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

WATERFALL II APPLICATION

(PART B)

STATEMENT OF AGREED FACTS

ISSUES 34 and 35

Pursuant to the Order of Mr Justice David Richards dated 9 March 2015, the parties agree the facts set out in this document (the "**Statement of Agreed Facts**") for the purposes of the determination of Issues 34 and 35 at the hearing listed to commence on 19 May 2015.

Alleged facts that are disputed by one or more of the parties have been omitted from the Statement of Agreed Facts, irrespective of whether the joint administrators (the "**Joint Administrators**") of Lehman Brothers International (Europe) (in administration) ("**LBIE**") themselves may be in agreement as to the existence of the alleged fact in question.

For the avoidance of doubt, this Statement of Agreed 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.

PART A – General Matters

Background

1. LBIE entered into administration (the "**Administration**") on 15 September 2008 (Lomas 9 at [8]).

2. The initial creditors' meeting was held on 14 November 2008. The meeting voted to form a creditors' committee (Pearson at [14]; [50] and [51]).

3. By late 2009, the Joint Administrators had concluded that they would, in due course, be in a position to make distributions to unsecured creditors from the LBIE estate. On 2 December 2009, the Joint Administrators obtained from the High Court an order to convert the Administration into a Distributing Administration (Lomas 10 at [28]).

4. Thereafter, the Joint Administrators sent to all creditors whose addresses were known to them at that time a notice pursuant to Rule 2.95 informing them that the Joint Administrators proposed to make a distribution to LBIE's unsecured creditors (the "**Distribution Notice**"). A copy of the Distribution Notice was posted on the publicly accessible section of the PwC website on or about 10 December 2009 (Lomas 10 at [29] and Pearson at [101]).

5. The CRA (the genesis of which is explained in Part B below) became effective on 29 December 2009 (Pearson at [108]).

6. From December 2009 onwards, the Joint Administrators encouraged creditors to submit their claims as soon as possible (Lomas 10 at [31]).

7. An online claims portal was launched in July 2010 in order to assist creditors in submitting their claims (the "**2010 Portal**") (Fourth Progress Report, page 28).

8. The first CDD using the original CDD template (the "**Agreed Claims CDD**") was entered into on 30 November 2010 (Lomas 10 at [53]).

9. In April 2011, LBIE devised a CDD template which would operate such that the agreed amount of a claim would become an "Admitted Claim"

immediately upon execution (an "**Admitted Claims CDD**"). The first Admitted Claims CDD was entered into on 28 July 2011 (Lomas 10 at [54]).

10. On 26 November 2012, the Joint Administrators gave notice of their intention to pay a first dividend of 25.2 pence in the pound.

11. On 19 June 2013, the Joint Administrators gave notice of their intention to pay a second dividend of 43.3 pence in the pound.

12. On 21 November 2013, the Joint Administrators gave notice of their intention to pay a third dividend of 23.7 pence in the pound.

13. On 23 April 2014, the Joint Administrators gave notice of their intention to pay a fourth and final dividend of 7.8 pence in the pound (the "**Final Dividend**") that took the cumulative dividends paid to LBIE's admitted unsecured creditors to 100 pence in the pound (Lomas 9 at [25]).

LBIE's Financial Position

14. The Joint Administrators have, throughout the course of the Administration, provided data on the LBIE estate's financial position. In so doing, the Joint Administrators have noted certain limitations and qualifications in relation to this data and cautioned creditors as to the use that should be made of it (Pearson at [89] and [110]).

15. At the times that the CRA became effective and the CDDs were first entered into (i.e. on 29 December 2009 (being the effective date of the CRA), 30 November 2010 (being the date the first Agreed Claims CDD was entered into) and 28 July 2011 (being the date the first Admitted Claims CDD was entered into)) the possibility of a potential surplus of assets in the Administration remaining after payment of 100 pence in the pound in respect of unsecured claims admitted for dividend (the "**Surplus**") was not generally being discussed in the market and had not been anticipated in the Joint Administrators' progress reports (Copley at [18]; Pearson at [33.1]; [33.2]; [113] and Lomas 10 at [66]).

