

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

No. 7942 of 2008

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

WATERFALL II APPLICATION
(PART B)



STATEMENT OF AGREED FACTS

ISSUE 36A

Pursuant to the Order of Mr Justice David Richards dated 9 March 2015, the parties agree the facts set out in this document (the "**Issue 36A Statement of Agreed Facts**") for the purposes of the determination of Issue 36A at the hearing listed to commence on 19 May 2015.

The facts contained in this Issue 36A Statement of Agreed Facts are those agreed by the parties to be relevant to Issue 36A only. The facts contained in the Issues 34 and 35 Statement of Agreed Facts are not repeated in this document but are incorporated herein by reference. For the purposes of Issue 36A, the parties are therefore agreed that all of the facts contained in this Issue 36A Statement of Agreed Facts and in the Issues 34 and 35 Statement of Agreed Facts are agreed between them.

Alleged facts that are disputed by one or more of the parties have been omitted from this Issue 36A Statement of Agreed Facts, irrespective of whether the joint administrators (the "**Joint Administrators**") of Lehman Brothers International (Europe) (in administration) ("**LBIE**") themselves may be in agreement as to the existence of the alleged fact in question.

For the avoidance of doubt, this Issue 36A Statement of Agreed Facts does not include facts evident from the provisions of either the Claims Resolution Agreement (the “CRA”) or the Claims Determination Deeds (the “CDDs”).

Terms capitalised but not otherwise defined have the meaning given to them in the Application or the Issues 34 and 35 Statement of Agreed Facts (as appropriate).

PART A – General Matters

- 1 The Release Clause was designed to give LBIE and the Joint Administrators certainty in respect of creditors’ claims so as to facilitate making interim distributions (Lomas 9 at [64.3] and Fourth Progress Report, page 29).
- 2 The significant majority by value of LBIE’s general unsecured creditors have entered into a form of CDD.

PART B – Statutory Interest

- 3 In early 2012, the possibility of a Surplus was being discussed in the market and this triggered queries from certain counterparties as to the impact of the Release Clause on any entitlement they may have to Statutory Interest. The Joint Administrators’ initial reaction to these queries was to explain their view that they considered the inclusion of language to preserve a creditor’s right to Statutory Interest to be unnecessary on the basis that the Release Clause did not waive any entitlement a creditor may have to Statutory Interest (Lomas 10 at [66] and [67]).
- 4 Between 28 June 2012 and September 2012, the Joint Administrators nevertheless agreed (on a case-by-case basis) to include language in CDDs dealing with Statutory Interest (Lomas 10 at [68] and [70]).
- 5 There may be a number of CDDs executed after September 2012 (when all CDD templates were updated to include the Statutory Interest Language) which do not contain the Statutory Interest Language because the draft was sent to the counterparty prior to the amendments having been made (Lomas 10 at [71] and Copley at [25] and [27]).
- 6 While, to the best of the Joint Administrators’ recollection, the impact of the Release Clause on Statutory Interest was not considered during the development of the CDDs, it was never the Joint Administrators’ intention that creditors would

waive their right to Statutory Interest by virtue of the Release Clause (Lomas 10 at [69]; Copley at [19]).

PART C - Currency Conversion Claims

- 7 From November 2011 until 31 December 2013 Mr Copley was the Joint Administrator with primary responsibility, for, *inter alia*, the agreement of creditors' claims, including under Project Canada (Copley at [14]).
- 8 Prior to March 2013, the concept of a non-provable claim for exchange rate losses had neither been considered by the Joint Administrators in the Administration, nor had it been raised with them by creditors, although the Joint Administrators were aware of the potential for exchange rate losses after the point in time when an unsecured creditor's claim would be converted into sterling for the purpose of proving (Copley at [19]).
- 9 Following the joinder of Lydian Overseas Partners Master Fund Limited (a fund controlled by Elliott) to the Waterfall I Application (in March 2013), certain creditors began to raise queries with the Joint Administrators as to the possible existence of Currency Conversion Claims and, latterly, the impact, if any, of the Release Clause thereon. It was in the context of such discussions that, from mid-2013, certain creditors first enquired as to whether the Joint Administrators would be willing expressly to preserve creditors' rights in respect of Currency Conversion Claims in the CDDs (Copley at [20] and [21]).
- 10 The initial response of the Joint Administrators in responding to such creditors was to refuse to make any amendments to the CDDs in light of the fact that the Joint Administrators wanted to deal with creditors on as consistent a basis as possible and a significant number of CDDs had already been executed (Lomas 10 at [76] and Copley at [21]).
- 11 The Joint Administrators had, however, no ability to compel a creditor to sign a CDD and stated this to creditors when asked, noting that creditors should take their own legal advice as to the effect (if any) of the Release Clause on such claims (Copley at [21]).
- 12 Where he was asked for his view, Mr Copley informed creditors that he did not know whether or not Currency Conversion Claims existed and, if they did exist

(which he initially doubted), whether they were waived by virtue of the Release Clause contained in the CDDs (not at that stage having taken legal advice on the matter) and that no changes would be made to the CDDs in this regard so as to avoid creating different classes of CDDs (Copley at [23]).

