

**First Respondent**  
**T Thomas**  
**First**  
**TT1**  
**11 August 2017**

**No. 7942 of 2008 / CR-2008-000012**

**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**

**BETWEEN:**

**(1) ANTHONY VICTOR LOMAS**  
**(2) STEVEN ANTHONY PEARSON**  
**(3) RUSSELL DOWNS**  
**(4) JULIAN GUY PARR**

**(in their capacity as the joint administrators of the above-named company)**

**Applicants**

**-and-**

**(1) BARCLAYS CAPITAL INC.**  
**(2) WENTWORTH SONS SUB-DEBT SARL**

**Respondents**

---

**WITNESS STATEMENT OF TODD THOMAS**

---

I, Todd Thomas, Partner of Boies Schiller Flexner LLP of 401 East Las Olas Blvd. Suite 1200 Fort Lauderdale, FL 33301 will say as follows:

1. I am a Partner of the firm Boies Schiller Flexner LLP (together with Boies Schiller Flexner (UK) LLP (“**BSF**”)), which acts for the First Respondent Barclays Capital Inc. (“**Barclays**”) in these proceedings (the “**Proceedings**”). I am an attorney qualified in Florida since 1993 and in the District of Columbia since 1995. I have acted for Barclays in respect of the facts underlying these proceedings since 2009. I am duly authorised to make this witness statement on behalf of Barclays.

2. I make this witness statement in support of Barclays' position that: (a) it presently has two co-existing claims, namely an unsecured claim and a client money claim; (b) that it has a right to elect to pursue either of those claims to the exclusion of the other; and (c) that, if it elects to pursue its unsecured claim, it is entitled to statutory interest on the full amount of that claim.
3. In this witness statement, I address the following matters:
  - (a) The acquisition by Barclays of certain assets from LBI in September 2008 (the "**Asset Sale**").
  - (b) Litigation between Barclays and LBI as to the scope of the Asset Sale.
  - (c) The LBI/LBIE Settlement (as defined below).
  - (d) The conclusion of the litigation between Barclays and LBI.
  - (e) The LBI/Barclays Settlement (as defined below).
4. There is now shown to me a bundle of copy documents marked "**TT1**" to which I refer in this statement by page numbers in square brackets.
5. Save where otherwise stated, the facts and matters contained in this witness statement are based upon my own knowledge and experience and are true to the best of my knowledge and belief.
6. Except where otherwise stated, capitalised terms used in this witness statement but not otherwise defined have the meaning given to them in the Application, the tenth witness statement of Russell Downs ("**Downs 10**") and Barclays' Position Paper dated 5 May 2017.
7. Nothing in this witness statement is intended to constitute a waiver of privilege.

**I. EXECUTIVE SUMMARY**

8. In this witness statement, I will address the key aspects of the factual background to Barclays' claim and the reasons why this gives rise to an entitlement to elect to pursue an unsecured claim and receive statutory interest

on the full amount of that unsecured claim (if it so elects). Whilst the legal arguments will be developed in submissions, in summary:

- (a) Barclays' claims arise as a result of its purchase of certain assets from LBI in a transaction designed, *inter alia*, to preserve value and avoid destabilisation arising in the context of and as a result of the Lehman Brothers insolvency in 2008.
- (b) Reflecting the considerable pressure under which the purchase was completed (and the complexities of that purchase), litigation subsequently ensued before the US Courts as to exact scope of the assets that Barclays had purchased from LBI.
- (c) Whilst that litigation was ongoing, LBI and LBIE entered into a settlement of their inter-company claims. The fact of and terms of that settlement are relevant to these proceedings only to the extent that they specifically carved out amounts in respect of assets which were the subject of the ongoing litigation between Barclays and LBI, because it had not yet been determined whether LBIE owed those amounts to Barclays or to LBI. This was achieved by way of a "Dedicated Reserve" in which US\$777 million was placed (this amount being calculated by way of a reconciliation exercise which Barclays did not participate in). In circumstances where (as was ultimately the case) it was determined that Barclays was the owner of the relevant assets, the terms of the settlement agreed between LBI and LBIE provided for LBIE to pay Barclays the relevant amount (and in such case for LBI to reimburse LBIE for up to US\$777 million of any payment made by LBIE to Barclays), or for LBI to make payment to Barclays from the Dedicated Reserve.
- (d) After a series of decisions in Barclays' favour in its litigation with LBI, Barclays and LBI entered into a settlement in respect of that litigation. Lawyers for Barclays and LBI negotiated the terms of this settlement, which was to be approved by the Bankruptcy Court of Southern District of New York (the "**SDNY Bankruptcy Court**") as part of LBI's ongoing bankruptcy proceedings. LBIE participated in this process, directly

