

Second Respondent
E Greenberg
Second
EG1
3 July 2013

Claim Nos. 7942 and 7945 of 2008 and No. 429 of 2009

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 LEHMAN BROTHERS LIMITED
(IN ADMINISTRATION)**

**AND IN THE MATTER OF LB HOLDINGS INTERMEDIATE 2 LIMITED
(IN ADMINISTRATION)**

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

- (1) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS
INTERNATIONAL (EUROPE) (IN ADMINISTRATION)**
- (2) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS LIMITED (IN
ADMINISTRATION)**
- (3) THE JOINT ADMINISTRATORS OF LB HOLDINGS INTERMEDIATE 2
LIMITED (IN ADMINISTRATION)**

APPLICANTS

-AND-

- (1) LEHMAN BROTHERS HOLDINGS, INC**
- (2) LYDIAN OVERSEAS PARTNERS MASTER FUND LIMITED**

RESPONDENTS

**SECOND WITNESS STATEMENT OF
ELLIOT GREENBERG**

I, Elliot Greenberg of Marshgate International Limited c/o Maples Corporate Services Limited, Uglan House, PO Box 309 Grand Cayman KY1-1104, Cayman Islands, will say as follows:

Introduction

1. I am a director of Marshgate International Limited. Marshgate International Limited is since 25 March 2013 the replacement voluntary liquidator of the Second Respondent, Lydian Overseas Partners Master Fund Limited (**Lydian**). I refer to my first witness statement and adopt the definitions therein.
2. I make this statement in relation to the Joint Application, in support of Lydian's case.
3. Save where otherwise appears, the facts and matters referred to in this witness statement are within my own knowledge or derived from information or documentation provided to me in my position described above. Where the matters stated are within my knowledge they are true; where they are not within my own knowledge, I identify the source of my information and, in such instances, the matters are true to the best of my knowledge, information and belief.
4. I understand there is presently a disclosure exercise being undertaken by the LBIE Administrators and interviews with relevant individuals are currently taking place. Furthermore, LBIE has not yet submitted its witness evidence and LBL and LBH12 have submitted evidence whilst reserving their rights to supplement such evidence once the disclosure and interview processes have concluded. Accordingly, I make this witness statement whilst reserving Lydian's rights to supplement it as and when disclosure is completed, all witnesses have been interviewed and all applicants have filed and served their evidence and/or supplementary evidence (as applicable).
5. There is now produced and shown to me a bundle of documents marked "Exhibit EG1". These are true copies of the documents to which I refer in this witness statement. Unless otherwise stated, references to page numbers in this witness statement are to pages of Exhibit EG1.

Overview of Lydian's Claims

6. Lydian submitted a proof of debt (**Lydian's Proof**) to the LBIE Administrators on or around 19 July 2012 (pages EG1-001 to EG1-014). As explained in paragraph 11 of my first witness statement, the quantum of Lydian's claims has not yet been agreed by the LBIE Administrators (although there is no dispute over the existence of its claim). To this end the LBIE Administrators have indicated, in a letter from Linklaters LLP dated 25 June 2013 (page EG1-015), that for the purposes of the Joint Application the LBIE Administrators are prepared to assume that Lydian has a valid unsecured claim in the LBIE administration.
7. In total (excluding any interest), Lydian has submitted an unsecured claim in the LBIE administration in the amount of USD264,188,121.99. In my first witness statement, I set out an overview of the relevant contracts (the **Contracts**) between Lydian and LBIE and explained that they all provide for the payment of early termination amounts, and other amounts calculated as owing under them, in United States Dollars (**USD**) (see paragraphs 8 and 9 of that statement).
8. I understand and am informed that, for the purposes of proving a debt in an English administration, claims in currencies other than pounds sterling (**GBP**) are required to be converted into GBP "*at the official exchange rate prevailing on the date when the company entered administration*" (Rule 2.86(1) of the Insolvency Rules 1986). As explained in my first witness statement (paragraph 10), the effect of this rule is that if LBIE were to pay Lydian in GBP now, there would remain a substantial shortfall in the amount owed by LBIE to Lydian pursuant to the terms of the Contracts. This is because of the depreciation of GBP against USD in the period since 15 September 2008, when LBIE went into administration.
9. It is Lydian's case that it should be able to make a claim in respect of this shortfall against the LBIE estate (the **Currency Conversion Claim**), and that such a Currency Conversion Claim should be paid, as a non-provable claim, after the payment of provable debts and post-administration interest to LBIE's unsecured creditors, but before any payment is made to LBIE's shareholders (either in their capacity as shareholders or as unsecured creditors).