- 13 The suggestion that the Release Clause waived Currency Conversion Claims was specifically made on 11 October 2013, at the Pre-Trial Review of the Waterfall I Application (the "PTR"), by leading counsel for LBHI2. Notwithstanding the Joint Administrators' initial resistance to the introduction of language to deal with Currency Conversion Claims, following the PTR, given the prominence of the point (and, in particular, the assertion in Court by LBHI2 that Currency Conversion Claims may have been waived by the Release Clause), the Joint Administrators subsequently revisited their position and engaged with various creditors and their legal advisors on this issue. They did so largely because there was such concern about the potential effect of the Release Clause on Currency Conversion Claims that some creditors were already refusing to sign CDDs and the Joint Administrators took the view that creditors more generally would likely no longer be prepared to sign Admitted Claim CDDs in their existing form until the issue had been resolved (Copley at [24] and Lomas at [76]).
- 14 On or shortly after the date of the PTR, Mr Copley made the decision to cease signing Admitted Claims CDDs unless there was an express preservation of Currency Conversion Claims, which he instructed the Joint Administrators' lawyers to draft (Copley at [24]).
- 15 Shortly after the PTR, on 11 October 2013, Mr Copley mentioned to some of the various creditors to whom he spoke that (subject to obtaining legal advice) his preference would be to make a publicly-available statement on the section of the PwC website dedicated to the Administration to the effect that it was the Joint Administrators' view that CDDs did not have the effect of releasing Currency Conversion Claims and that it had not been the intention of the Joint Administrators that creditors waive their right to Currency Conversion Claims (Copley at [25] and [27]).
- 16 In circumstances where the possibility of Currency Conversion Claims had not been considered by the Joint Administrators at the time the Release Clause had originally been drafted, there was not, and could not have been, a positive intention

- specifically to release creditors' rights in relation to Currency Conversion Claims (Copley at [25]).
- 17 Ultimately, following consultation by Mr Copley with the Joint Administrators' legal advisors and with other of the Joint Administrators, it was decided that it was not appropriate (because the CDDs might have the effect of releasing Currency Conversion Claims) to provide the update on the PwC website that Mr Copley had previously suggested might be made and he informed various of LBIE's creditors of that fact (Copley at [26]).
- 18 In his discussions with various significant (in value terms) creditors from mid-2013 onwards (including the discussions that followed the PTR referred to above), Mr Copley stated that when he was the Joint Administrator signing CDDs on behalf of LBIE he did not intend to compromise Currency Conversion Claims (Zambelli 1 at [6]). Mr Copley made these statements in the context, and for the reasons articulated in his witness statement, namely (Copley at [32] and [33]):
- 18.1 There could not have been a positive intention on the part of the Joint Administrators, at the time the Release Clause in the template CDDs was originally drafted, specifically to release creditors' rights in relation to Currency Conversion Claims, in circumstances where, so far as Mr Copley was aware, prior to 2013, the possibility of Currency Conversion Claims being made (or, indeed, existing) had not been considered by the Joint Administrators (Copley at [25]); and
- 18.2 Had he known (which he did not) about the existence of Currency Conversion Claims at the time that the Release Clause was drafted in 2010, he would have sought to have them carved out from the effect of the Release Clause if it were necessary to do so in order to preserve them. The reason for him making such a statement was that, had he known at the time the CDDs were drafted that a Currency Conversion Claim would be available as a non-provable claim in the event there was a surplus, he believed his own preference at that time would have been to carve them out (Copley at [28]).
- 19 Mr Copley also informed one significant creditor that he was willing to give evidence in court proceedings to ensure that the CDD provisions were correctly interpreted (Zambelli 1 at [8] and Copley 1 at [32] and [33]).

- 20 Following the prominence given at the PTR to the possible effect of the Release Clause on a creditor's Currency Conversion Claim, it became apparent to the Joint Administrators that an amendment to the CDDs was likely to be necessary. The ensuing negotiation of the carve-out dealing with Currency Conversion Claims proved to be difficult and lengthy, with proposals being put forward for consideration by the Joint Administrators by various of the law firms acting for creditors involved in this matter. In addition, there was considerable uncertainty within the market as to how such non-provable claims should be defined and dealt with in the CDDs (Copley at [29]).
- 21 As a result of the extensive negotiations that took place from the end of October 2013 to February 2014, interim versions of the language dealing with Currency Conversion Claims were included in CDDs from 31 October 2013 (Copley at [30] and Lomas 10 at [77]).
- 22 On certain occasions, Agreed Claims CDDs were entered into at the request of creditors (instead of using an Admitted Claims CDD which required the conversion of the creditor's claim into sterling) until the existing form of the CCC Language was approved and the CDD templates updated accordingly in February 2014 (Copley at [30]).

PART D – Developments and the admission of claims without CDDs

- 23 Since December 2013, the Joint Administrators have determined the claims of certain creditors using admittance letters instead of CDDs ("**Admittance Letters**"), in the event that the creditor was unwilling to sign a CDD (Lomas 10 at [81]).
- 24 The Admittance Letters expressly state that the unsecured claim is admitted without prejudice to any further rights that the creditor may have to: (i) any interest payable under Rules 2.88(7)-(9) (inclusive) of the Rules; or (ii) any non-provable claim that may arise due to the creditor having had a contractual right to be paid an amount in a currency other than sterling (the "**Contractual Currency**"), if the distributions from LBIE (converted from sterling to the Contractual Currency at the time of the distributions) are lower than such amount in the Contractual Currency when converted to sterling at the time of LBIE's administration (Lomas 10 at [82]).
- 25 There is no clause in the form of the Release Clause (or other form of release) in the Admittance Letters.

- 26 In addition, there are a limited number of instances in the Administration in which a creditor's unsecured claim has been admitted by a bespoke contract (Lomas 10 at [83]).

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