discussing the terms of the settlement with my firm and the lawyers for LBI. Following these various negotiations and discussions, the final terms of the settlement between Barclays and LBI provided that Barclays was to receive the US\$777 million from LBI and that nothing waived, released or reduced its claim for interest (or LBIE's defenses thereto). This language was agreed at a time when it was clear that statutory interest was likely to be distributed to LBIE's creditors (because there was a substantial surplus in the estate).

(e) However, the Joint Administrators of LBIE (the "**LBIE Administrators**") now seek to argue – against the clear words of the settlement between Barclays and LBI, which LBIE expressly agreed and consented to, and the understanding of the parties at the time – that Barclays is not entitled to pursue its claim for statutory interest on the amount of US\$777 million.

9. In addressing these issues, I set out the background to and detail of the negotiations between the various parties which resulted in the settlement between LBI and Barclays. Whilst (as will be expanded in submissions and expert evidence), Barclays' primary position is that the wording of the settlement was, and is, clear and unambiguous, I include these points in the event that the Court does consider them relevant (and as Barclays reasonably relied on certain representations in this background, as set out below). I understand it will be a matter for submission and/or expert evidence as to whether this extrinsic evidence is admissible.

## **II. THE ASSET SALE**

10. The ultimate background to this dispute is the Asset Sale in September 2008. As set out above, I have acted for Barclays, a long-standing client of my firm, in respect of this dispute since 2009.

11. This acquisition was completed on 22 September 2008, one week after Lehman Brothers Holdings Inc. ("**LBHI**"), LBI's parent company, filed for bankruptcy. The bankruptcy of LBHI (*In re Lehman Brothers Holdings Inc.*,

445 B.R. 143, 148-49 (Bankr. S.D.N.Y. 2011) (“*In re Lehman*”) was the largest bankruptcy filing in U.S. history and is recognized to have triggered the global economic crisis.

12. Prior to the collapse of the Lehman Brothers Group, LBI operated an extensive, worldwide exchange-traded derivatives business (the “**ETD Business**”). LBIE was LBI’s European broker and custodian, through which LBI effected trades for itself as well as for customers wishing to trade in, among other things, exchange-traded derivatives in Europe and Asia (the “**ETD Trades**”). LBI, in return, also carried out trades for LBIE and for customers of LBIE who wished to transact in exchange-traded derivatives in the United States.
13. On 15 September 2008, the balance of the ETD Trades resulted in a net amount being owed by LBIE to LBI (“**LBIE’s ETD Trade Liability**”). This amount represented monies which had been provided to LBIE by LBI for trading both on behalf of LBI itself and on behalf of LBI’s clients as well as the proceeds of such trading.
14. On 16 September 2008, Barclays and LBI entered into the Asset Sale by way of an Asset Purchase Agreement (the “**APA**”), as subsequently amended by the First Amendment and the Clarification Letter [**Exhibit to Downs 10, 1–69**]. The Asset Sale was approved by the SDNY Bankruptcy Court on 19 September 2008.
15. The Asset Sale – a very complex transaction conducted under significant time pressure – was of considerable significance in preserving the value in LBI and in avoiding any further destabilisation of the United States economy as a result of the collapse of the Lehman Brothers Group.
16. The consideration provided by Barclays for the acquired assets was approximately US\$50 billion in cash and an agreement that Barclays would assume certain specifically enumerated liabilities of LBI. The Asset Sale was acknowledged to be perhaps the only alternative to a forced liquidation, which would have been disastrous for LBI, LBHI and their creditors and would have

had serious economic consequences. Indeed, the U.S. Court of Appeals for the Second Circuit (the “**Second Circuit**”) has explained that:

*“Both government regulators and Lehman alike desired, and achieved, an emergency sale of LBI to Barclays Capital Inc. (“Barclays”) pursuant to Section 363 of the Bankruptcy Code, 11 U.S.C. § 363 (the “Sale” or “Asset Sale”). The Sale was the ‘largest, most expedited and probably the most dramatic asset sale that has ever occurred in bankruptcy history . . . .’ In re Lehman Bros. Holding Inc., 445 B.R. 143, 148-49 (Bankr. S.D.N.Y. 2011). The sale of Lehman’s businesses as a going concern saved thousands of jobs and avoided losses estimated to be in “the hundreds of billions of dollars.*