16. From early 2012, the possibility of a Surplus was being discussed in the market (Lomas 10 at [66]).

17. It was not until 12 April 2013, with the publication of the Joint Administrators' Ninth progress report for the period 15 September 2012 to 14 March 2013, that the Joint Administrators first provided illustrative outcome estimates indicating a potential Surplus (Copley at [18] and Pearson [113]).

18. Ordinary unsecured claims against LBIE were trading at the following over-the-counter indicative prices:

    18.1 Less than 25 per cent of par in mid-2009; and

    18.2 Less than 40 per cent of par shortly after the CRA became effective (Pearson at [33.2]).

19. It was not until some point in 2012 that the over-the-counter indicative prices suggested no discount to par (Pearson at [33.2]).

Currency

20. The Joint Administrators' proposals for achieving the purpose of the Administration (as approved by creditors at the initial creditors' meeting on 14 November 2008) (the "**Proposals**") included proposal (xi) that the Joint Administrators would maintain all funds in the estate in the currencies in which assets were realised. Proposal (xi) noted that the Joint Administrators' strategy as regards the selection of an appropriate currency for maintaining estate funds would be determined in consultation with the creditors' committee. On 27 November 2008, a copy of the Proposals was sent to all known creditors of LBIE (Pearson at [50]).

21. On 28 October 2008, the Joint Administrators invited creditors to submit details of their claims on an online portal that had been created by the Joint Administrators. The submission of the creditor's claims was, at that stage, for voting purposes at the initial creditors' meeting only. Claims were required to be entered in US dollars (Pearson at [127]).

22. Creditors were able to submit their claims on the 2010 Portal in any currency. The 2010 Portal would automatically convert, using conversion rates applicable as at the Date of Administration, claims submitted in a foreign currency into sterling. Creditors that had previously submitted

information regarding their claim through the earlier version of the online portal (as referred to in paragraph 21 above) were also required to submit a proof of debt (accompanied, where relevant, by a valuation statement) through the 2010 Portal.

23. Prior to December 2009, the Joint Administrators held asset realisations in multiple currencies (Pearson at [125]).

24. From December 2009 until shortly after 2 August 2010, at which time the conversion process was suspended pending obtaining greater clarity in relation to the extent and status of client money tracing rights into the house estate, the Joint Administrators began to convert foreign currency amounts to sterling (Pearson at [125]).

25. Following obtaining this greater clarity, the Joint Administrators recommenced converting foreign currency amounts to sterling and, by September 2012, the majority of residual foreign currency amounts had been converted to sterling, leaving only certain amounts potentially subject to client money tracing and certain other reserves for amounts not expected to be for the ultimate benefit of the House denominated in their original currencies (Eighth Progress Report, page 6).

26. By 14 September 2013, balances held in foreign currency had reached *de minimis* amounts (Tenth Progress Report, page 36).

27. The majority of claims relating to Trust Assets (as defined in paragraph 29 below) were denominated in US dollars (Pearson at [29]). A claims analysis carried out by the Joint Administrators in the context of the surplus entitlement proposal, a potential compromise solution proposed by the Joint Administrators in March 2014, indicated that 78% by value of the admitted claims and proofs of debt for claims not yet admitted were denominated in US dollars [(Browning 1 at [10])].

[*Wentworth does not dispute the factual accuracy of this paragraph but it objects to the admissibility of Browning 1 at [10] for the purposes of construction.*]

28. Most creditors' original claims are in currencies other than sterling and, since the Date of Administration, most of those other currencies have at various times strengthened against sterling (Copley at [17]).

PART B – The CRA

Background to and development of the CRA

29. Prior to the Administration, LBIE held in its own name or to its order a considerable quantity of securities and cash on trust for clients and other parties (including affiliates) through its prime brokerage and other businesses ("**Trust Assets**") through depositories, exchanges, clearing houses and sub-custodians (Pearson at [10]).

