IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

COMPANIES COURT

No. 7942 of 2008

Before the Honourable Mr Justice Hildyard

Monday the 12th day of December 2016

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN

(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 S.À.R.L

(3) HUTCHINSON INVESTORS, LLC

(4) WENTWORTH SONS SUB-DEBT S.À.R.L

(5) YORK GLOBAL FINANCE BDH, LLC

(6) GOLDMAN SACHS INTERNATIONAL

Respondents

ORDER

UPON THE TRIAL of certain of the issues (as more fully particularised below) ("**Tranche C**") in the Application of Anthony Victor Lomas, Steven Anthony Pearson, Paul David Copley, Russell Downs and Julian Guy Parr of PricewaterhouseCoopers LLP, 7 More London Riverside, London SE1 2RT, the administrators of Lehman Brothers International (Europe) ("**LBIE**") (the "**Administrators**"), dated 12 June 2014, amended on 13 May 2015 and re-amended on 30 October 2015 (the "**Application Notice**")

AND UPON READING the written submissions filed on behalf of the Administrators, the First to Third Respondents (the "**Senior Creditor Group**"), the Fourth Respondent ("**Wentworth**"), the Fifth Respondent ("**York**") and the Sixth Respondent ("**GSI**")

AND UPON HEARING William Trower QC, Daniel Bayfield QC and Stephen Robins for the Administrators, Robin Dicker QC, Richard Fisher and Henry Phillips for the Senior Creditor Group, Antony Zacaroli QC, David Allison QC and Adam Al-Attar for Wentworth, Tom Smith QC and Robert Amey for York and David Foxton QC and Craig Morrison for GSI

IT IS HEREBY DECLARED that:

Issue 10 (paragraph 10 of the Application Notice)

(i) On the true construction of the term "Default Rate" as it appears in the ISDA Master Agreement, the term "relevant payee" refers only to LBIE's contractual counterparty and does not extend to a third party to whom LBIE's counterparty has transferred (by assignment or otherwise) its rights under the ISDA Master Agreement.

Issue 11 (paragraph 11 of the Application Notice)

(ii) The expression "*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*" in the

ISDA Master Agreement is the cost which the relevant payee is or would be required to pay in borrowing the relevant amount under a loan transaction, whether an actual cost where the relevant payee does in fact enter into a loan or a hypothetical cost where it does not do so.

(iii) The expression "*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*" in the ISDA Master Agreement does not include any cost of equity funding.

(iv) The expression "*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*" in the ISDA Master Agreement does not include costs or financial consequences to the relevant payee of carrying a defaulted LBIE receivable on its balance sheet.

(v) The expression "*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*" in the ISDA Master Agreement does not include the actual or asserted cost to the relevant payee to fund or of funding a claim against LBIE.

(vi) The relevant "*cost*" must involve the incurring of an obligation (whether actual or hypothetical) to pay a sum of money. It does not include any form of financial detriment.

(vii) The relevant "*cost*" does not include any loss of profits or consequential losses arising from the non-payment of the relevant amount.

(viii) A "*cost*" is not incurred if any payment obligation, or the amount of any payment obligation, is itself discretionary.

(ix) The obligation (whether actual or hypothetical) to pay a sum of money must be incurred in obtaining the funding and as part of the bargain entered into to obtain such funding in order for it to be a relevant "*cost*".

(x) The relevant "*cost*" must be the cost of funding the relevant amount to address the cash shortfall caused by non-payment. It does not include the cost of funding some other amount for other or wider purposes.

(xi) The relevant "*cost*" does not include any professional or arrangement fees incurred by the relevant payee, save for such fees paid to a lender as part of the price of borrowing the relevant amount.

(xii) In order to constitute a relevant "cost", a rate of borrowing must not exceed that which the borrower knows to be or which could be available to it in the circumstances pertaining to its business, having regard to the permitted object of the actual or hypothetical borrowing (to cover the relevant amount).

Issue 12 (paragraph 12 of the Application Notice)

(xiii) For the purpose of establishing the "*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*", which cost is a cost of borrowing, such borrowing should be assumed to have recourse to the relevant payee's unencumbered assets generally and not solely to its claim against LBIE.

(xiv) The certifiable cost is the price which the relevant payee has paid, or would have to pay, to a counterparty to a transaction to borrow a sum equivalent to the relevant amount taking into account all relevant circumstances, and is not the weighted average cost on all its borrowings.

(xv) The relevant "cost" does not include any impact on the cost of the relevant payee's equity capital attributable to borrowing a sum equivalent to the relevant amount.

(xvi) Depending on the particular facts and circumstances, it may be rational and in good faith for a relevant payee to determine that it would have funded the relevant amount on the basis of overnight funding or funding for any other duration.

Issue 13 (paragraph 13 of the Application Notice)

(xvii) The "*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*" may be calculated:

a. by reference to the relevant payee's circumstances on a particular date, or on a fluctuating basis taking into account any changes in the relevant circumstances, subject to the requirement to certify the cost of funding rationally and in good faith;

b. in each case, taking into account relevant market conditions and any other relevant facts or circumstances; and

c. in light of hindsight, insofar as any certification given by the relevant payee at the end of the relevant period will be based on what it actually did or could have done to fund the relevant amount throughout the relevant period.

