided a sealed copy of this order to solicitors for the serving party (Linklaters LLP, One Silk Street, London EC2Y 8HQ)

## **Annex**

### **THE AMENDED APPLICATION**

#### **(A) Client Money Entitlements**

1. Barclays have a Client Money Entitlement in respect of (i) the Client ETD Trades; (ii) the Non-Client ETD Trades; and/or (iii) the Korean ETD Trades?
2. If the answer to Issue 1 is “yes”, is Barclays estopped or otherwise precluded from asserting this Client Money Entitlement (or any part thereof) in respect of such ETD Trades?
3. If Barclays has a Client Money Entitlement and a Parallel Unsecured Claim, and the Parallel Unsecured Claim is reduced by any set-off (whether under Rule 2.85 or otherwise), does the Client Money Entitlement fall to be reduced by the same (or any other) amount?

#### **(B) Unsecured Claims**

4. To the extent that Barclays (i) does not have a Client Money Entitlement in respect of some or all of the ETD Trades; or (ii) has a Client Money Entitlement but is estopped or otherwise precluded from asserting such Client Money Entitlement in respect of some or all of the ETD Trades, does Barclays have an Unsecured Claim in respect of such ETD Trades?
5. To the extent that Barclays has a Client Money Entitlement in respect of some or all of the ETD Trades (and is not estopped or otherwise precluded from asserting such Client Money Entitlement), does Barclays also have a Parallel Unsecured Claim?
6. To the extent that the answer to Issue 5 is “yes”, on what basis is the Parallel Unsecured Claim to be valued?

7. If Barclays has both a Client Money Entitlement and a Parallel Unsecured Claim, is Barclays entitled and/or should the Administrators be directed to treat Barclays as being entitled to elect to pursue the Parallel Unsecured Claim to the exclusion of the Client Money Entitlement? If so:

(1) (a) Is Barclays required to disclaim, surrender, abandon, assign or take any other step in relation to the Client Money Claim before the Parallel Unsecured Claim can be admitted by the Administrators; (b) If so, is Barclays entitled to disclaim, surrender, abandon, assign or take such other step in relation to the Client Money Claim?

(2) If the value of the Parallel Unsecured Claim is impacted by the Client Money Entitlement, prior to the Client Money Pool being distributed are the Administrators entitled and/or obliged (a) to admit the Parallel Unsecured Claim; and/or (b) to pay a dividend in respect of the Parallel Unsecured Claim? If so, in each case, to what extent should the Client Money Entitlement be taken into account when admitting or paying a dividend in respect of the Parallel Unsecured Claim?

(3) If the Parallel Unsecured Claim should not be admitted until a particular time or event, what interim steps (if any) are the Administrators entitled and/or obliged to take to make a provision for the Parallel Unsecured Claim?

(4) If the Parallel Unsecured Claim may be admitted but no dividend(s) may be paid in relation thereto until a particular time or event, what interim steps (if any) are the Administrators entitled and/or obliged to take to make a provision for the Parallel Unsecured Claim?

(5) If the Administrators pay dividends in respect of the Parallel Unsecured Claim, does the corresponding Client Money Entitlement fall to be reduced by the amount of such dividends (or any other amount)?

7A. If Barclays is not entitled to elect to pursue the Parallel Unsecured Claim to the exclusion of the Client Money Entitlement, should the Administrators be directed to

treat Barclays as being so entitled? If such a direction should be made, are the answers to Issues 7(1) to 7(5) any different?

8. If Barclays is not entitled to elect to pursue the Parallel Unsecured Claim to the exclusion of the Client Money Entitlement:

(1) Are the Administrators entitled and/or obliged to admit any Unsecured Claim prior to the Client Money Pool being distributed? If so, to what extent should the Client Money Entitlement be taken into account when admitting the Unsecured Claim?

(2) If any Unsecured Claim should not be admitted until a particular time or event, what interim steps (if any) are the Administrators entitled and/or obliged to take to provide for the Unsecured Claim?

