Party: Applicant
Witness: Anthony Victor Lomas
Statement No: 9
Exhibit: "AVL9"
Date: 11 June 2014

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

NINTH WITNESS STATEMENT OF ANTHONY VICTOR LOMAS

I, **Anthony Victor Lomas** of PricewaterhouseCoopers LLP (**"PwC"**) of 7 More London, Riverside, London, SE1 2RT say as follows:

1. I am a Partner in the firm of PwC of the above address and am one of the joint administrators (the "**Joint Administrators**") of Lehman Brothers International (Europe) (in administration) ("**LBIE**").

2. I make this statement in relation to the application for directions to be issued on behalf of the Joint Administrators pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 (the "**Act**"), as described below (the "**Application**").

3. The directions sought in the Application (which we refer to as the "**Waterfall II**" application) have been the subject of discussions with and comment from the main Respondents named in the Application. They relate to issues arising in LBIE's administration as to the existence and/or quantification of certain claims in respect of the surplus of assets that

exists in the LBIE estate after admitted unsecured claims have been paid in full.

4. I make this statement in order to provide the relevant background to the Court for the purposes of an initial hearing in relation to the Application at which procedural directions will be sought.

5. There is now produced and shown to me marked "**AVL9**" a paginated bundle of documents and correspondence, to which I shall refer. Save where otherwise stated, page references in this statement are to the contents of this exhibit. References to a "Rule" are to a rule provided for in the Insolvency Rules 1986. Terms capitalised but not otherwise defined have the meaning given to them in the Application.

6. Save where otherwise stated this witness statement is made from facts and matters that are within my own knowledge. Nothing that I say in this witness statement is intended to be a waiver of any privilege to which LBIE and/or the Joint Administrators are entitled and no such privilege is waived.

(A) BACKGROUND

7. LBIE was the principal trading company within the European Lehman Brothers group of companies and is an English unlimited company.

8. LBIE entered into administration (the "**Administration**") on 15 September 2008 (the "**Administration Date**"). The current Joint Administrators are myself, Steven Anthony Pearson, Paul David Copley, Russell Downs and Julian Guy Parr.

9. The Joint Administrators have for some time anticipated the possibility of there being sufficient assets in the LBIE estate for them to be able to pay 100 pence in the pound in respect of claims admitted for dividend and of there being a surplus of assets remaining after they have done so (the "**Surplus**").

10. The Joint Administrators' latest progress report, for the period from 15 September 2013 to 14 March 2014 (the "**LBIE Progress Report**") is at **pages 1 to 54**. It states that the indicative financial outcome for LBIE creditors "*now shows a surplus in both the Low and High case scenarios for the first time*". The LBIE Progress Report states that, subject to a number of important assumptions, the potential value range of the Surplus is "*estimated to be between £3.50bn and £6.99bn*".

(B) THE WATERFALL APPLICATION

11. In February 2013, in anticipation of a possible Surplus, the Joint Administrators, together with the joint administrators of LBIE's immediate parent companies, LB Holdings Intermediate 2 Limited ("**LBHI2**") and Lehman Brothers Limited ("**LBL**"), issued an application for directions (the "**Waterfall Application**") as to, among other things:

    11.1 the relative priority for payment, in the event of a Surplus, of:

        a) interest on proved debts payable pursuant to Rule 2.88(7) ("**Statutory Interest**"); and

        b) amounts owing from LBIE to LBHI2 under certain subordinated loan agreements between LBIE and LBHI2 (the "**Sub-Debt**");

    and

    11.2. whether or not, in the event of a Surplus, creditors of LBIE whose provable contractual or other claims are denominated in a foreign currency, the amount of which was converted into sterling as at the Administration Date for the purpose of proving a debt under Rule 2.86(1), are entitled to claim against LBIE for any currency losses suffered by them as a result of a decline in the value of sterling as against the original currency of the claim between the Administration Date and the date or dates of payment or payments of distributions to them in respect of their claims (a

"**Currency Conversion Claim**") and where Currency Conversion Claims, if they exist, rank for payment in the event of a Surplus.