*The Sale was also understood as a tremendous risk for Barclays. However, as the bankruptcy court later stated, ‘the overall transaction with Barclays . . . provided the means for the most favorable disposition of these assets with the least amount of risk.’ Id. at 157. It was the best, and perhaps the only, alternative to a huge economic loss.” [In re Lehman, 761 F.3d at 306]*

### **III. THE SALE ORDER LITIGATION**

17. Following the Asset Sale, a dispute arose between Barclays and LBI as to the scope of the Asset Sale, including specifically whether Barclays had acquired certain assets (the “**Margin Assets**”) from LBI under the APA. The disputed Margin Assets included LBIE’s ETD Trade Liability. It was Barclays’ position that it had acquired LBIE’s ETD Trade Liability from LBI under the APA, and that this included LBI’s rights against LBIE both in the form of an unsecured claim in the LBIE administration (the “**Unsecured Claim**”) and as a beneficiary of the LBIE client money trust under the UK CASS 7 Rules (the “**Client Money Claim**”).

18. In September 2009, proceedings were commenced in the SDNY Bankruptcy Court to resolve, *inter alia*, the question as to which of LBI or Barclays owned

the Margin Assets, including LBIE's ETD Trade Liability (the "**Sale Order Litigation**").

#### **IV. THE LBI/LBIE SETTLEMENT**

19. In April 2013, while the Sale Order Litigation was ongoing, LBI and LBIE entered into a settlement whereby LBI and LBIE settled all of their inter-company claims (the "**LBI/LBIE Settlement**").

20. The LBI/LBIE Settlement covered numerous open positions and issues between the estates. It also dealt with LBIE's ETD Trade Liability, because the rightful owner of this claim into the LBIE estate (be it Barclays or LBI) had not yet been determined in the Sale Order Litigation.

21. I understand that LBI and LBIE sought to deal with LBIE's ETD Trade Liability in the LBI/LBIE Settlement as follows:

(a) LBI and LBIE conducted a reconciliation exercise (which Barclays had no involvement in) as to the value of LBIE's ETD Trade Liability, determining this value to be approximately US\$777 million.

(b) LBIE therefore allocated US\$777 million to LBI in respect of LBIE's ETD Trade Liability.

(c) However, because the rightful owner of LBIE's ETD Trade Liability had yet to be determined by the courts, the LBI/LBIE Settlement made provision for the possibility that the US\$777 million might in fact be owed to Barclays rather than to LBI (as was always Barclays' position and as ultimately proved to be the case) by requiring LBI to hold that amount in a reserve (the "**Dedicated Reserve**") pending resolution of the Sale Order Litigation. If, at the end of the Sale Order Litigation, the courts were to determine that LBI was the rightful owner of LBIE's ETD Trade Liability, then LBI was entitled to release the Dedicated Reserve and keep the US\$777 million: LBI/LBIE Settlement, Art 10.01(b) [**Exhibit to Downs 10, 127**]. If, however, the courts determined that Barclays had acquired LBIE's ETD Trade Liability under the APA (as

Barclays contended), then the LBI/LBIE Settlement provided that LBI was permitted (but not required) to pay the US\$777 million from the Dedicated Reserve on to Barclays: LBI/LBIE Settlement, Art 10.02 [Exhibit to Downs 10, 128].

(d) The LBI/LBIE Settlement expressly dealt with the effect that payment of the US\$777 million from the Dedicated Reserve to Barclays was intended to have on LBIE. Under Art 10.06(c), any payment from the Dedicated Reserve to Barclays would have the effect of reducing the “*Barclays LBIE ETD Claim Maximum Liability*”: LBI/LBIE Settlement, Art 10.06(c) [Exhibit to Downs 10, 131–132]. In this regard:

(i) “*Barclays LBIE ETD Claim Maximum Liability*” was defined under the LBI/LBIE Settlement (Annex A to the LBI/LBIE Settlement (“*Definitions*”)) [Exhibit to Downs 10, 163] as:

“*[T]he maximum aggregate undischarged Liability (including whether potential or contingent) of LBIE (in its individual capacity and/or as LBIE Client Money Trustee) to Barclays with respect to the Barclays LBIE ETD Claims [...]*”.

