Lehman Bros. Intl. (Europe) (In Admin.) v AG Fin. Prods., Inc.
2023 NY Slip Op 31675(U)
May 17, 2023
Supreme Court, New York County
Docket Number: Index No. 653284/2011
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

Plaintiff,

- v -

AG FINANCIAL PRODUCTS, INC.,

Defendant.

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INDEX NO. 653284/2011

MOTION DATE 05/09/2023

MOTION SEQ. NO. 020

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 020) 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821

were read on this motion to/for JUDGMENT - MONEY.

Now that AG Financial Products, Inc. ("Assured") has prevailed in this litigation, the parties disagree primarily over the interest rate to apply to Assured's judgment. Given the age of this case, any difference in the interest rate yields a marked difference in amounts. Assured argues that the court should issue a judgment in dollars and that the interest rate of 9% from the ISDA agreement between the parties should apply. Lehman Brothers International (Europe) ("LBIE") argues that the interest rate from the "Scheme of Arrangement" (the Scheme) that governs LBIE's bankruptcy proceedings[1] in the English courts applies. That rate is 8%. LBIE also argues that this court should issue a judgment in British pounds at a 2008 conversion rate, rather than in US dollars.

I. Applicable Interest Rate

A "scheme of arrangement" is a statutory mechanism, under the English Companies Act 2006, that allows a company and its creditors to agree to the resolution of disputed issues. LBIE's Scheme received the approval of the required number and value of creditors on June 5, 2018, and on June 18, 2018, the English High Court entered an order sanctioning the Scheme. The Scheme set an interest rate of 8%.

[1] LBIE entered "administration" (bankruptcy) under English law on September 15, 2008.

Despite having declined to challenge the interest rate during the Administration process, Assured now argues that the rate of interest from the Scheme does not apply, because Assured merely seeks the 9% interest rate it would have been entitled to under its ISDA agreement with LBIE. Assured is incorrect. Although it may have once had a 9% default interest rate under its ISDA agreement with LBIE, the Scheme replaced that rate under British Insolvency law and therefore the interest rate from the Scheme applies. However, reaching that conclusion requires a trek through various documents.

A. The Recognition Order

On June 19, 2018, the bankruptcy court for the Southern District of New York issued an order (the Recognition Order) that gave full force and effect to the Scheme under Chapter 15 of the federal Bankruptcy Code: "[The Scheme and Sanction Order are] hereby recognized, granted comity and given full force and effect in the United States and are binding and fully enforceable in accordance with their terms." (Recognition Order pg. 6 §5) The Recognition Order also held any judgment inconsistent with Scheme to be "unenforceable in the United States" (id. pg. 9 §7). In section 6 (pg. 7), the Recognition Order permanently enjoined the assertion of any debt, claim or interest against LBIE, except "that nothing contained herein shall enjoin or otherwise stay the AG Financial Products Litigation that is pending in the Supreme Court of the State of New York, County of New York [i.e. this case]" (id. pg. 9).

B. The Scheme

The day before, June 18, 2018, the High Court in England approved the Scheme that the Administrators for LBIE and LBIE's creditors had adopted. The Scheme excludes "the AGFP proceedings" from the Scheme, "but only to the extent that such proceedings do not seek to determine the calculation of Statutory Interest in a manner that is inconsistent with the payment of Statutory Interest pursuant to this Scheme." As Assured argues it is not seeking statutory interest, but rather contractual default interest, it becomes necessary to determine whether the Scheme replaced the contractual rate with the statutory interest rate. It did.

C. Explanatory Statement to the Scheme of Arrangement

The Explanatory Statement to the Scheme of Arrangement ("Explanation" EDOC 817) reaffirms the exclusion of this case from the Scheme, except for the calculation of statutory interest (see Explanation, definition of "Excluded Proceedings"). The Explanation defines "statutory interest" as "statutory interest payable by the Company pursuant to Rule 14.23 of the Insolvency Rules."

Rule 14.23 of the Insolvency Rules is entitled "Interest." Paragraph (3) loops contractual interest into statutory interest: "If the debt is due *by virtue of a written instrument* and payable at a certain time, interest may be claimed for the period from that time to the relevant date." 14.23(6) continues that "The rate of interest to be claimed under paragraph (3) ...is the rate specified in section 17 of the Judgements Act 1838(1) on the relevant date." Thus, the rule apparently replaces contractual interest with that in the statutory scheme.

