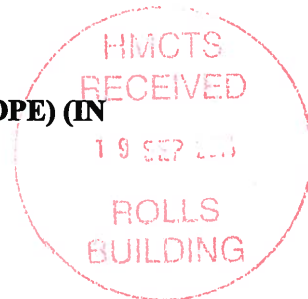


**Claim No. 7942 of 2008**

**IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
COMPANIES COURT**

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

**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**



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**THIRD WITNESS STATEMENT OF  
ROBERT FRANCIS GARVEY**

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I, **Robert Francis Garvey** of CarVal Investors GB, LLP (together with the investment entities it manages, as referred to below, *CarVal*) of 25 Great Pulteney Street, London, W1F 9LT, will state as follows:

**Introduction**

1. I am an employee of CarVal within the Global Corporate Securities team at CarVal. I make this statement as the member of the team at CarVal responsible for managing its claims against LBIE who interacted most frequently with the Joint Administrators of LBIE (*JAs*) or their representatives in connection with CDDs.
2. The purpose of this witness statement is to set out CarVal's perspective on certain of the matters covered in the ninth and tenth witness statements of Anthony Victor Lomas (*Lomas 9* and *Lomas 10*) and to address certain matters which *Lomas 9* and *Lomas 10* do not cover. I am in broad agreement with what I understand the Lomas evidence to say on the matters I cover in this statement and I intend this statement to supplement and support the Lomas evidence.
3. Terms capitalised but not otherwise defined have the meaning given to them in *Lomas 9* and *Lomas 10*.

4. Save where I have indicated otherwise, the contents of this witness statement are matters within my personal knowledge and are true. Where matters are not within my own personal knowledge, I identify the source and I confirm that they are true to the best of my knowledge and belief.
5. Attached to this witness statement marked **RG3** is an exhibit containing copies of the documents to which I refer below. Except where otherwise indicated, references to page numbers and tabs below are to pages and tabs of exhibit RG3. I do not at this stage exhibit all the documents produced by the JAs from which I derived my understanding on the points covered in this statement.
6. This statement is organised into six sections:
  - (i) Section I discusses CarVal's understanding of the purpose of CDDs and the Release Clause.
  - (ii) Section II discusses the JAs' communications on the effect of the Release Clause on Statutory Interest claims.
  - (iii) Section III explains the circumstances in which CarVal entered into CDDs.
  - (iv) Section IV covers CarVal's experience of the process by which LBIE admitted claims and agreed CDDs.
  - (v) Section V describes the forms of CDDs used by the JAs.
  - (vi) Section VI discusses CarVal's understanding of the Surplus Entitlement Proposal.

**Section I: CarVal's understanding of the purpose of CDDs and the Release Clause**

7. Lomas 10, in discussing the background to the Consensual Approach, states at paragraphs 33 to 34 that the JAs were acutely aware in early 2010 that the process of determining claims under the statutory proof of debt regime would be complicated and lengthy. They therefore decided to develop an alternative approach in order to "*facilitate the making of a distribution to unsecured creditors*".
8. Lomas 9 notes at paragraphs 64.3 and 65 that the CDDs developed as part of this Consensual Approach contained "*waivers and releases designed to give LBIE and the JAs certainty in respect of the creditor's claims so as to facilitate making interim distributions*".

9. These passages in Lomas 9 and Lomas 10 reflect what I understood to be the purpose of the CDDs when they were first presented to creditors such as CarVal in 2010: that they were designed in order for the creditor and LBIE to agree the amount of balances provable in the Administration so as to facilitate the making of distributions in respect of claims.
- (i) I understood this from the communications made by the JAs to creditors such as CarVal about the purpose of the CDDs, which I read as part of my role at CarVal. For example, the JA's 4<sup>th</sup> Progress report produced on 14 October 2010 emphasised that the immediate focus of the JA's 'Consensual Approach' was "*on agreeing balances provable*" [RG3 page 31] in order to enable distributions to be made.
- (ii) At the time that most CDDs were presented to CarVal by the JAs, the JAs were projecting that LBIE would not have sufficient funds to pay provable claims in full (see paragraph 14 below). I therefore understood the purpose of the CDD exercise as being solely to fix the amount of CarVal's claims that would be eligible to participate in dividends.
10. It has never been suggested to me by the JAs or any of their representatives that the CDDs were intended to release non-provable claims. I have made enquiries of the other individuals employed by CarVal who have had material interactions with the JAs or their representatives. All the individuals with whom I have spoken have confirmed to me that no such suggestion has ever been made to them by the JAs or their representatives.
11. As such, in authorising the signing of CDDs, I understood the purpose of the CDD exercise as being solely to fix the amount of CarVal's claims that would be eligible to participate in dividends, that is, its provable claims. I have made enquiries of the other individuals employed by CarVal who have authorised the signing of CDDs, and all the individuals with whom I have spoken have confirmed to me that this was also their understanding.