12. The respondents to the Waterfall Application (the joint administrators of LBHI2 and LBL were joint applicants with the LBIE Joint Administrators) were:

    12.1 Lehman Brothers Holdings, Inc. ("**LBHI**"), being the ultimate parent company of the global Lehman Brothers group and (directly or indirectly) the principal creditor of LBHI2; and

    12.2 Lydian Overseas Partners Master Fund Limited ("**Lydian**"), being a substantial unsecured creditor of LBIE.

13. Following a hearing before Mr Justice David Richards in November 2013, on 21 February 2014 the Judge announced his Statement of Conclusions in relation to the Waterfall Application and, on 14 March 2014, the Judge handed down his judgment on the Waterfall Application (the "**Waterfall Judgment**") (a copy of which is at **pages 55 to 121**).

14. In relation to the issues outlined above at paragraph 11, Mr Justice David Richards concluded:

    14.1 that the Sub-Debt ranks for payment behind Statutory Interest and non-provable liabilities in the event of a Surplus; and

    14.2 that Currency Conversion Claims exist as a non-provable liability and therefore rank for payment ahead of the Sub-Debt in the event of a Surplus.

15. Therefore, following the Waterfall Judgment, and subject to appeals, the Surplus is to be applied to pay claims in the following order of priority:

    (i) Statutory Interest on admitted provable claims;

    (ii) non-provable claims, including Currency Conversion Claims; and

    (iii) the Sub-Debt.

(C) FURTHER ISSUES RELATING TO THE SURPLUS

16. The majority of unsecured claims against LBIE are now owned by funds that acquired such claims in the secondary market. Some of the largest owners of LBIE unsecured claims are funds controlled by:

    (i) King Street Capital Management, L.P. ("**King Street**");

    (ii) Elliott Management Corporation ("**Elliott**");

    (iii) Baupost Group LLC ("**Baupost**");

    (iv) Carval Investors GB LLP ("**Carval**"); and

    (v) Davidson Kempner Capital Management LP ("**DK**").

17. In the period between the issuing of the Waterfall Application and the Waterfall Judgment, during which it became increasingly clear that there would likely be a significant Surplus in the LBIE estate, LBIE's unsecured creditors became increasingly focused on their respective entitlements in respect of such Surplus. Initially, LBIE's ordinary unsecured creditors were all broadly focused on maximising the claims which, they argued, ranked ahead of the Sub-Debt. For example, the existence (and prior ranking) of the Currency Conversion Claim in the event of a Surplus was an issue raised by Lydian (a fund controlled by Elliott) when it was joined to the Waterfall Application in March 2013. Similarly, creditors raised with the Joint Administrators the issue of the value of claims for contractual interest under ISDA Master Agreements.

18. This position became more complex when, on 1 October 2013, the joint administrators of LBHI2 announced that LBHI2 and LBHI had entered into a commitment letter and heads of terms with King Street and Elliott under which King Street and Elliott acquired a substantial interest in the Sub-Debt. A copy of the heads of terms for that transaction is at **pages 122 to 134**. Under the transaction an offshore structure known as "Wentworth" was established to hold the claims against LBIE (including

unsecured claims) of LBHI2, LBHI, King Street and Elliott (the "**Wentworth Group**"), and to receive realisations on those claims. I understand that that transaction was completed in January 2014 but the Administrators do not know the precise terms on which the acquisition took place.

19. From that point onwards, LBIE's creditors have been increasingly focused on developing legal arguments as to their rights in, and the proper distribution of, the Surplus, and have been sharing their views in this regard with the Joint Administrators. The principal groups with which the Joint Administrators have been discussing the Application are:

    19.1 hedge funds controlled by Baupost, Carval and DK (the "**Senior Creditor Group**"), which hold claims to Statutory Interest and Currency Conversion Claims; and

    19.2 the Wentworth Group which has an interest not only in claims to Statutory Interest and Currency Conversion Claims but also the Sub-Debt.

20. Briefly, the issues with which the Wentworth Group and the Senior Creditor Group are primarily concerned are:

    20.1 how Statutory Interest is to be calculated (including under the ISDA Master Agreement) and the date from which it accrues;

    20.2 how Currency Conversion Claims are to be quantified; and

    20.3 the impact on claims to Statutory Interest and/or Currency Conversion Claims of certain contracts entered into, post-administration, between LBIE and certain of its creditors ("**Post-Administration Contracts**").