30. After their appointment, the Joint Administrators were under considerable pressure from clients to return Trust Assets as quickly as possible as those assets were, in many cases, critical to the clients' businesses. The Order of the Honourable Mr Justice Blackburne dated 7 October 2008 directed the Joint Administrators to prioritise the return of Trust Assets by implementing certain processes pending the approval by the creditors of the Joint Administrators' proposals for achieving the purpose of the Administration (Pearson at [13]).

31. The return of Trust Assets was identified as a key priority of the Joint Administrators from the early stages of the Administration (Pearson at [45]).

32. The Joint Administrators initially progressed the return of Trust Assets on a bilateral basis with clients claiming particular Trust Assets (Pearson at [15]).

33. In the opinion of the Joint Administrators, the bilateral return process was unsatisfactory because it was time consuming, costly and subject to uncertainties arising from the existence of competing claims to certain Trust Assets as well as from the scope and effectiveness of the undertakings and/or indemnities that LBIE's clients were required to give in order to participate in this process (Pearson at [16]).

34. Therefore, the Joint Administrators began to consider alternatives to the bilateral return process based on a defined series of methodologies for

the valuation of claims and allocation of any stock shortfalls (Pearson at [16] to [19]; [104] to [105]).

35. The form and content of the CRA evolved from a draft scheme of arrangement initially proposed by the Joint Administrators (the "**Draft Scheme**"), which the Court of Appeal ultimately determined could not be promulgated as the High Court did not have the necessary jurisdiction to approve it. As a result of that decision, the Joint Administrators instead focused on developing a consensual, contractual mechanism for returning Trust Assets (Pearson at [26] to [27]).

36. The provisions of the CRA substantially replicated those set out in the briefing note and the short-form version of the explanatory statement prepared by the Joint Administrators in connection with the Draft Scheme (Pearson at [27]).

37. There were numerous communications, meetings and updates between the Joint Administrators and Trust Asset creditors throughout the course of the development of the Draft Scheme, and then the CRA (Pearson at [32]; [36] to [44] and [130]).

38. In the course of its development, the CRA was described as:

    38.1 a mechanism for returning Trust Assets (in the same way as the Draft Scheme would have done), determining the value of a creditor's net financial position with LBIE and speeding up the return of Trust Assets ([Browning 1 at [20]]; Pearson 7 at [60]; First Progress Report, page 34; Exhibit SAP7, page 363 and Exhibit MNB1, page 335);

    38.2 a compromise of claims relating to Trust Assets and financial contracts (Pearson at [98] and [117]; update on the LBIE website dated 24 November 2009 in respect of the CRA and Exhibit SAP7, page 702); and

    38.3 an arrangement which sought so far as possible (i) to achieve finality of dealings with Trust Asset claimants, including their trust and unsecured claims (First Progress Report, page 34); (ii) to determine, quantify and crystallise the value of unsecured claims

[(Ereira 2 at [94])]; (iii) to establish standard methods for the termination and valuation of financial contracts (Exhibit SAP7, page 12); and (iv) to provide finality and certainty regarding the financial position between signatories and LBIE (Pearson at [60]; [67] and [97]).

[*Wentworth does not dispute the factual accuracy of this paragraph but it objects to the admissibility of Browning 1 at [20] and Ereira 2 at [94] for the purposes of construction.*]

39. The CRA was developed in conjunction with a working group including the Joint Administrators and representatives of each of the members of the creditors' committee (Pearson at [32]; [36] and [37]).

40. The CRA was proposed to eligible creditors on 24 November 2009 with the publication of the CRA circular (Lomas 10 at [27] and Pearson at [97]).

41. The CRA was proposed for collective approval and was therefore not subject to negotiation or amendment. However, Trust Asset creditors had notice of and opportunity for questions and answers on the proposed terms of the CRA (Lomas 10 at [27] and Pearson at [130]).

42. The CRA only became effective once a pre-determined approval threshold, which was set at a very high level, had been reached (Lomas 10 at [27] and Pearson at [26]).