**Section II: The JAs' communications on the effect of the Release Clause on Statutory Interest claims**

12. Lomas 10 states at paragraphs 67 and 69:

- (i) That it was never the intention of the JAs that creditors would waive their right to statutory interest by entering into the CDDs; and
  - (ii) That LBIE's initial reaction to enquiries from creditors about the effect of the Release Clause on statutory interest was to explain its view that the inclusion of language to preserve a creditor's right to statutory interest was unnecessary because the release did not waive any such entitlement.
13. Although I cannot now recall any specific discussions I had with the JAs or their representatives with respect to the effect of the Release Clause on Statutory Interest claims, Mr Lomas' evidence accords with my general recollections of the process by which language explicitly preserving Statutory Interest came to be added to the Release Clause.

### **Section III: The circumstances in which CarVal entered into CDDs**

14. The LBIE Administration is now in surplus (see Lomas 9 at paragraph 3). However, as Lomas 9 at paragraphs 9-10 shows, creditors were entering into CDDs at a time when, based on the information provided by the JAs, no surplus was forecast. The JAs did not project that provable claims might be paid in full until the JA's 9<sup>th</sup> Progress Report produced on 12 April 2013 [RG3 page 95].
15. Lomas 9 at paragraph 66 and Lomas 10 at paragraph 48 confirm that the JAs made entry into CDDs a condition for participation in dividends. Creditors were told that if they did not agree to a CDD their claims would be negotiated by a separate bi-lateral process at an unspecified future date.
16. The CDDs were also presented to creditors by the JAs as non-negotiable documents, as Lomas 10 sets out at paragraph 56.
17. I recall that the result of the matters set out above was that, during the period when no surplus to pay any Statutory Interest was forecast, CarVal was put in a position whereby, if it did not sign CDDs: (a) the payment of distributions in respect of the provable debts owed to it by LBIE would be delayed, potentially for a very significant period, without any expectation of compensation for that delay and (b) it faced ongoing uncertainty about when and at what value its claims would be admitted. The JAs' 4<sup>th</sup> Progress Report, dated 14 October 2010 noted at page 31 "*Any creditors who would prefer not to adopt [the claims agreement approach under*

*the Consensual Approach] and instead wish to wait to negotiate bilaterally may do so at a later date, albeit this is likely to take significantly longer to achieve".* The result was that, unless CarVal was prepared to accept that delay and that uncertainty it had no option but to sign the CDD in the form presented as non-negotiable by the JAs.

**Section IV: CarVal's experience of the process by which LBIE admitted claims and agreed CDDs**

18. LBIE required creditors, including CarVal, to submit proofs of debt using an online claims portal. Proofs of debt were required by LBIE to be submitted in the currency of creditors' entitlement. That is the manner in which details of CarVal's claims were inserted into the online claims portal by my colleagues in the CarVal operations team.
19. At some point after a claim was submitted using the claims portal, (although often after a significant delay), the JAs or their representatives typically contacted me by telephone with an offer to settle and agree the claim.
20. My recollection, although I did not check this in every instance, is that the choice of the currency in which an offer was made by LBIE usually corresponded to the currency in which the corresponding proof of debt was denominated. At the same time as the offer described above was communicated to me orally, a draft CDD would typically be sent to me by email. This draft would not include an amount for the agreed (or admitted) claim but would leave the amount blank. In those cases where we accepted the offer and communicated to LBIE that we would sign a CDD then the draft CDD would typically be updated by LBIE and sent to us by email as a final version for signing with the agreed amount to the claim included. This amount would (if it was an Admitted Claim CDD) show a Sterling figure after conversion of the offered amount into Sterling as at the Date of Administration, in accordance with Insolvency Rule 2.86 (1).
21. I therefore understood that the process of conversion into Sterling of the figure shown in Admitted Claim CDDs was simply the conversion required by Insolvency Rule 2.86 (1). I have made enquiries of the other individuals employed by CarVal involved in the submission of claims and negotiation of CDDs, and all the individuals with whom I have spoken have confirmed to me that they had the same understanding.
22. It has never been suggested to me by the JAs or any of their representatives that the process of conversion had any other purpose. I have made enquiries of the other