    On these issues, the Wentworth Group and the Senior Creditor Group are polarised. Whereas the Wentworth Group is focused on enhancing the amount of the Surplus available to repay the Sub-Debt, the Senior

Creditor Group is focused on enhancing the value of its claims to Statutory Interest and Currency Conversion Claims.

21. A further creditor, York Global Finance BDH, LLC ("**York**"), has communicated to the Joint Administrators a desire to take part in the Application. York has an interest in a significant claim for Statutory Interest, the value of which is materially impacted by the issue of the date from which Statutory Interest is to be calculated (see paragraph 43.6 below). York is one of four co-participants in five claims held by Bank of America Credit Products, Inc., the total value of which is US$676.25 million. The other co-participants are RMF Liberty, LLC, SCPC Group, LLC and OZ LV Holdings, LLC, which have authorised York to act as a respondent to the Application on their behalf.

(D) CONSENSUAL PROPOSAL

22. The Wentworth Group, the Senior Creditor Group and other creditors have been working with the Joint Administrators to develop a basis on which a compromise might be reached in respect of creditors' entitlements to the Surplus to allow claims for an interest in the Surplus to be quantified and distributions of Statutory Interest to be made expediently. That process has involved the Joint Administrators receiving the views of the Wentworth Group and the Senior Creditor Group and other creditors in relation to the issues set out briefly at paragraph 20 above and in more detail at Sections (H) – (K) below, and analysing very considerable amounts of data.

23. On 10 March 2014, the Joint Administrators disclosed to certain creditors that had entered into a Non-Disclosure Agreement the terms of a potential compromise (the "**LBIE Proposal**"). The LBIE Proposal was disclosed to the market more generally on 28 March 2014 by posting it on the section of the PwC website dedicated to the Administration. The LBIE Proposal was a potential compromise that created a waterfall of rights. It sought to deal with the issues that are the subject of this Application by a

commercial compromise in respect of all parties' claims to an entitlement in the Surplus. A copy of the term sheet for the LBIE Proposal is at **pages 135 to 148**.

24. Unfortunately, the LBIE Proposal did not achieve consensus among the Wentworth Group, Senior Creditor Group and other creditors. During the last several months the Joint Administrators have continued to discuss these issues with creditors while preparing this Application. Although they have not received any counterproposals that are acceptable to all parties, the Joint Administrators have been discussing with creditors, on a without prejudice basis, how certain limited issues might be resolved with a view to facilitating interim distributions of Statutory Interest, but it has also not been possible to reach agreement on this.

(E) FINANCIAL POSITION

25. On 23 April 2014, the Joint Administrators gave notice of their intention to pay a final dividend (which was paid on or about 30 April 2014) that took payments to LBIE's admitted unsecured creditors up to 100 pence in the pound (the "**Final Dividend**").

26. Set out below are certain financial estimates, made by the Joint Administrators, relating to the potential size of the eventual Surplus and possible claims in relation to it.

27. The Joint Administrators' estimate (set out in the LBIE Progress Report) of the potential size of the Surplus as at 14 March 2014 was as follows:

    High case: £6.99 billion

    Low case: £3.50 billion

28. The Joint Administrators' estimate (prepared for the purpose of the LBIE Proposal) of the value of Statutory Interest calculated from the Date of Administration at the rate of 8% provided for by section 17 of the

Judgments Act 1838 (the "**Judgments Act Rate**") on all ordinary unsecured claims was approximately £5.5 billion.

29. The Joint Administrators' estimate (prepared for the purpose of the LBIE Proposal on the basis set out in that document) of the value of Currency Conversion Claims arising on ordinary unsecured claims was approximately £1.3 billion.

30. The Joint Administrators' estimate (set out in the LBIE Progress Report) of the value of unresolved unsecured claims as at 14 March 2014 was as follows:

High case: £1.86 billion

Low case: £3.50 billion

(F) RESPONDENTS

31. The Joint Administrators have identified three groups of appropriate respondents for the Application. They are, as noted below, all holders of very significant claims, which gives them a very material interest in the outcome of each of the issues in the Application.

