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Re Lehman Brothers International (Europe) (in administration); Grant and others v FR Acquisitions Corporation (Europe) Ltd and another

[2022] EWHC 2532 (Ch), [2022] All ER (D) 51 (Oct)

The Chancery Division made rulings in proceedings concerning the administration of Lehman Brothers International (Europe), following an application for directions made by the applicant administrators. The application concerned the construction and effect of various standard form events of default provisions which had been included in the 1992 and 2002 versions of the ISDA master agreements.

Catchwords

COMPANY – ADMINISTRATION – LEHMAN BROTHERS

Background

The present application around in the course of the administration of Lehman Brothers International (Europe) (LBIE). The joint administrators of LBIE applied for directions.

The application concerned the construction and effect of various standard form events of default provisions which had been included in the 1992 and 2002 versions of the ISDA master agreements (multicurrency – cross border versions).

LBIE was a party to two interest rate swap transactions (together, the swaps), each incorporating the terms of an ISDA master agreement. One was a sterling interest rate swap (the sterling swap) to which the first respondent, FR Acquisitions Corporation (Europe) Ltd (FRAC), was a party. The sterling swap was governed by the 1992 ISDA master agreement. The other was a US dollar interest rate swap (the dollar swap) with the second respondent company (JFB), which was presently governed by the 2002 ISDA master agreement. FRAC and JFB (together, Firth Rixson) were part of the Firth Rixson group of companies, which made and supplied rings, industrial forgings and other specialised metal products, primarily to aerospace engine manufacturers.

It was common ground that, under the two interest rate swap agreements (together, the transactions), there was owing to LBIE (a) by FRAC, under the terms of the sterling interest rate swap, a principal amount of more than £8m and (b) by JFB, under the dollar interest rate swap, a principal amount of more than US$53m.

However, since the inception of the administration of LBIE by order of the court in September 2008, Firth Rixson had relied on a provision in both ISDA master agreements (together, the ISDA master agreements), s 2(a)(iii), to suspend their payment obligations to LBIE. Section 2(a)(iii) made any payment obligation arising under the transactions subject to the condition precedent that: 'no event of default or potential event of default with respect to the other party has occurred and is continuing'.

There was no doubt that the making of the administration order had triggered that suspensory condition. Between 2010 and 2012, the administrators engaged in litigation with Firth Rixson (and a number of other parties) as to the meaning of s 2(a)(iii). The courts held that Firth Rixson were entitled to rely on s 2(a)(iii) to suspend their payment obligations until such time as there were no longer any continuing events of default in respect of LBIE.

On that basis, Firth Rixson declined to pay LBIE any of the amounts owing.

The administrators contended that, if and when their appointments terminated under para 79 of Schedule B1 of the

Insolvency Act 1986 (IA 1986) and LBIE was placed under the control of its directors, no event of default or potential event of default would be 'continuing' with respect to LBIE under the ISDA master agreements. They contended that, at that stage, the suspensory condition provided for by s 2(a)(iii) would fall away, and Firth Rixson would become liable to make payment. Firth Rixson disputed that.

The administrators applied to the court for directions.

Issues and decisions

(1) Whether the event of default which, it was common ground LBIE's failure to make, when due, a payment under the sterling swap had occasioned, had ceased to be 'continuing' on 2 December 2009 as a result of the operation of the insolvency set-off provisions in rule 14.24 of the Insolvency (England and Wales) Rules 2016.

On the evidence, it had so ceased, and that event of default had not thereafter been 'continuing'. In light of that answer, the further issues identified in relation to s 5(a)(i), raising questions as to whether, and if so how, an event of default could be 'cured', did not arise (see [168] of the judgment).

Lomas v JFB Firth Rixson Inc; Lehman Brothers Special Financing Inc v Carlton Communications Ltd; Pioneer Freight Futures Co Ltd (in liq) v Cosco Bulk Carrier Co Ltd [2012] All ER (D) 29 (Apr), [2012] 2 Lloyd's Rep 548, [2012] 2 All ER (Comm) 1076, [2012] EWCA Civ 419 considered.
Re Lehman Brothers International (Europe) (in administration) [2020] All ER (D) 132 (Jul), [2020] Bus LR 1875, [2020] EWHC 1932 (Ch) considered.

(2) Whether the event of default which, it was common ground, had occurred under s 5(a)(vii)(2) of the ISDA master agreement when LBIE had made admissions in writing of its inability to pay debts as they fell due, had been a 'one-off' event incapable of 'continuing'.

On the evidence, it had not been: the notice spoke to a continuing inability in that regard unless and until it was corrected. As to the further question as to what form or mode of correction was required, even though, as a practical matter, the general perception would already be that the admission had long since been superseded, any doubt in that regard was easily removed. As the administrators would be justified in doing, the court would direct them to publish, or cause LBIE to publish, a notice to the effect that LBIE had a surplus of assets over liabilities and was presently able to pay its debts as they fell due. It was common ground that that would suffice to remove any doubt (see [168] of the judgment).

(3) Whether LBIE's scheme was an 'arrangement' or 'composition' within the meaning of s 5(a)(vii)(3) of the ISDA master agreement, so as to give rise to an event of default.

The scheme had not been an 'arrangement' or 'composition', principally because it had not been proposed or intended to operate in circumstances of financial distress. On that basis, the further issue as to whether, if it had been an event of default, it would be 'continuing', did not arise (see [168] of the judgment).

(4) Whether the events of default which (it was common ground) had occurred under s 5(a)(vii)(4) of the ISDA master agreement, when LBIE had entered administration on 15 September 2008 and administrators were appointed and which (it was likewise common ground) was 'continuing' could be cured.

It could be 'cured' in the sense that the state of affairs constituting the event of default could be brought to an end and would be so when LBIE exited administration under para 79 of Sch B1 to the Insolvency Act 1986. The conversion of LBIE's administration to a distributing administration on 2 December 2009 did not mean that the event of default could never be cured. Nor could an event of default not be cured unless and until the entire bundle of legal effects consequential upon the administrators' appointment had been brought to an end (see [168] of the judgment).

(5) Whether the Spanish and French Exequaturs had given rise to events of default under any of subsections (4), (6) or (8) of s 5(a)(vii) of the ISDA master agreement and, if so, whether they were 'continuing'.

On the evidence, none of those subsections had done so, and in any event, none would be 'continuing'. Once the administrators' appointments were terminated, there would no longer be any administrators whose appointments could be recognised in Spain or France, and the Spanish and French Exequaturs would fall away and cease to have any effect (see [168] of the judgment).

(6) Whether a related successful application and order made for its recognition and enforcement in the USA under the

US Bankruptcy Code (the Chapter 15 proceedings) or the making of the Chapter 15 order (including a permanent injunction) had triggered an event of default under s 5(a)(vii)(4) or (8) of the ISDA master agreement.

Neither the Chapter 15 proceedings nor the Chapter 15 order had constituted an event of default if (as the court had held) the scheme had not (see [168] of the judgment).

Judgment date
11 October 2022

Judge
Judge Hildyard (Chancery Division Court)

Representation
Daniel Bayfield KC and Ryan Perkins (instructed by Linklaters LLP) for the applicants.
Robin Dicker KC and Henry Phillips (instructed by Macfarlanes LLP for the respondents. Since 12 September 2022, the respondents had been represented by Cleary Gottlieb Steen & Hamilton LLP).

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