Purpose and operation of the CRA

43. The Joint Administrators' principal objective in developing the CRA was to facilitate the return of Trust Assets (by compromising and agreeing all claims relating to Trust Assets and financial contracts with LBIE ("**Financial Contracts**") other than certain specified excluded claims) (Pearson at [24] and [99.3]).

44. It was an integral element of this objective that claimants to Trust Assets would have their unsecured financial claims under their Financial Contracts with LBIE determined i.e. that the Trust Asset claimant's net financial position with LBIE (defined under the CRA as the "**Net Contractual Position**") would be quantified in order to establish whether

there was an amount owing to or from LBIE (Pearson at [21] and [24]). The resolution of the unsecured financial claims of Trust Asset creditors was also an integral element of the Draft Scheme (Pearson at [24]).

45. In order to calculate a client's Net Contractual Position, it was necessary to convert all claims into a single currency. This enabled an account to be taken of all positions and claims arising between LBIE and a CRA signatory (e.g. for set-off purposes) (Pearson at [29]).

46. The Net Contractual Position is calculated by reference to the Contractual Valuation Provisions (as defined in the CRA) subject to a number of Overriding Valuation Provisions (as defined in the CRA) (Pearson at [119.3]).

47. The mechanism by which claims were determined under the CRA (and before it the Draft Scheme) was designed to bring finality (save in respect of certain limited and explicit exceptions for example, client money claims) to the relationship between LBIE and the CRA signatory (Pearson at [27] and [97]).

48. Neither the Draft Scheme nor the CRA contained a distribution mechanism in respect of a signatory's ordinary, unsecured claim (Pearson at [27]).

Currency

49. The CRA required conversion of all claims into a single currency for the purposes of calculating whether the accession threshold for the CRA had been reached and to enable a CRA signatory's Net Contractual Position to be calculated. US dollars was chosen as this single currency for administrative convenience (Pearson at [29]; [35.10]; [75] and [129]). Prior to administration, LBIE's functional currency (i.e. LBIE's operational currency) had been US dollars, and this was also the currency in which its assets were principally denominated [(Browning 1 at [10])].

[*Wentworth does not dispute the factual accuracy of this paragraph but it objects to the admissibility of Browning 1 at [10] for the purposes of construction.*]

PART C – CDDs

Background to Project Canada

50. At the time of the publication of the Joint Administrators' third progress report (i.e. 14 April 2010), the Joint Administrators envisaged that approximately 4,500 counterparties were likely to be creditors of LBIE (Lomas 10 at [32]).

51. The majority of LBIE's unsecured creditors have claims arising under complex financial trading contracts (Lomas 10 at [33]).

52. The "Consensual Approach" (known internally within LBIE as Project Canada) was described to creditors in the Joint Administrators' Fourth Progress Report dated 14 October 2010 (section 6.1). This approach was developed in consultation with the Unsecured Creditors' Resolution Working Group, which included members of the Creditors' Committee (Lomas 10 at [42]).

53. One of the objectives of Project Canada was to simplify and accelerate the claims determination and distribution process by developing and implementing an alternative framework to the standard insolvency proving regime (Lomas 10 at [34] and [42]). The Administrators intended to use CDDs, amongst other things, to streamline the process of creditors agreeing the valuation of their claim amounts, to enable them to make distributions in respect of these claims (Lomas 9 at [61]; Lomas 10 at [47-48]; and Fourth Progress Report, page 29).

54. Project Canada proceeded on the basis that LBIE would offer a creditor a single number representing LBIE's determination of the creditor's claim taking account of the positions under all Financial Contracts between LBIE and the creditor (the "**LBIE Determination**") (Lomas 10 at [44]). The LBIE Determination was usually made in the currency of a creditor's entitlement (to the extent the creditor's underlying entitlements were denominated in more than one currency, in the currency in which the largest element of the aggregate claim was denominated) [(Garvey 3 at [20])].

[*Wentworth does not dispute the factual accuracy of this paragraph but it objects to the relevance of Garvey 3 at [20].*]

55. LBIE formally commenced the communication of LBIE Determinations to creditors in November 2010 (Lomas 10 at [46]).

56. Creditors were advised that the LBIE Determination was not intended to be a matter for negotiation and that they were entitled either to accept or reject it. If the LBIE Determination was accepted, the agreement would be formalised in a CDD (provided the other terms thereof were accepted by the creditor). Creditors were also advised that if the LBIE Determination was rejected then they would be able to negotiate their claims on a bilateral basis at a later stage (Lomas 10 at [45]), albeit this alternative would have taken significant time to conclude and, in exceptional cases, may have required court adjudication (Fourth Progress Report, page 29).

57. The LBIE Determination was presented to the creditor as a single number. No breakdown of the claim amount recorded in each CDD was agreed as between LBIE and the relevant creditor; neither was the value attributed by LBIE to individual Financial Contracts or trading positions usually shared with the creditor (Lomas 11 at [68]).

58. It was generally the case that LBIE would communicate the LBIE Determination in the currency of the creditor's underlying entitlement (to the extent the creditor's underlying entitlements were denominated in more than one currency, in the currency in which the largest element of the aggregate claim was denominated). Creditors were also informed that this foreign currency amount would ultimately need to be converted to sterling. At the same time as an offer was made orally to creditors, they would typically receive a draft CDD by email, in which the amount for which the claim was to be agreed or admitted was left blank [(Garvey 3 at [20])].

[*Wentworth does not dispute the factual accuracy of this paragraph but it objects to the relevance of Garvey 3 at [20].*]

59. The Joint Administrators have sought, so far as reasonably possible, to ensure that CDDs remain relatively standardised, although they have evolved to some extent over time (Lomas 10 at [57]).

60. In particular, the Joint Administrators have made global revisions to the CDD templates from time to time in circumstances where a particular amendment was being commonly accepted by LBIE (Lomas 10 at [58]).

61. As at July 2014, over 1,500 CDDs had been entered into with approximately 1,180 different counterparties. For each of the CDDs entered into, there are typically, in addition to the final CDD itself, drafts of the deed exchanged between the parties as well as correspondence and other related documentation (Lomas 10 at [8] and [10]).

Purpose and operation of the CDDs

62. The CDDs were (and continue, on occasion, to be) used for the purposes of agreeing the amount of unsecured and client money claims and documenting releases, ongoing rights and obligations of LBIE and the creditor (Lomas 10 at [47]).

63. The primary purpose of the CDDs was stated by the Joint Administrators to be to provide an efficient process for agreeing the amount of a creditor's claim such that distributions could be expedited (Lomas 10 at [48]).

64. Part of this purpose, from the Joint Administrators' perspective, was served by ensuring that, once a claim amount (whether an "Agreed Claim" or "Admitted Claim") had been agreed, it could not subsequently be reopened by the creditor (Lomas 10 at [48]).

65. Entering into a CDD gave a creditor 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 (Lomas 10 at [48]).

66. The CDDs contained a transfer notice mechanism that ensured that in the event that the creditor wanted to sell its claim both the creditor and the Joint Administrators had a defined process by which the claim assignment would be acknowledged by LBIE. The transfer notice has

become widely recognised in the market as the accepted procedure for LBIE acknowledging the assignment of claims (Lomas 10 at [48] and [63]).

The Agreed Claims CDD

67. In August 2010, the Court of Appeal delivered a judgment in respect of an application made by the Joint Administrators in relation to pre-Administration client money (the "**Client Money Appeal Judgment**"). The Client Money Appeal Judgment created considerable uncertainty as to the existence and scope of pre-Administration client money entitlements ("**Client Money Entitlements**") (Lomas 10 at [38] to [39]).

68. The Agreed Claims CDD accommodated this uncertainty in relation to Client Money Entitlements by agreeing the amount of a creditor's claim but leaving for a later determination or agreement whether the claim constituted a Client Money Claim (as defined in the Agreed Claims CDD) or an unsecured creditor claim (or a combination of the two). This enabled the claims determination process to proceed where, in the absence of such a structure creating optionality, the Joint Administrators and the creditors would have been unable to proceed until there was greater certainty regarding the extent of Client Money Entitlements (whether as a result of court determination or otherwise) (Lomas 10 at 49)].