32. For the Senior Creditor Group, the Respondents to the Application are:

32.1 CVI GVF (Lux) Master S.à.r.l, ("**CVI**"), which is an entity managed by Carval. CVI (together with other Carval affiliates) holds general unsecured claims against LBIE in excess of £1 billion;

32.2 Hutchinson Investors, LLC ("**Hutchinson**"), which is an entity managed by Baupost. Hutchinson (together with other Baupost affiliates) holds general unsecured claims against LBIE in excess of £1 billion; and

32.3 Burlington Loan Management Limited ("**Burlington**") is an entity managed by DK. Burlington holds general unsecured claims against LBIE in excess of £750 million,

(the "**Senior Creditor Respondents**"). The Senior Creditor Respondents together hold in excess of £2.75 billion of admitted unsecured claims in the LBIE estate.

33. For the Wentworth Group, the Respondent to the Application is Wentworth Sons Sub-Debt S.à.r.l (the "**Wentworth Respondent**"). The Wentworth Respondent holds the entirety of the Sub-Debt, in the amount of £1,254,165,598.48, originally claimed against LBIE by LBHI2.

34. Finally, the Joint Administrators consider it appropriate to join York to be able to argue (albeit without duplicating other parties' arguments) the issue of the date from which Statutory Interest accrues (see paragraph 43.6 below). York's economic interest in LBIE unsecured debt is as outlined above at paragraph 21.

(G) REASONS FOR THE APPLICATION

35. In the course of planning for the distribution of a potential Surplus, when developing the LBIE Proposal, and in the course of discussions with the Senior Creditor Group and the Wentworth Group, the Joint Administrators have identified a number of issues on which they consider it appropriate to seek the Court's directions. This is either because the Joint Administrators consider there is some uncertainty as to the correct answer or because – even though the Joint Administrators may not consider there to be material uncertainty – alternative positions have been put forward by the Senior Creditor Group and the Wentworth Group such that (particularly in light of the sums at stake) the Joint Administrators have concluded that the questions require determination.

36. The Joint Administrators have concluded that, whilst there are funds available to distribute, they will not be in a position to make a distribution in respect of the Surplus absent resolution of the issues in the Application. The Joint Administrators have publicised the need for the Application both in the LBIE Progress Report and in the live webcast held by the Joint Administrators for LBIE creditors on 6 May 2014.

37. The ultimate form of the questions in the Application arises from consultation with the principal respondents, and there are a number of questions which the Joint Administrators would not themselves have been minded to ask (at all, or at least in the form in which they appear) but which they have nonetheless included at the request of the principal respondents with a view to the expeditious resolution of issues that might otherwise delay the distribution of the Surplus.

(H) ISSUES RELATING TO STATUTORY INTEREST

38. The first category of issues in respect of which directions are sought, which are issues 1 to 27 in the Application, concern how the quantum of Statutory Interest payable to an unsecured creditor is to be calculated.

39. These issues broadly fall into two categories:

    39.1 issues relating to the construction of Rule 2.88 which gives rise to the statutory entitlement to Statutory Interest on proved debts in the event of a surplus; and

    39.2 issues relating to the construction of certain master agreements, in particular the ISDA Master Agreement, which create a contractual right to interest at a rate that many creditors (including the Senior Creditor Group) consider may be significantly higher than the Judgments Act Rate.

Construction of Rule 2.88

40. Rule 2.88(7) creates the obligation for the Joint Administrators to apply the Surplus first to pay Statutory Interest on proved debts. Rule 2.88(7) states:

    "*Any surplus remaining after payment of the debts proved shall, before being applied for any purpose, be applied in paying interest on those*

debts in respect of the periods during which they have been outstanding since the relevant date."

41. Rules 2.88(9) and 2.88(6), taken together, provide the rate at which Statutory Interest is to be paid. Rule 2.88(9) provides that:

"*The rate of interest payable under paragraph (7) is whichever is the greater of the rate specified under paragraph (6) and the rate applicable to the debt apart from the administration*".

Rule 2.88(6) provides that:

"*The rate of interest to be claimed… is the rate specified in section 17 of the Judgments Act 1838 on the relevant date*".

42. Rule 2.88 therefore provides that Statutory Interest is payable on debts proved at the Judgments Act Rate or at the "*rate applicable to the debt apart from the administration*" if it is higher (a "**Higher Rate**").