9. If Barclays has an Unsecured Claim (whether a Parallel Unsecured Claim, a Shortfall Unsecured Claim or any other Unsecured Claim):

(1) Is such Unsecured Claim subject to a mandatory set-off under Rule 2.85 against any sums owing by LBI to LBIE?

(2) Is such Unsecured Claim subject to a mandatory set-off under Rule 2.85 against any sums owing by Barclays to LBIE?

(3) Does LBIE have an equitable right to set off such Unsecured Claim against any sums owing by Barclays and/or LBI to LBIE?

(4) Does LBIE have a common law right to set off such Unsecured Claim against any sums owing by Barclays and/or LBI to LBIE?

**(C) The LBI Payment**

10. In what manner, and from what date, does the LBI Payment fall to be applied towards the discharge or reduction of:



- (1) Barclays' Client Money Entitlement (if any);
  - (2) Barclays' Unsecured Claim(s) in respect of the ETD Trades (if any); and/or
  - (3) Barclays' other claims (if any)?
11. Rule 2.72(3)(b)(ii) provides that a proof of debt must state "*the total amount of [the creditor's] claim as at the date on which the company entered administration, less any payments that have been made to [the creditor] after that date in respect of [the creditor's] claim ...*" On the true construction of the latter provision, does the LBI Payment, or any part thereof, constitute a payment in respect of Barclays' claim within the scope of Rule 2.72(3)(b)(ii)?
  12. Are the Administrators entitled and/or obliged to admit the Barclays Proof for a reduced amount deducting an amount in respect of the LBI Payment (or any part thereof)?
  13. Does (i) the creation of the Dedicated Reserve; and/or (ii) the LBI Payment; and/or (iii) the Administrators' consent thereto; and/or (iv) any other action relating to the creation of the Dedicated Reserve and payment therefrom, itself constitute (a) an admission to proof; and/or (b) payment of a dividend by the Administrators of part of the Barclays Proof in an amount equal to such payment?
  14. If the Barclays Proof should be admitted without deducting an amount in respect of the LBI Payment (or any part thereof), are the Administrators entitled and/or obliged to give credit for the Sterling Equivalent of the LBI Payment (or any part thereof) when paying dividends in respect of the Barclays Proof?
  15. In relation to Issues 10 to 14 and Issue 19, how is the amount in respect of the LBI Payment to be calculated? In particular, if it is the Sterling Equivalent that is to be taken into account, should the Sterling Equivalent of the LBI Payment be calculated based on the exchange rate prevailing at:

- (1) The Time of Administration;
- (2) The time when Barclays received the LBI Payment; or
- (3) Some other time?

**(D) LBIE Surplus Entitlements**

- 16. If Barclays has an Unsecured Claim in respect of the ETD Trades, in what currency (or currencies) is such Unsecured Claim denominated (prior to any conversion under Rule 2.86)?
- 17. On the true construction of Rule 2.88(7), if the Barclays Proof should be admitted for a reduced amount by deducting an amount in respect of the LBI Payment (or any part thereof), is the debt on which Statutory Interest is payable: (i) the amount admitted to proof; or (ii) the amount that would have been admitted to proof but for such deduction?
- 18. If the Administrators admit the Barclays Proof for a reduced amount by deducting an amount in respect of the LBI Payment (or any part thereof):
  - (1) Should the Administrators be directed under the rule in *Re Condon; ex p. James* (1873-74) LR 9 Ch App 609; and/or
  - (2) Should the Administrators be directed under paragraph 74 of Schedule B1; and/or
  - (3) Are the Administrators estopped from refusing to pay Statutory Interest on some amount other than the sum admitted to proof? If so, how should such amount be calculated, and from what date should Statutory Interest be paid thereon?
- 19. If the Barclays Proof should be admitted without deducting an amount in respect of the LBI Payment (or any part thereof), on the true construction of Rule 2.88(7), in

calculating the principal sum on which Statutory Interest is payable in respect of the Barclays Proof, should such principal sum be reduced by the Sterling Equivalent of the LBI Payment from the date when Barclays received the LBI Payment (or any other date)?