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 DISPUTED FACTS

ISSUES 34, 35 AND 36A

Pursuant to the Order of Mr Justice David Richards dated 9 March 2015, the joint administrators (the "**Joint Administrators**") of Lehman Brothers International (Europe) (in administration) ("**LBIE**") have filed a statement of agreed facts in relation to Issues 34 and 35 and a statement of agreed facts in relation to Issue 36A (together the "**Statements of Agreed Facts**").

Pursuant to paragraph 1 of the Order of Mr Justice David Richards dated 22 April 2015 (the "**April Order**"), the Senior Creditor Group and Wentworth filed on 27 April 2015 documents identifying those alleged facts which are not included in the Statements of Agreed Facts which they intend to seek to rely at the trial of Issues 34, 35 and 36A (the "**Respondents' Lists of Disputed Facts**").

Pursuant to paragraph 2 of the April Order, the Joint Administrators set out in this document those facts not agreed between the parties but contended by one or more of them to be admissible and relevant to the determination of Issues 34, 35 and 36A.

This Statement of Disputed Facts has been structured as follows:

- Part One contains the additional facts sought to be relied on by Wentworth in relation to Issues 34, 35 and 36A;

- Part Two contains the additional facts sought to be relied on by the Senior Creditor Group in relation to Issues 34, 35 and 36A; and
- Part Three contains additional facts that the Joint Administrators consider may be relevant for the determination of Issues 34, 35 and 36A insofar as such facts do not appear in Parts One or Two.

In relation to Part One and Part Two, the Joint Administrators have reproduced the alleged facts in the terms as set out in the Respondents' List of Disputed Facts. The Joint Administrators have not sought to indicate whether they themselves agree or dispute the existence of the alleged fact in question. The Senior Creditor Group and Wentworth have, by letters dated 29 April 2015 and 30 April 2015 respectively, identified the reasons for not agreeing the alleged facts that have been put forward by the other party. These comments have not been incorporated into this Statement of Disputed Facts.

For the avoidance of doubt, this Statement of Disputed 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 Statements of Agreed Facts (as appropriate).

PART ONE – Wentworth's Alleged Facts

Issues 34 and 35

1 In the course of its development, the CRA was consistently described as:

1.1 a compromise (Pearson at [98] and [117]);

1.2 an arrangement which sought so far as possible to achieve finality as regards the relationship between LBIE / the Joint Administrators and the Trust Asset creditors (Pearson at [24] and [117]); and

1.3 a mechanism which involved a release of all pre-existing claims in exchange for a new unsecured claim against LBIE (Pearson at [71] and [99]).

2 CRA signatories were made aware that they would be giving up a number of valuable and/or potentially valuable rights arising out of their existing contracts in return for the benefits arising out of the CRA, including those associated with agreeing the value of the new unsecured claim derived from financial contracts with LBIE ("**Financial Contracts**") and the return of Trust Assets (Pearson [116] to [120]; Lomas 9 at [64.3] and Lomas 10 at [48] and [63]).

3 Trust Asset creditors had significant notice of and opportunity for questions and answers on the proposed terms of the CRA (Lomas 10 at [27] and Pearson at [130]).

4 The resolution of the unsecured financial claims of the Trust Asset creditors arising out of their Financial Contracts was always an integral element of the structure embodied in the Draft Scheme and subsequently the CRA (Pearson at [24]).

5 There were benefits to LBIE, the Joint Administrators and a CRA signatory in achieving finality and certainty, including with respect to their Financial Contracts (Pearson at [23]; [97] and [120]).

6 In return for releasing valuable rights under the underlying Financial Contracts CRA signatories obtained a number of benefits. For example, rehypothecated securities were valued under the CRA as at 12 September 2008, collaterisation enabled the reduction of any interest accrual on any liabilities, and the CRA facilitated the early return of Trust Assets (Pearson [106]; [119.3] and [120]).

7 Entering into a CDD gave a creditor certainty as to the amount of its claim and enabled a creditor more easily to realise immediate value by selling its claim (Lomas 10 at [48] and [63]).

8 From the creditor's perspective, entering into a CDD allows them to transfer their claims pursuant to the transfer notice appended to the CDD (Lomas 10 at [63]).