43. Briefly, the issues that relate to the construction of Rule 2.88 are:

43.1 whether Statutory Interest is payable on a simple or compound basis. Rule 2.88 is silent on this point. I understand that this issue arises both:

(i) in respect of Statutory Interest payable at the Judgments Act Rate; and

(ii) in respect of Statutory Interest payable at a Higher Rate, including where that Higher Rate derives from a contract or other source which itself provides for compounding of interest.

The question of whether Rule 2.88 should be construed as allowing for compounding of Statutory Interest, whether on all or some of the proved debts, will have a very significant impact on the amount of Statutory Interest that will be paid to creditors and, therefore, the amount of any of the Surplus that will remain to

meet non-provable claims (including Currency Conversion Claims) and to repay the Sub-Debt. This issue is raised at questions 1 and 3 of the Application;

43.2 whether Rule 2.88 should be construed as providing for Statutory Interest to be calculated on the basis of dividends in the Administration being allocated first to the payment of principal or first to the payment of accrued Statutory Interest. This issue is raised at question 2 of the Application;

43.3 whether the words "*the rate applicable to the debt apart from the administration*" in Rule 2.88(9) includes only interest rates deriving from contracts, or can also include rates deriving from judgments or other statutory sources. For example, certain creditors of LBIE have suggested that, had it not been for the statutory moratorium under the Administration, they would or could have sought and obtained judgment against LBIE in a jurisdiction that provides for judgment interest at a rate higher than the Judgments Act Rate and that this would be a "*rate applicable to the debt apart from the administration*" for the purposes of Rule 2.88(9). This issue is raised at question 4 of the Application;

43.4 for the purposes of assessing under Rule 2.88(9) whether a "*rate applicable to the debt apart from the administration*" is higher than the Judgments Act Rate, whether only the numerical rates are to be compared or whether the effect of any applicable methods of calculation (including compounding) are to be taken into account. This issue is raised at question 5 of the Application;

43.5 whether, where a debt that would give rise to a "*rate applicable to the debt apart from the administration*" only becomes payable on a date after the commencement of the Administration whether, for the purposes of assessing under Rule 2.88(9) whether a "*rate applicable to the debt apart from the administration*" is higher than the Judgments Act Rate, that rate is to be treated as applying

from the Date of Administration, the date on which the debt became due, or another date. This issue is raised at question 6 of the Application; and

43.6 the date from which Statutory Interest starts to accrue in the case of contingent debts and future debts. Rule 2.88(7) provides for Statutory Interest to be paid for the period "*during which they have been outstanding since*" LBIE entered administration. I am advised that, in the context of future and contingent debts, the term "outstanding" is capable of being construed in two alternative ways:

(i) such debts might be regarded as having been "outstanding" for the purposes of Rule 2.88(7) from the Date of Administration; or

(ii) they might be regarded as having been "outstanding" since the date on which the debt in fact crystallised.

Many of the claims admitted by LBIE were contingent as at the Administration Date and some remained so for significant periods of time thereafter. The question of whether Statutory Interest accrues in respect of such claims from the Date of Administration or the dates on which the debts ceased to be contingent debts will therefore have a significant economic impact on both the LBIE estate and the creditors holding such claims. This issue is raised at questions 7 to 9 of the Application. This is the issue on which York will make submissions.

Interest under Master Agreements

44. In addition to issues as to the proper construction of Rule 2.88, a key issue that will impact the amount of Statutory Interest payable by LBIE is the construction of certain provisions of the ISDA Master Agreement. The ISDA Master Agreement is the most commonly used master service

agreement for over-the-counter derivative transactions internationally. There are two main variants of the ISDA Master Agreement: the 1992 version (a copy of which is at **pages 149 to 172**); and the 2002 version (a copy of which is at **pages 173 to 208**). A significant proportion of LBIE's debts arise under ISDA Master Agreements.

45. The ISDA Master Agreement provides that, in the event that a party defaults in the performance of a payment obligation, it will be required to pay interest on the overdue amount at the "Default Rate". The "Default Rate" is defined under the ISDA Master Agreement as "*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*". The Default Rate is considered to be a "*rate applicable to the debt apart from the administration*" for the purposes of Rule 2.88(9).

46. The definition of "Default Rate" in the ISDA Master Agreement, as with the proper interpretation of Rule 2.88, gives rise to a number of issues included within the Application. In particular:

46.1 the meaning of the term "relevant payee" and, in particular, whether this means the original counterparty to the ISDA Master Agreement or a subsequent transferee. This is of particular relevance in the Administration, where a large proportion of claims under ISDA Master Agreements are no longer held by the original counterparty. This issue is raised at question 10 of the Application;

46.2 the meaning of the term "*cost (without proof or evidence of any actual cost)… if it were to fund or of funding the relevant amount*". In view of the assertions made by the Senior Creditor Group, the Court will need to determine:

(i) whether the term "funding" refers only to debt funding or also to other forms of funding including equity funding; and

(ii) how, in any given case, the "cost" of funding the relevant amount is to be calculated.

This issue is raised at questions 11 to 13 and 17 of the Application;

46.3 the meaning of the term "as certified by it", and in particular:

(i) by whom the certification is required to be made; and

(ii) whether such certification is conclusive and, if it is not, what conditions or requirements it is subject to.

This issue is raised at questions 14 to 16 of the Application.

47. Given the differing views of creditors as to the meaning of the term "Default Rate", the likely quantum of claims to Default Interest under ISDA Master Agreements is unclear. Some LBIE creditors have indicated that they consider that they can establish claims to Default Interest under ISDA Master Agreements at rates significantly in excess of the Judgments Act Rate. I am advised that the validity of such claims depends, in whole or in part, on the issues outlined above and set out in questions 10 to 19 of the Application. Such claims would, depending on their volume, have the potential significantly to increase LBIE's liability for Statutory Interest. Furthermore, since all claims to Statutory Interest (whether at the Judgments Act Rate or a Higher Rate) rank *pari passu*, such claims may also, depending on the size of the Surplus, have the effect of diluting ordinary claims to Statutory Interest at the Judgments Act Rate.

48. During the course of its business pre-Administration, LBIE entered into derivative transactions pursuant not only to the English law form of ISDA Master Agreement but also New York law ISDA agreements and similar forms of master agreements under German and French law. Similar issues to those outlined above in respect of the English law ISDA Master Agreement arise in respect of those foreign law agreements, on which (for the same reasons, given the similar effects the determination may

have on the distribution of the Surplus) the Joint Administrators seek the Court's guidance.

49. The Joint Administrators are conscious that, because these issues (raised at questions 10 to 27 of the Application) involve (in part) issues of foreign law, the Court is likely to require, and the parties will likely seek to rely on, evidence of those foreign laws. The Joint Administrators will seek to ensure that such evidence of foreign law is adduced in the most efficient and helpful manner possible.

50. All of the issues outlined above in this Section H are relevant for the purposes of calculating the amount of Statutory Interest that LBIE will be required to pay to unsecured creditors on proved debts and, by extension, the amount of the Surplus (if any) that will be remaining after the payment of Statutory Interest to pay Currency Conversion Claims and the Sub-Debt which, following the Waterfall Judgment (and subject to any appeal thereof), both rank below Statutory Interest.

51. The Senior Creditor Group is very focused on the construction of issues relating to the calculation of Statutory Interest. Consequently, the Joint Administrators have agreed to accommodate the inclusion of a number of questions notwithstanding that certain of the points raised will need to be developed comprehensively in the position papers of the Senior Creditor Group.

(I) ISSUES RELATING TO CURRENCY CONVERSION CLAIMS

52. The second category of issues, which are the issues numbered 28 to 33 in the Application, concern Currency Conversion Claims and, in particular:

52.1 how Currency Conversion Claims are to be quantified; and

52.2 whether Currency Conversion Claims arise in certain factual scenarios which were not directly considered in the Waterfall Application.

53. These issues are relevant for the purposes of calculating the amount of Currency Conversion Claims that LBIE may be required to pay to unsecured creditors and, by extension, the amount of the Surplus (if any) that will remain after the payment of Currency Conversion Claims to pay the Sub-Debt.

54. Whilst the Waterfall Judgment established, subject to any appeal, the existence of the Currency Conversion Claim as a non-provable liability, it did not specify (as indeed the Waterfall Application did not ask) precisely how Currency Conversion Claims are to be calculated.

55. The Wentworth Respondent will argue that, in quantifying a Currency Conversion Claim, the Joint Administrators must give credit for Statutory Interest received by the creditor.