69. The original Agreed Claims CDD was designed to be used in situations where the relationship between the creditor and LBIE concerned a single product, a single currency and no claims to Trust Assets (Lomas 10 at [53]).

70. The Agreed Claims CDD provided: (i) for an "Agreed Claim" in the amount agreed between LBIE and the creditor; (ii) for the "Agreed Claim" to become an "Admitted Claim", admitted for unsecured dividends in the Administration, upon either: (a) determination by LBIE of the creditor's Client Money Entitlements and distributions being made from the client money pool (with the "Admitted Claim" being the amount of the "Agreed Claim" less the amount of such distributions); or (b) 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 its Client Money

Entitlements; and (iii) for waivers and releases designed to give LBIE and the Joint Administrators certainty in respect of the creditor's claims so as to facilitate interim distributions (Lomas 10 at [50]).

71. LBIE produced template supplemental deeds (each a "**Client Money Supplemental Deed**") which enabled a creditor to release or assign its Client Money Entitlements in order to secure an "Admitted Claim" against LBIE, which claim would be admitted for dividends in the Administration. The first Client Money Supplemental Deed was entered into on 21 June 2011 (Lomas 10 at [52]).

72. The executed Agreed Claims CDDs are predominantly denominated in a foreign currency ("**Foreign Currency Agreed Claims CDDs**") and, less frequently, in sterling.

73. Foreign Currency Agreed Claims CDDs are denominated in the currency of the underlying contractual claim(s) or, in circumstances where there were underlying contractual claims denominated in more than one foreign currency, in the currency in which the predominant element of the aggregate claim was denominated. In the event that the creditor is a CRA signatory, the Foreign Currency Agreed Claims CDD is denominated in US dollars.

The Admitted Claims CDD

74. In April 2011, LBIE devised the Admitted Claims CDD template. The Admitted Claims CDD was originally used in circumstances where there was little or no possibility of the creditor having entitlements to client money. The Admitted Claims CDDs were all Sterling CDDs (Lomas 10 at [54]).

75. 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 pursuant to rule 2.86(1) and express the amount of the creditor's Admitted Claim in the Admitted Claims CDD in sterling [(Garvey 3 at [20] and [21])].

[*Wentworth does not dispute the factual accuracy of this paragraph but it objects to the relevance of Garvey 3 at [20] and [21].*]

76. There were periods in the Administration during which both Agreed Claims CDDs and Admitted Claims CDDs were in use (Copley at [30]).

CDDs in relation to Trust Assets

77. The Joint Administrators developed a number of CDDs specifically for creditors (both CRA signatories and non-CRA signatories) with claims to Trust Assets ("**Trust CDDs**"). The Trust CDDs contain either release clauses similar to the Release Clause (as defined in paragraph 81 below) or more narrow release provisions whereby particular types of claims are preserved for future determination or agreement. The first occasion a Trust CDD was entered into by a CRA signatory was 12 January 2012. The first occasion a Trust CDD was entered into by a non-CRA signatory was 22 February 2012 (Lomas 10 at [64]).

78. It was not strictly necessary for the CRA Signatories to enter into CDDs in order to agree and admit their unsecured claims (as the CRA was intended to be a complete mechanism for the resolution of their claims) but LBIE requested that creditors did so where they reached agreement with LBIE as to the amount of their claim, primarily for the reasons outlined in the following paragraph (Lomas 10 at [63]).

79. A CDD is generally considered by the Joint Administrators to be a more straightforward and less time-consuming way of documenting the unsecured claim than issuing the various notices required under the CRA. The creditors could also transfer their claims pursuant to the transfer notice appended to the CDD (Lomas 10 at [63]).

80. Some creditors who had entered into a Trust CDD with a narrower release clause (i.e. one which preserved certain claims that were outstanding at the time the Trust CDD was executed) subsequently entered into further CDDs ("**Additional Tiered CDDs**") in order to admit or agree all or part of their previously preserved claims (such as asset shortfall claims and/or claims relating to trades pending at the Date of Administration). The first Additional Tiered CDD was entered into on 31 May 2013 (Lomas 10 at [64] and Lomas 11 at [65]).

The Release Clause

81. A broad release provision (the "**Release Clause**") was included in the Agreed Claims CDDs and the Admitted Claims CDDs (Lomas 10 at [59]).

82. The Release Clause is in materially the same form in each of the different forms of CDD save for the Trust CDDs (Lomas 10 at [61]).

CDD Creditor Interaction

83. When the Joint Administrators provided creditors with a draft CDD for their consideration, it was usual practice that the creditor received a standard form covering email. The precise wording of this email evolved over time but generally highlighted that (Lomas 10 at [56]):

    83.1 the terms of the CDD, once executed, would establish the agreed claim amount which the counterparty would have against LBIE (Lomas 10 at [56.1]);

    83.2 the counterparty should take independent professional advice on the contents of the deed before executing it (Lomas 10 at [56.2]); and

    83.3 the terms of the CDD were intended to be non-negotiable (Lomas 10 at [56.3]).

84. 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]).

Statutory Interest

85. Prior to 2012, the various CDD templates did not contain an express reference to Statutory Interest. The first CDD incorporating an express reference to Statutory Interest was executed on 28 June 2012. The first Client Money Supplemental Deed incorporating an express reference to Statutory Interest was executed on 25 September 2012 (Lomas 10 at [66] and [68]).

86. In early 2012, the possibility of a Surplus was being discussed in the market and this triggered queries from certain counterparties as to the

impact of the Release Clause on any entitlement they may have to Statutory Interest (Lomas 10 at [66]).

87. In August 2012, the Joint Administrators decided that the suite of CDD templates should be revised in order to include standard form language dealing with Statutory Interest (Lomas 10 at [70]).

88. Such language was subsequently agreed by the Joint Administrators in the form set out below (the "**Statutory Interest Language**") and was incorporated in the global suite of CDD templates in September 2012 with the effect that CDDs executed after this date generally contain the Statutory Interest Language:

> *"For the avoidance of doubt, this Deed shall not prejudice, affect or restrict (and entry into this Deed is not intended to be, and shall not be construed as, an election of remedy or a waiver of limitation of) any rights or claims that the Creditor may have for or in respect of interest under rules 2.88(7) to 2.88(9) (inclusive) of the Insolvency Rules or section 189 of the Insolvency Act"* (Lomas 10 at [70]).

89. The Client Money Supplemental Deeds were similarly updated in early September 2012 to include the following language in relation to Statutory Interest (the "**CM Statutory Interest Language**"):

> *"For the avoidance of doubt, this Deed and the CDD[s] shall not prejudice, affect or restrict (and entry into this Deed is not intended to be, and shall not be construed as, an election of remedy or a waiver or limitation of) any rights or claims that the Creditor may have for or in respect of interest on its Admitted Claims (if any) under rules 2.88(7) to 2.88(9) (inclusive) of the Insolvency Rules or section 189 of the Insolvency Act."* (Lomas 10 at [73])

Currency Conversion Claims

90. In the Administration, the concept of Currency Conversion Claims was first raised with the Joint Administrators by a creditor (Elliott Management Corporation) in the context of the Waterfall I Application in or around

March 2013. At that point in time, the various CDD templates did not contain a reference to Currency Conversion Claims. The first CDD incorporating an express reference to Currency Conversion Claims was executed on 31 October 2013 (Copley at [19]).

91. In mid-February 2014 the Joint Administrators updated the CDD template to contain wording (the "**CCC Language**") in the following form:

> *"Nothing in this Deed shall (i) prevent the Creditor from asserting a Currency Conversion Claim; (ii) operate as a discharge or release of a Currency Conversion Claim if any such claim exists; or (iii) constitute an acknowledgement by the Company of the existence (as a matter of law or fact) of any Currency Conversion Claim"* (Lomas 10 at [78]).

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ISSUES 34 and 35

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