9 Under an Admitted Claims CDD, if the currency of a creditor's claim against LBIE was other than sterling, the Joint Administrators would determine the amount of that claim in the currency of the underlying obligation, convert the claim into sterling using the same official rate as under rule 2.86(1) and express the amount of the creditor's Admitted Claim in the Admitted Claims CDD in sterling.[1]

Issue 36A

10 A substantial proportion of creditors that have entered into the CRA or CDD are sophisticated entities with access to expert legal advice (Pearson at [32], [36] to [38]).

11 The possibility of the Currency Conversion Claim was raised with the Administrators by Elliott Management Corporation, a creditor of LBIE (Copley at [19]). There is no evidence as to how many other creditors might also have contemplated such a claim prior to the joinder of Lydian to Waterfall I.

12 Mr Copley said to some creditors that he believed the CDDs waived the right to payment of claims in the original currency of the underlying claim (Ryan at [16]).

[1] This paragraph is a revised version of paragraph 75 of the statement of agreed facts in relation to Issues 34 and 35 (the "**34/35 Statement of Agreed Facts**"). As a result of correspondence received after the filing of 34/35 Statement of Agreed Facts, it is clear that the current formulation of paragraph 75 is not agreed by Wentworth. Accordingly, Wentworth's alternative formulation has been included in this Statement of Disputed Facts.

PART TWO – The Senior Creditor Group's Alleged Facts

Issues 34 and 35

(A) General Matters

LBIE's Financial Position

1 The emergence of a surplus sufficient to pay at least some Statutory Interest was due, at least in material part, to the settlement between LBIE and the Lehman US broker dealer Lehman Brothers Inc. in 2012, which was overwhelmingly positive to LBIE (see e.g. Ninth Progress Report at pages 5, 6 and 8).

2 A surplus potentially sufficient to pay provable claims and Statutory Interest in full and to pay some or all Currency Conversion Claims was first projected by the Joint Administrators in 2014 (Eleventh Progress Report at 8).

3 LBIE's creditors were and are ultimately reliant on the Joint Administrators for information about LBIE's financial position. The Joint Administrators' Progress Reports are the principal source of information for creditors about LBIE's financial position over time, including for creditors active in the market for ordinary unsecured claims against LBIE.

4 The CRA and CDD process were initiated by the Joint Administrators (Lomas 10 at [18-19], [33] to [35] and [42] to [48]).

Currency

5 When creditors submitted their claims on the 2010 Portal, the Portal provided for the entry of the claim in the currency of entitlement (Garvey 3 at [18]).

(B) The CRA

Background to and development of the CRA

6 The CRA reflected an attempt by the Administrators to develop proposals for the return of Trust Assets based on a standard methodology for the valuation of claimants' positions (Lomas 10 at [18]).

7 In the course of its development, and as set out in the CRA Reader's Guide, the valuation methodology was intended to mirror the valuation methodology set forth in the provisions of the financial contracts subject to certain overriding valuation principles (Browning 1 at [32]; [41] and [43]; Browning 2 at [6(b)]).

8 CRA signatories were made aware that they would be giving up certain rights (such as the rights to claims for consequential loss or economic loss as a result of LBIE returning trust assets via the methodologies in the CRA (as set out in clause 4.2.2 of the CRA and Part II, Clause 10 of the CRA Circular)) arising out of their existing contracts in return for the rights arising out of the CRA, including those associated

with agreeing the value of unsecured claims under financial contracts with LBIE and the return of Trust Assets (Pearson at [116] to [120]).

Purpose and operation of the CRA

9 The principal objective of the CRA was to facilitate, and provide a mechanism for regulating, the return of Trust Assets (Browning 1 at [22] and [23]; Browning 2 at [6(a)]).

10 Although in order to calculate a client's Net Contractual Position it was necessary to convert all claims into a single currency, the majority of claims modified by the CRA were already denominated in USD prior to the creditors' accession to the CRA such that this modification would only have a substantive effect in the minority of cases (Browning 1 at [5]; [9] to [11] and [25] to [27]).

(C) CDDs

Background to Project Canada

11 The initial and immediate focus of 'Project Canada' was "*on agreeing balances provable*" (Fourth Progress Report at page 29, fourth bullet in Highlights).