56. This issue has (potentially) significant economic impact for LBIE's creditors with Currency Conversion Claims and for those with an interest in the Sub-Debt. If it is correct that Currency Conversion Claims are reduced by the amount of the Statutory Interest received by the relevant creditor or the amount of the Statutory Interest which is in excess of any interest entitlement a creditor would have had but for the Administration, the quantum of the Currency Conversion Claims may be significantly reduced. This issue is raised at question 28 of the Application.

57. A further issue in relation to Currency Conversion Claims is whether, in addition to arising (as established by the Waterfall Judgment) in relation to principal amounts, they can also be established in respect of interest amounts. Specifically, some creditors of LBIE have suggested that a creditor of LBIE is entitled to a claim akin to a Currency Conversion Claim where the amount of interest it receives from applying the applicable interest rate to its admitted sterling claim is, when converted back into the original currency, less than the amount of interest that it would have

received if the applicable interest rate had been applied to the debt in its original currency. This question is asked, in relation to interest at the Judgments Act Rate and a Higher Rate respectively, at questions 29 and 30 of the Application.

58. Finally in relation to Currency Conversion Claims, there is an issue as to whether a Currency Conversion Claim arises where, under a contract, the right to payment in a currency other than sterling is a right arising under terms which provided for termination, close-out and set-off upon an event of default and those terms do not apply to an event of default by LBIE. This issue has been raised by some creditors both generally and specifically in relation to the standard General Master Securities Lending Agreement and the standard Global Master Repurchase Agreement. This issue is raised at questions 31 and 32 of the Application.

(J) ISSUES RELATING TO POST-ADMINISTRATION CONTRACTS

59. The third category of issues, which are the questions numbered 34 to 38 in the Application, concerns the impact of Post-Administration Contracts on creditors' claims to Statutory Interest and Currency Conversion Claims.

60. On 29 December 2009, LBIE and the Joint Administrators entered into a Claims Resolution Agreement (the "**CRA**") with a large number of LBIE's creditors. The CRA (a copy of which is at **pages 209 to 493**) contained a methodology for dealing with claims to trust assets and for calculating the unsecured claims of trust asset claimants. The CRA gave a creditor a new claim, called a "Net Financial Claim", in return for the release of certain "Released Claims". There is a debate as to the effect of the CRA on claims to Statutory Interest and Currency Conversion Claims.

61. LBIE has, since entering into the CRA, entered into Claims Determination Deeds ("**CDDs**") with individual creditors (both creditors which had already entered into the CRA and creditors which had not). The CDDs, of which there are a number of different templates to cater for the specific

circumstances of the relevant creditor, are the documents used by the Joint Administrators for the purposes of agreeing the quantum of certain claims. The first CDD was initially developed during 2010 as part of what was known as "Project Canada" within the Administration. Project Canada was the Joint Administrators' project to develop and implement a framework that would:

61.1 allow the Joint Administrators and LBIE consensually to agree with creditors the value of their claims without undue delay and without the need to reconcile and agree every component part of a claim;

61.2 allow LBIE and the Joint Administrators to achieve a degree of finality as to the claims LBIE would face from those creditors; and

61.3 account for difficulties arising from uncertainty as to creditors' entitlements in respect of client money ("**Client Money Claims**") under Chapter 7 of the CASS Rules ("**CASS Chapter 7**"). In particular, in late 2010 it remained unclear:

(i) whether client money protection under CASS Chapter 7 extended only to those claimants which in fact had money segregated by LBIE under CASS Chapter 7 or also to creditors which should have had money segregated under CASS Chapter 7; and

(ii) whether LBIE's client money pool would have to be expanded, which would have had the effect of diminishing the assets that would otherwise be available to unsecured creditors.

62. Under Project Canada, LBIE would make to a creditor an offer as to the amount at which its claim would be agreed. If that offer was accepted, LBIE and the creditor would enter into a CDD.

63. The original CDD template (an "**Agreed Claims CDD**") accommodated the uncertainty in relation to Client Money Claims by agreeing the

quantum of the claim amount but leaving it for a later determination as to whether the claim constituted a Client Money Claim or an unsecured creditor claim (or a combination of the two).