Admittedly, these rules and how they interact are less than clear. For example, another section of Insolvency Rule rule 14.23, section (7), subsection (c) might allow for a higher rate of interest: "the rate of interest payable under sub-paragraph (a) [related to surplus in administration] is whichever is the greater of the rate specified under paragraph (6) and the rate applicable to the debt apart from the administration." Fortunately, contested issues during LBIE's Administration proceeding resulted in case law that clears up the question of which interest rate to apply.

In *Joint Administrators of LB Holdings Intermediate 2 Ltd v. Joint Administrators of Lehman Brothers International (Europe) et al.*, [2017] UKSC 38 ("Waterfall I"), the United Kingdom Supreme Court, under a heading entitled "Does the right to contractual Interest Revive" answered its own question in the negative: "the contractual right to interest for the post-administration period does not revive or survive in favour of a creditor who has proved for his debt" (Waterfall I ¶ 125). The court reasoned that "the legislative provisions...provide a complete statutory code for the recovery of interest on proved debts in administrations" (id) and that the contractual right to recover interest "has been replaced by legislative rules" (id ¶ 126). This conclusion finds further support in *Burlington Loan Mgmt. Ltd. et al. v. Lomas et al.*, [2017] EWCA Civ 1462 ("Waterfall II") at ¶ 77 where the court discussed that the process of Administration can extinguish the contractual rights of creditors, including the right to contractual default interest:

> "Rule 2.88(9) constitutes a clear but limited departure from the emerging principle (fortified by the majority of the Supreme Court in Waterfall I) that the process of proof of debt and dividend in insolvency, including administration, replaces and extinguishes creditors' previous contractual rights. **So far as concerns interest**, the statutory regime permits regard to be had to those rights to enable it to be seen whether, under their contractual (or other) pre-existing rights against the insolvent debtor, creditors would have achieved a higher level of compensation for the delay in distribution after the cut-off date than they would, if compensated at the Judgments Act rate. **This is not by way of specific enforcement of those**

> **contractual rights. They have been extinguished**. Rather it is an examination of the parties' contractual relationship as at the cut-off date, to ascertain what is the appropriate statutory rate of interest payable thereafter. To that limited extent creditors are not treated equally, although compensation at the Judgments Act rate is an irreducible minimum to which they are all entitled, out of any available proceeds of the administration"

In other words, the rate of interest from a particular creditor's contract is relevant to determining the statutory interest the court overseeing the Administration ultimately sets. However, the contractual right to recover that interest ultimately becomes replaced by legislative rules. This conclusion finds support in cases in the United States as well (see *In re Lehman Bros. Holdings Inc.*, 829 F. App'x 567, 568 [2d Cir. 2020] ["When LBIE found itself with a surplus in the English insolvency proceedings, English courts determined that the creditors were entitled to be paid statutory interest, which 'replaces all prior rights, including contractual rights'"").

It is undisputed that Assured had an opportunity to participate in the setting of LBIE's interest rate in Administration, but did not do so. The Scheme set the interest rate without Assured's objection at 8%. Accordingly, the appropriate interest rate is 8%.

2. U.S. Dollars or British Pounds?

LBIE argues that this court should issue its judgment in British Pounds and at the exchange rate in effect on September 15, 2008. The court declines to do so. N.Y. Jud. Law § 27(a) requires that judgments "be computed in dollars and cents." Apparently, LBIE is going to require Assured to be paid through the British proceeding and admits that "claims against LBIE denominated in foreign currencies—including AGFP's US dollar claims arising from the parties ISDA agreement—will be converted to GBP **by the Administrators**" (Opp. [EDOC 802] at pg. 13). "The Administrators" is not this court. Moreover, although it was unsuccessful, LBIE has always sought a judgment in US dollars in this case. Accordingly, any judgment this court renders will be in U.S. dollars as the Judiciary Law requires. It is more appropriate for the Administrators, being in charge of LBIE's estate, to convert a dollar award into British pounds per the Scheme, especially if the judgment will be domesticated in England.

Accordingly, it is

ORDERED THAT the court grants in part the motion of AG Financial Products to adopt its proposed judgement; and it is further

ORDERED THAT the clerk is directed to enter judgment in accordance with the attached judgment; and it is further

ORDERED THAT the clerk is directed to mark this case disposed without prejudice to defendant making a separate motion for reasonable out-of-pocket expenses, including, but not limited to, attorney's fees.

5/17/2023
DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE