1. Respondent: HUTCHINSON INVESTORS, LLC
2. Name of witness: Mary Nell Browning
3. No. of statement: 2
4. Date: 3 March 2015

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

SECOND WITNESS STATEMENT OF MARY NELL BROWNING

I, **Mary Nell Browning**, consultant to Baupost Capital, LLC (together with the investment entities that it manages) (**Baupost**) of 10 St James Ave, Suite 1700, Boston, MA 02116, United States, will state as follows:

Introduction

1. Since 1 April 2014, I have been a consultant to Baupost where my role includes advising on a significant portfolio of claims against Lehman Brothers International (Europe) (in administration) (**LBIE**) which Hutchinson Investors, L.L.C. (**Hutchinson**) acquired from certain funds managed by my former employer, GLG Partners L.P. (**GLG**). Hutchinson is the third respondent to these proceedings. I make this statement in my capacity as consultant to Baupost and I am duly authorised to do so.

2. I refer to my first witness statement in these proceedings for more details regarding my experience in relation to the LBIE administration. As with my first witness statement, I make this statement based on publicly available information and/or communications by the administrators of LBIE (the **Administrators**) at meetings to which all creditors were invited and not on the basis of any confidential information which was disclosed to me as a member of either of the committees referred to in paragraph 3 of my first witness statement.

3. The purpose of this witness statement is to respond to certain statements made in the seventh witness statement of Steven Anthony Pearson (**Pearson 7**). While there is much in Pearson 7 which appears to be common ground, I am concerned that, in a number of places, Mr Pearson misunderstood what I was saying in my first witness statement (**Browning 1**). I do not intend to address every point made against me by Mr Pearson. Rather, the purpose of this witness statement is to seek to clarify the key points that I wish to make in my evidence.

4. Terms capitalised but not otherwise defined have the meaning given to them in Pearson 7 and Browning 1.

5. I believe the facts set out in this witness statement to be true from my own knowledge and/or on the basis of documents to which I refer, save where I state otherwise. Where I do not derive the facts stated from my own knowledge or from those documents, I state the source of any information and the facts are true to the best of my knowledge and belief.

Purpose of my evidence

6. The key points that I wish to make in my evidence on behalf of CRA signatories such as GLG are that:

   (a) the primary purpose of the CRA was to return trust assets to CRA signatories. Mr Pearson appears to agree with this (see [24] of Pearson 7). In order to do so, it was necessary to quantify the amount of any Net Financial Liabilities owing to LBIE. There were clearly related benefits in the CRA determining the quantum of any Net Financial Claim owed by LBIE to the signatory;

   (b) notwithstanding the fact that the CRA used the concepts of "new obligations" and "Released Claims", the Net Financial Claim was calculated by reference to a signatory's existing contractual entitlements subject to a number of overriding valuation principles (such as the valuation of short and rehypothecated assets as at 12 September 2008) (see [32], [41] and [43] of Browning 1). In other words, the content of the "new" obligation was derived from, informed by, and was intended to reflect the character and economics of, the existing contractual claim unless expressly modified by the terms of the CRA;

(c) the releases in the CRA referred to by Mr Pearson (see for example [35], [71] and [118] of Pearson 7) were not therefore intended to affect the economics arising from the prior contractual relationship unless there were express provisions in the CRA to that effect (for example the overriding valuation methodologies referred to below). Furthermore, it was not necessary for the releases to affect such economics in order for the CRA to achieve its primary objective of returning trust assets and its objective of providing certainty and finality as referred to in [24], [66], [67], [97] and [117] of Pearson 7;

(d) the Net Financial Claim was expressed in USD because this was the obvious choice of currency; not only were the vast majority of trust assets denominated in USD (as referred to in [29] and [75] of Pearson 7) but it was my understanding that the majority of claims against LBIE were already denominated in USD (see [5] and [10] of Browning 1);

(e) otherwise than in the context of the overriding valuation methodologies which were clearly set out in the CRA, there was no reason for the Administrators, when acting in accordance with their duties and the best interests of unsecured creditors generally, to include provisions in the CRA which had the effect of changing the economics arising from the prior contractual relationship (including, for example, any right to contractual interest which was expressly preserved through clause 20.4.7 of the CRA as referred to below); and

(f) there were no communications to creditors that indicated that this would be the effect of their signing up to the CRA.

7. Although Mr Pearson suggests in [115] of Pearson 7 that a number of my observations in Browning 1 are inconsistent with the "factual" account provided by him, it is not clear to me whether Mr Pearson is disputing any of these key points.

Purpose of the CRA

8. Mr Pearson appears to agree that the principal objective of the CRA was to expedite the return of trust assets (see [24] of Pearson 7). To assist in the process for returning trust assets, it was essential that LBIE be able to calculate a client's Net Contractual Position so that any liabilities owed to LBIE could be taken into account when returning trust assets. In support of the view that this was the principal objective of

the CRA, I am aware that certain funds were not able to accede because they did not have trust assets.

9. There were clearly related benefits in the CRA determining the quantum of any Net Financial Claim owed by LBIE to the signatory and I do remember statements (such as the one in the CRA Letter referred to at [97] of Pearson 7) regarding the CRA providing "finality" and "certainty" regarding the financial position between signatories and LBIE. At no stage, however, did I take this as meaning that a signatory would be required to and would be giving up any part of the economic benefits provided for by its existing contractual entitlements unless those entitlements (a) were inconsistent with the overriding valuation methodologies set out in Part VII of the CRA or (b) were expressly covered by the releases in clause 4.2.2. of the CRA. My understanding was supported by paragraph 2.2 of the Reader's Guide which expressly stated that "Financial Contracts that have been closed out will be valued based on the close-out amounts determined in the manner set out in the contracts".

10. It was my understanding that the content of the "new" obligation referred to in the CRA was derived from and informed by the existing contractual claim, and reflected all the characteristics of that claim unless those characteristics were expressly modified by the CRA. It was not, for example, necessary, when seeking to achieve the finality and certainty that the CRA was intended to achieve, for the "new" obligation to reflect different economics compared with the original contractual entitlement (for example, no contractual rate of interest where the original claim carried such a right). The existence of non-provable claims did not stand between LBIE and returning the trust assets to the owners nor did it interfere with the Administrators' ability to determine the quantum of the principal claim. Indeed clause 20.4.7 (*Accrual of interest*) of the CRA expressly preserved post-administration interest pursuant to Rule 2.88 of the Insolvency Rules 1986. I understand that Rule 2.88 is expressed in terms which provide for the payment of interest at the 8% Judgments Rate, or interest at the rate applicable to the debt proved apart from the administration if higher.

Net Financial Claims and scope of CRA releases

11. I do not dispute the statement at [117] of Pearson 7 that the CRA was intended to reflect a compromise and that certain contractual entitlements were modified or released. I remember all of the examples given at [119] of Pearson 7 being clearly

communicated to creditors in the various meetings and circulars regarding the CRA. I do not remember, on the other hand, there being any communications about the CRA having any impact on the economics of the signatory's other contractual entitlements.

12. I also accept that clause 4.2.2 of the CRA made it clear that all claims for consequential loss or economic loss as a result of LBIE returning trust assets via the methodologies in the CRA were released; this was consistent with the principal objective of the CRA which was the return of trust assets.

13. I also remember references, in the meetings and circulars, to the release of liability of the Administrators and the members of the Claim Resolution Agreement Working Group arising in connection with (a) the preparation and negotiation of the CRA and (b) their acts, omissions or defaults pursuant to clause 9 of the CRA (Release of Liability).

14. In response to [120] of Pearson 7, I remember discussions regarding the proposed right to collateralise any Net Financial Liability with, inter alia, any admitted client money claims. The reason for this was because of the provision referred to at [119.1] of Pearson 7, namely the agreement by CRA signatories to pay interest on any Net Financial Liability owed to LBIE, even if the CRA signatory's contract did not so provide. In other words, my memory is that the collateralisation elections were a *quid pro quo* for this particular contractual modification regarding interest on the Net Financial Liability, and not for the signatory releasing the economics associated with other valuable contractual rights.

15. I therefore accept that the CRA did involve the modification of certain contractual rights (as set out above) and this was consistent with the wording in clause 4.4.2 which provided that signatories would have their Released Claims exchanged for (among other things) the right to claim as "new" obligations of LBIE their Net Financial Claims as calculated pursuant to Part VII of the CRA. However, my understanding was that the "new" obligation was calculated by reference to, and therefore derived from and informed by, the signatory's rights under the original Financial Contract. Thus the Net Financial Claim is based on the Close-Out Amount under each Financial Contract. As set out at clause 21.3 of the CRA, Close-Out Amount means:

"in respect of a Financial Contract and each Signatory that is a party to it: (i) a single amount payable by either one of the Company or the relevant Signatory to the other as a result of termination of such Financial Contract as determined in accordance with Clause 20; or (ii) the aggregate of each Close-Out Component in accordance with Clause 21.3."

16. The CRA makes clear that the Contractual Valuation Provisions, which stem from the underlying Financial Contract, determine the Close-Out Amount subject to the application of the Overriding Valuation Provisions. There is nothing in those Overriding Valuation Provisions which suggest that, when calculating the Net Financial Claim, a signatory would be required to or would be giving up the economic benefit represented by any non-provable aspects of the Financial Contract (such as a right to contractual interest). For the reasons given above, when achieving the objectives of the CRA, there was no reason why the "new" obligation under the CRA (being derived from the underlying Financial Contract) should not, save as expressly provided by the CRA, possess all the attendant characteristics flowing from such contractual claim.

Currency

17. Mr Pearson agrees that the proposed Scheme on which the CRA was based was intended to operate in USD (see [74] of Pearson 7). As explained in my first witness statement, this decision made sense to me given that so much of the estate was denominated in USD already, as acknowledged in relation to trust assets by Mr Pearson at [29] and [75]. I note that Mr Pearson does not appear to dispute the analysis regarding LBIE claims in [10] of Browning 1.

18. Mr Pearson also agrees, at [75] and [128], that the CRA required Net Financial Claims to be calculated in USD. At [29] of Pearson 7, this is described as being "*for administrative convenience*" as it minimised the conversion exercise (the majority of trust asset claims being denominated in USD). Each signatory with a Net Financial Claim (in USD) was entitled to prove for that debt and therefore receive a *pro rata* portion of LBIE's general unsecured estate. There was nothing in the CRA (or the communications to creditors about the CRA) which indicated that this dividend in respect of the converted sterling sum reflecting the Net Financial Claim as proved would be a signatory's only entitlement in the context of a surplus if it did not satisfy, in full, the entitlement to be paid in USD arising under the CRA.

19. In [123] and [128] of Pearson 7, Mr Pearson indicates that the CRA did not provide a distribution mechanism in respect of unsecured claims and that the "new" USD claim arising under the CRA would need to be converted into GBP for proof of debt purposes. There was no reason to conclude from this, however, that further distributions through the administration would not follow the normal course. Mr Pearson rightly notes in [128] that the US dollar claims arising under the CRA were converted into sterling for the purpose of distributions "*like any other foreign currency denominated unsecured claim[s] against LBIE*". In the context of a surplus, given that the "new" obligations were denominated in US dollars, I can see no reason why those claims should not give rise to an entitlement to Currency Conversion Claims if the relevant creditors received less, through distributions in the administration, than the USD value of the "new" obligations given that, as Mr Pearson says, the US dollar claim under the CRA functions like any other foreign currency denominated unsecured claim. For the reasons given in Browning 1, in the majority of cases, this would reflect the Currency Conversion Claim that the signatory would have had in any event in respect of its original claim and, in the minority of cases where the claim was not originally denominated in USD, the fact that the signatory would have a Currency Conversion Claim as a result of clause 24.1 of the CRA was simply a necessary consequence of the "administrative convenience" referred to by Mr Pearson and the certainty that the CRA was seeking to achieve.

20. I do not understand Mr Pearson's references in [29] and [129] to the CRA not providing a "hedge" for signatories with USD claims. Mr Pearson appears to be under the impression that I was suggesting that the CRA provided some form of tool for managing currency risk by signatories. This was most definitely not the case. My point was simply that USD was the obvious choice of currency for the CRA for the reasons set out in [9] and [10] of Browning 1. Given that the majority of claims were already denominated in USD, converting Net Financial Claims into USD for the purposes of the CRA had the minimum impact on creditors' original rights to Currency Conversion Claims based on the currency of denomination while also serving the purpose of being convenient for the quantification of the creditors' entitlement to asset returns.

Statement of Truth

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

Signed: .....

Mary Nell Browning

Dated this 3rd day of March 2015

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