64. The Agreed Claims CDD provided for:

64.1 an Agreed Claim in the amount agreed between LBIE and the creditor;

64.2 through the execution of a supplemental deed to the CDD, the Agreed Claim to become an "**Admitted Claim**", admitted for dividends in the Administration, upon either determination by LBIE of the creditor's Client Money Claims or the creditor electing to be paid its Agreed Claim out of the unsecured estate rather than the client money pool by either releasing or assigning (to Laurifer, an SPV set up for the purpose by LBIE) its Client Money Claim; and

64.3 waivers and releases designed to give LBIE and the Joint Administrators certainty in respect of the creditor's claims so as to facilitate making interim distributions.

65. Later, with the uncertainty as to creditors' entitlements in respect of Client Money Claims diminishing, LBIE devised a CDD which would operate such that the agreed amount of a claim would become an Admitted Claim immediately upon execution (an "**Admitted Claims CDD**"). The Admitted Claims CDD was used in circumstances where there was little or no risk of the creditor having a Client Money Claim. The Admitted Claims CDD contains similar waivers and releases as contained in the Agreed Claims CDD and referred to at paragraph 64.3 above.

66. From a creditor's perspective, entering into a CDD gave it certainty as to the amount of its claim and, upon the claim becoming an Admitted Claim, pursuant to the terms of the CDD, an entitlement to participate in such dividends as would be paid in the Administration. This in turn facilitated the transfer of the claim to a third party if the creditor wished to do so in order to realise immediate value for its claim.

67. Following their introduction, CDDs remained largely consistent in form but did evolve to some extent over time. It has been asserted by the Wentworth Group that some CDDs had the effect of releasing creditors' claims to Statutory Interest and/or Currency Conversion Claims. Against this, the Senior Creditor Group have asserted that CDDs had no such effect. A template CDD with a Release Clause is at **pages 494 to 526**.

68. The questions as to the impact of Post-Administration Contracts on claims to Statutory Interest and Currency Conversion Claims are at questions 34 to 36 in the Application.

69. A further issue that arises in relation to CDDs is, to the extent that claims to Statutory Interest and/or Currency Conversion Claims are not compromised by the CDD, how such claims are to be determined in circumstances where a CDD encompassed multiple claims (potentially with different original currencies and applicable interest rates) but did not specify how the admitted claim under the CDD related to those claims. This issue is raised at question 37 of the Application.

70. The questions in the Application as to the impact of the Post-Administration Contracts on claims to Statutory Interest and Currency Conversion Claims have significant economic importance for the Administration and LBIE's creditors, because they impact the amount of Statutory Interest and Currency Conversion Claims that LBIE will be required to pay to unsecured creditors and, by extension, the amount of the Surplus (if any) that will remain to pay claims which, in light of the Waterfall Judgment, rank below them. The total value of Currency Conversion Claims could be in excess of £1.3 billion.

(K) OTHER ISSUES

71. A further issue that has been raised by the Senior Creditor Group is whether LBIE creditors are entitled to any compensation in respect of the delay in payment of Statutory Interest, Currency Conversion Claims

and/or other non-provable claims. This issue is raised at question 38 of the Application.

(L) PROPOSED DIRECTIONS

72. It is clear that some of the issues in the Application will require factual and/or expert witness evidence to be adduced. The Joint Administrators are considering with the Respondents how most efficiently such evidence may be adduced. The Joint Administrators will seek to agree appropriate directions with the Respondents ahead of the initial hearing on 25 June 2014.

(M) CONCLUSION

73. For the reasons set out above, the Court is respectfully requested to provide directions for the determination of the issues identified in the Application.

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

Dated 11 June 2014

.....

Anthony Victor Lomas

Party: Applicant
Witness: Anthony Victor Lomas
Statement No: 9
Exhibit: "AVL9"
Date: 11 June 2014

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

EXHIBIT "AVL9" TO NINTH WITNESS STATEMENT OF ANTHONY VICTOR LOMAS

This is the exhibit marked "AVL9" referred to in the Ninth Witness Statement of Anthony Victor Lomas dated 11 June 2014.

Signed .....

Party: Applicant
Witness: Anthony Victor Lomas
Statement No: 9
Exhibit: "AVL9"
Date: 11 June 2014

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
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IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

NINTH WITNESS STATEMENT

OF

ANTHONY VICTOR LOMAS

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