Issue 14 (paragraph 14 of the Application Notice)

(xviii) A relevant payee's certification of its cost of funding for the purposes of applying the "Default Rate" is conclusive unless such certification:

a. is made irrationally;

b. is made otherwise than in good faith;

c. contains a manifest numerical or mathematical error; or

d. does not fall within the scope of the expression "*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*", as those words are construed in accordance with declarations (ii) to (xvii) above.

Issue 15 (paragraph 15 of the Application Notice)

(xix) Where the defaulting party seeks to challenge the relevant payee's certification of its cost of funding, the defaulting party bears the burden of proving, on the balance of probabilities, that the relevant payee's certification has not met the relevant requirements set out in declaration (xviii) above.

Issue 16 (paragraph 16 of the Application Notice)

(xx) The relevant payee and any other party expressly or impliedly authorised by the relevant payee can provide certification of the relevant payee's cost of funding and, where such certification is not possible, the Court will put itself in the shoes of the relevant payee to determine what decision the relevant payee would have made had the relevant payee determined its cost of funding properly.

Issue 18 (paragraph 18 of the Application Notice)

(xxi) The power of a party under section 7(b) of the 1992 form ISDA Master Agreement (the "1992 Form") to transfer any amount payable to it from a Defaulting Party under section 6(e) of the 1992 Form without the prior written consent of that party includes the power to transfer any contractual right to interest under that agreement.

Issue 19 (paragraph 19 of the Application Notice)

(xxii) Declarations (i) to (xxi) above apply whether the underlying ISDA Master Agreement is governed by New York or English law.

Issue 20.1 (paragraph 20.1 of the Application Notice)

(xxiii) A creditor under a German Master Agreement for any sum which is payable pursuant to clauses 7 to 9 thereof (the "GMA Close-Out Amount") is not entitled, following LBIE's administration, to make a "damages interest claim" within the meaning of section 288(4) of the German Civil Code.

Issue 20.2 (paragraph 20.2 of the Application Notice)

(xxiv) If (contrary to declaration (xxiii) above) a "damages interest claim" in respect of a GMA Close-Out Amount were permissible following LBIE's administration, any interest or damages (howsoever described) payable on the GMA Close-Out Amount

pursuant to the German Civil Code would not constitute a "*rate apart from the administration*" for the purpose of Rule 2.88(9) of the Insolvency Rules 1986 (the "Rules").

Issue 21 (paragraph 21 of the Application Notice)

(xxv) If (contrary to declarations (xxiii) and (xxiv) above) a "damages interest claim" in respect of the GMA Close-Out Amount could be made following LBIE's administration and such a claim would constitute a "*rate apart from the administration*" for the purpose of Rule 2.88(9):

a. in circumstances where the relevant claim under the German Master Agreement had been transferred (by assignment or otherwise) to a third party after the commencement of LBIE's administration, the damages interest claim which could be asserted by the transferor, and not the transferee, is relevant for the purposes of Rule 2.88(9);

b. if (contrary to declaration (xxv)(a) above) the damages interest claim that could be asserted by the transferee is relevant for the purposes of Rule 2.88(9), where the relevant claim under the German Master Agreement has been acquired by a third party, there is no cap or limitation on the amount of further damage that an assignee can claim; and

c. as a matter of German civil procedure, the assessment of damages is in the discretion of the Court. The obligee bears the burden of proof and must establish both the causal connection for the damage and its amount on the balance of probabilities. In calculating damages for the late payment of a defaulted debt, banks are entitled to perform the calculation in the abstract by a simplified method of quantification; however, other investors, such as non-bank financial institutions and hedge funds, may not rely on such simplified method of quantification.

Issue 27 (paragraph 27 of the Application Notice)

(xxvi) Declarations (i) to (xxv) above apply whether the relevant payee is a credit institution, a financial institution, a fund entity, a corporate or other type of counterparty.

Supplemental Issue 1(A) (derived from Issue 4 (paragraph 4 of the Application Notice))

(xxvii) The words "*the rate applicable to the debt apart from the administration*" in Rule 2.88(9) of the Rules include, in the case of a provable debt that is a close-out sum under a contract, a contractual rate of interest that began to accrue only after the close-out sum became due and payable due to action taken by the creditor after the date of the commencement of LBIE's administration.

AND IT IS HEREBY ORDERED that:

Costs

1. The Administrators' costs of and occasioned by Tranche C and Supplemental Issue 1(A) be paid as an expense of the administration.

2. The Senior Creditor Group's and York's respective costs of and occasioned by Supplemental Issue 1(A) be paid as an expense of the administration, in the case of the Senior Creditor Group, limited to such costs as would have been incurred had the Senior Creditor Group retained one firm of solicitors only.

3. The costs applications made by Wentworth, the Senior Creditor Group and GSI in respect of Tranche C will be the subject of a reserved judgment and a further order consequent thereon.

Permission to appeal

4. The Senior Creditor Group has permission to appeal against declarations: (i) to (iv), (vi), (viii) to (xiv) and (xxii) to (xxv).

5. GSI has permission to appeal against declarations: (ii), (iii), (vi) and (viii) to (xv).

6. York has permission to appeal against declaration (xxvii).

7. Time be extended for the filing of Appellant's Notices: (i) by York, to 6 January 2017; and (ii) by the Senior Creditor Group and GSI, to 20 January 2017.

Service of the order

The court has provided a sealed copy of this order to the serving party:

Linklaters LLP, One Silk Street, London EC2Y 8HQ (ref: Patrick Robinson)