individuals employed by CarVal who have had material interactions with the JAs or their representatives, and all the individuals with whom I have spoken have confirmed to me that no such suggestion has ever been made to them by the JAs or their representatives.

**Section VI: The forms of CDDs used by the JAs.**

23. Lomas 10 sets out at paragraphs 47-55 and 81-83 the different forms of documentation used by the JAs in agreeing the amount of provable claims.
24. The description in Lomas 10 accords with my experience of dealing with the JAs' representatives in respect of CDDs. In my experience LBIE stopped routinely proposing CDDs to CarVal using the Agreed Claim CDD template (discussed at paragraph 49 of Lomas 10) in around April 2011. Under the Agreed Claim CDD template, the amount of the agreed claim was denominated in the currency of the underlying contractual entitlement. From around April 2011, LBIE instead began proposing Admitted Claims CDDs (discussed at paragraph 54 of Lomas 10). LBIE has in 2014 begun proposing to CarVal CDDs using an Agreed Claims CDD template (as discussed in paragraph 51 of Lomas 10), modified to include the carve-out language discussed at paragraphs 78-79 of Lomas 10. In addition, LBIE has in my experience recently begun admitting certain of CarVal's claims on the basis of Admittance Letters, as described in Lomas 10 at paragraphs 81-82.
25. It has never been suggested to me by the JAs or any of their representatives that the different forms of agreements and letters by which the JAs have admitted CarVal claims were intended by the JAs to confer different rights on creditors with respect to their non-provable claims or that CarVal had any choice as to the form of CDD by which its claims would be admitted. On the contrary, the only explanation that I recall being given as to the reason for the use of different forms of CDD was that set out in Lomas 10 at paragraph 54—that there was no longer a need for the CDDs to account for uncertainty as to creditors' client money claims. I have made enquiries of the other individuals employed by CarVal who have had material interactions with the JAs or their representatives. All the individuals with whom I have spoken have confirmed to me that the JAs or their representatives similarly never suggested to them that the different forms of agreements and letters were intended to confer different rights or that CarVal had any choice as to the form of agreement used.

26. I never intended different forms of agreements by which CarVal claims have been admitted to have different effects on CarVal's non-provable claims. I have made enquiries of the other individuals employed by CarVal who have authorised the signing of CDDs, and all the individuals with whom I have spoken have confirmed to me that they too had no such intention.

**Section VII: CarVal's understanding of the Surplus Entitlement Proposal**

27. Lomas 9 outlines at paragraphs 22-23 the JAs' development in early 2014 of a CVA proposal, known as the Surplus Entitlement Proposal.
28. It envisaged that Statutory Interest would be paid *pari passu* without reference to the effect of the type of CDD applicable to a claim.
29. It envisaged that Currency Conversion Claims would be recognised and distributions made on them *pari passu* without reference to the type of CDD applicable to a claim.
30. In a webcast update to creditors on 6 May 2014 Mr Copley commented in respect of the Surplus Entitlement Proposal that it was based on the JAs' legal analysis and, where there was legal uncertainty, on what the JAs considered to be fair [RG3 page 137].
31. The Surplus Entitlement Proposal is consistent with what I have understood to be the JAs' approach to the effect of the CDDs and Release Clause on non-provable claims throughout the administration, as set out above.

Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed 

**Robert Francis Garvey**

Dated 19 September 2014



**IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
COMPANIES COURT**

**IN THE MATTER OF LEHMAN BROTHERS  
INTERNATIONAL (EUROPE) (IN  
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**THIRD WITNESS STATEMENT OF  
ROBERT FRANCIS GARVEY**

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