ISDA Master Agreement

10. By way of illustration as to how Lydian's Currency Conversion Claim arises, I focus the rest of this statement on one of the agreements under which amounts are outstanding from LBIE to Lydian. This is an ISDA Master Agreement between Lydian and LBIE dated as of 10 December 2001 (pages EG1-016 to EG1-033) (the **Agreement**), as amended by a schedule to the Agreement (the **Schedule**) (pages EG1-034 to EG1-056). Incorporated by reference into the Schedule were a guarantee from LBHI (pages EG1-057 to EG1-058) and a credit support annex granted by LBIE in favour of Lydian (pages EG1-059 to EG1-073). The Agreement was amended by an amendment agreement dated as of 26 April 2004 (pages EG1-074 to EG1-075).
11. As referred to above, other Contracts have similar provisions but, given that I understand and am informed that this Application is about questions of legal principle (rather than the detail of Lydian's contractual relationship with LBIE), I have only referred to the terms of the Agreement below.
12. The Agreement is governed by New York law and is subject to the exclusive jurisdiction of the New York courts (per Sections 13(a) and 13(b)(i) as amended by Part 4 (h) and (i) of the Schedule) (see page EG1-028 and page EG1-042 respectively).
13. On 15 September 2008, LBIE was placed into administration in the UK and LBHI became subject to proceedings under Chapter 11 of the US Bankruptcy Code. This constituted an Event of Default under Section 5(a)(vii) of the Agreement (see page EG1-021). The occurrence of this Event of Default gave Lydian the right (inter alia) to:
 - (a) designate an Early Termination Date under section 6(a) of the Agreement;
 - (b) make the calculation of the amounts owing following Early Termination pursuant to section 6(e) of the Agreement (the **Section 6(e) Calculation**); and
 - (c) send to LBIE the statement contemplated by section 6(d)(i) of the Agreement setting out the Section 6(e) Calculation and specifying any amounts payable.
14. Under the Agreement, the relevant provisions of which I set out below, all amounts owed by LBIE to Lydian must be paid in United States Dollars and

interest will accrue on such amounts from and including the Early Termination Date at Lydian's cost of funding plus 1% per annum, compounded daily. Under the Agreement, such interest must also be paid in United States Dollars:

(a) Section 6(d)(ii) of the Agreement provides that:

"An amount calculated as being due in respect of any Early Termination Date under Section 6(e) will be payable on the day that notice of the amount payable is effective (in the case of an Early Termination Date which is designated or occurs as a result of an Event of Default)...Such amount will be paid together with (to the extent permitted under applicable law) interest thereon...in the Termination Currency, from (and including) the relevant Early Termination Date to (but excluding) the date such amount is paid, at the Applicable Rate. Such interest will be calculated on the basis of daily compounding and the actual number days elapsed."

(b) "Termination Currency" is specified in Part 1 (g) of the Schedule as being "United States Dollars".

(c) Under Section 14 of the Agreement (Definitions):

"Applicable Rate" means "(a) in the case of obligations payable or deliverable...by a Defaulting Party, the Default Rate".

"Default Rate" means: "a rate per annum equal to the cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount plus 1% per annum."

15. As set below, Section 8 provides that to the extent that payments are not made in the contractually specified currency, the paying party (here, LBIE) shall indemnify the receiving party in respect of any resulting shortfall (see page EG1-026):

"8. Contractual Currency

(a) ***Payment in the Contractual Currency.*** Each payment under this Agreement will be made in the relevant currency specified in this Agreement for that payment (the "Contractual Currency"). To the extent permitted by applicable law, any obligation to make payments under this Agreement in the Contractual Currency will not be discharged or satisfied by any tender in any currency other than the Contractual Currency, except to the extent such tender results in the actual receipt by the party to which payment is owed, acting in a reasonable manner and in good faith in converting the currency so tendered into the Contractual Currency, of the full amount in the Contractual Currency of all amounts payable in respect of this Agreement. If for any reason the amount in the Contractual Currency so received falls short of the amount in the Contractual Currency payable in respect of this Agreement, the party required to make the payment will, to the extent permitted by applicable law, immediately pay such additional amount in the Contractual Currency

as may be necessary to compensate for the shortfall. If for any reason the amount in the Contractual Currency so received exceeds the amount in the Contractual Currency payment in respect of this Agreement, the party receiving the payment will refund promptly the amount of such excess...

...(c) *Separate Indemnities.* To the extent permitted by applicable law, these indemnities constitute separate and independent obligations from the other obligations in this Agreement, will be enforceable as separate and independent causes of action, will apply notwithstanding any indulgence granted by the party to which any payment is owed and will not be affected by judgment being obtained or claim or proof being made for any other sums payable in respect of this Agreement.”

16. For illustrative purposes only, the following two paragraphs show the potential quantum of the Currency Conversion Claim based on the amount of Lydian’s claim in respect of the Agreement as stated in its Proof (which, as stated above, does not include interest). Given that foreign exchange rates continue to fluctuate, the quantum of such claim may be greater or less than this amount by the time Lydian receives its distributions in the LBIE administration but it is unlikely that foreign exchange rates will move sufficiently for there to be no such claim.
17. As can be seen from page three of Lydian’s Proof (page EG1-003), Lydian’s claim in respect of the Agreement (excluding interest) is USD9,077,763 or £5,060,914.87 in GBP, applying the prevailing exchange rate as at 15 September 2008 of 0.5575 USD to GBP.
18. The current exchange rate, as at the date of this witness statement, is around 0.6582 USD to GBP. At this exchange rate, Lydian’s claim of £5,060,914.87 in respect of this Agreement would now only be worth around USD7,689,022.90. This would leave a USD1,388,740.10 (or around 15.3%) shortfall on the amounts owed by LBIE to Lydian under the Agreement, which Lydian should be entitled to seek recovery of as a non-provable claim.

Statement of Truth

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

Signed:

Elliot Greenberg

Dated: 3rd day of July, 2013.

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**SECOND WITNESS
STATEMENT OF
ELLIOT GREENBERG**

3 July 2013

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