12 The Joint Administrators informed creditors that, to be considered eligible for participation in dividends paid by LBIE, they would need to execute a CDD or similar agreement issued by LBIE (Garvey 3 at [15] and the FAQ issued by LBIE with respect to each dividend). This was the case until late 2013 when the Joint Administrators decided that in certain cases they would admit claims by Admittance Letter without insisting on the creditor signing a CDD (Lomas 10 at [81]).

The Admitted Claims CDD

13 The purpose of converting foreign currency claims to sterling for the purposes of an Admitted Claims CDD was explained to creditors as being for the purposes of having a proven claim against LBIE, and in accordance with the provisions of UK insolvency law for the purposes of proving (Fourth Progress Report at pages 10, 33 and 75).

CDD Creditor Interaction

14 Although LBIE did consider proposed amendments to CDDs at the request of creditors on a case by case basis (Lomas 10 at [57] to [58]), only a small number of substantive amendments relevant to the Release Clause were made. Those were followed by updates to the standard form CDDs (Lomas 10 at [68] to [70] and [76] to [78]).

Issue 36A

(A) General Matters

15 The Joint Administrators are experienced insolvency practitioners with access to specialist legal advice. LBIE creditors are:

15.1 Ultimately reliant on the Joint Administrators for information on the financial position of LBIE; and

15.2 Aware that the Joint Administrators are officeholders with statutory duties with respect to creditors and access to specialist legal advice to assist them in the discharge of those duties.

16 The Joint Administrators did not indicate to creditors that it was any part of the purpose of the CDDs to release non-provable claims or that they intended such claims to be released by the CDDs (Lomas 10 at [69]; Copley 1 at [25] and [27]).

17 There was no contemplation or discussion by the Joint Administrators of non-provable claims when the CRA was being developed and promoted (Pearson 7 at [122]).

18 The CDDs were presented to creditors as non-negotiable (Lomas 10 at [56.3] and Garvey 3 at [16]).

(B) Currency Conversion Claims

19 The Joint Administrators did not indicate to creditors that the effect of a Sterling denominated CDD might be different from, or was intended to be different from, the effect of a foreign currency denominated CDD vis a vis the extent of the rights released by creditors in the event of a surplus (Garvey 3 at [22]).

20 The Joint Administrators did not indicate to creditors that the CDDs were intended to release Currency Conversion Claims (Copley at [19]). When creditors raised the issue of the exchange rate used to admit claims, they were told that such conversion was a requirement of the UK statutory administration regime (Copley 1 at [17]).

21 The matters stated in paragraphs 20 and 21 in the Statement of Agreed Facts in relation to Issue 36A were communicated to certain creditors by the Joint Administrators (Lomas 10 at [67]; Zambelli at [6]; Copley at [25], [28] and [32]).

(D) The Surplus Entitlement Proposal

22 The Joint Administrators' 2014 Surplus Entitlement Proposal envisaged Statutory Interest and Currency Conversion Claims being paid to creditors *pari passu* without reference to the type of CDD applicable to a claim, based on the Joint Administrators' legal analysis and, where there was uncertainty, what the Joint Administrators considered to be fair (Garvey 3 at [27] to [30]).

PART THREE – The Joint Administrators' Alleged Facts

Issues 34 and 35

1 The CRA provided for a uniform set of rules for the return of Trust Assets and contained a standard methodology for the valuation of claims (Lomas 10 at [18]).

2 Whilst the CDDs were circulated under cover of an email that stated they were non-negotiable, LBIE did consider proposed amendments at the request of creditors on a case by case basis (Lomas 10 at [57] to [58]). The Release Clause is in materially the same form in each of the different forms of CDD save for those dealing with Trust Property (Lomas 10 at [61]). In later CDDs, the Statutory Interest Language and the CCC Language was included in the CDDs (Lomas 10 at [61]; [68] to [70] and [76] to [78]).

Issue 36A

3 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 fluctuations (i.e. losses or gains) after the point in time when an unsecured creditor's claim would be converted into sterling for the purpose of proving (Copley at [19] and Pearson at [122]).[2]

[2] This paragraph is a revised version of paragraph 8 of the statement of agreed facts in relation to Issue 36A.

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ISSUES 34, 35 AND 36A

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