(ii) “*Barclays LBIE ETD Claim*” was defined (Annex A to the LBI/LBIE Settlement (“*Definitions*”)) [Exhibit to Downs 10, 163] to mean:

“*(i) the Claim asserted by Barclays against LBIE in respect of the LBI/LBIE ETD Accounts as a contingent unsecured claim in the Barclays LBIE Proof of Debt, or (ii) any Barclays LBIE Client Money Claim, in the case of each of (i) and (ii), to the extent (and only to the extent) such Claim constitutes a Barclays ETD Claim.*”

(e) The LBI/LBIE Settlement also made provision for LBIE to make direct payment to Barclays of US\$777 million (rather than from the Dedicated Reserve), in circumstances where Barclays was determined to be the rightful owner of LBIE’s ETD Trade Liability. In these circumstances, the mechanism put in place between LBI and LBIE was for LBI to reimburse LBIE from the Dedicated Reserve up to that same amount: LBI/LBIE



Settlement, Art 10.08 [**Exhibit to Downs 10, 134–137**]. The LBIE Administrators referred to this as an “*indemnity ... provided by LBI*”, the “*\$777m dedicated LBIE reserve/indemnity*” and the “*LBI indemnity payment*” on several occasions from October 2013 to as recently as April 2016. See: Tenth Progress Report, dated 11 October 2013, p.18 [TT1/2]; Eleventh Progress Report, dated 11 April 2014, p.17 [TT1/4]; Twelfth Progress Report, dated 10 October 2014, p.14 [TT1/6]; Thirteenth Progress Report, dated 10 April 2015, pp.5, 14, 19 [TT1/8-10]; Fourteenth Progress Report, dated 12 October 2015, p.30 [TT1/12]; Fifteenth Progress Report, dated 12 April 2016, p.10 [TT1/14].

22. The LBI/LBIE Settlement was thus not prescriptive as to whether, in the event that Barclays was determined as the rightful owner of LBIE’s ETD Trade Liability, Barclays should recover these amounts from the Dedicated Reserve or directly from LBIE. Both options were provided for under the LBI/LBIE Settlement, with the terms of the LBI/LBIE Settlement operating to mean that, in either case, the net result was that LBIE would pay LBIE’s ETD Trade Liability, either directly or through LBI, to Barclays, but removing the risk of double recovery/liability – i.e. providing that LBIE would not pay twice in respect of the same liability.

23. Whilst the terms of the LBI/LBIE Settlement fixed the amount paid into the Dedicated Reserve at US\$777 million, a subsequent reconciliation exercise (this time involving Barclays) found there to have been an error in the first valuation, such that the actual value of LBIE’s ETD Trade Liability was, in fact, approximately US\$930 million (see Downs 10 at [49]).

## V. CONCLUSION OF THE SALE ORDER LITIGATION

24. On 22 February 2011, the SDNY Bankruptcy Court awarded the Margin Assets, including LBIE’s ETD Trade Liability, to LBI. On appeal, however, the U.S. District Court for the Southern District of New York (the “**SDNY Court**”) reversed the SDNY Bankruptcy Court’s decision, and on 16 July 2012 issued a decision awarding the Margin Assets to Barclays.

25. On 26 July 2012, Barclays filed its Proof of Debt in the LBIE administration, which included the value of LBIE's ETD Trade Liability.
26. LBI appealed against the SDNY Court's judgment to the Second Circuit. On 5 August 2014, the Second Circuit affirmed the SDNY Court's judgment confirming Barclays' ownership of the Margin Assets. LBI subsequently petitioned the U.S. Supreme Court for a writ of certiorari, but this petition was denied by the Supreme Court on 4 May 2015.
27. Whilst this Supreme Court decision concluded (in Barclays' favour) Barclays' dispute with LBI as to the ownership of the Margin Assets (including LBIE's ETD Trade Liability), litigation continued in the SDNY Court as to what the Margin Assets actually comprised, with the LBI Trustee seeking to exclude certain assets from the definition of Margin Assets. In an April 2015 ruling, the SDNY Court found in Barclays' favour, holding that "*Barclays is entitled to all Margin Assets*": *In re Lehman* 2015 WL 1822646 at p.8 (emphasis added). This decision was able to be appealed by the LBI Trustee.
28. Faced with the prospect of further appeals by the LBI Trustee in this latest dispute and in order to avoid further litigation, Barclays entered into settlement discussions with LBI in May 2015.

## **VI. THE LBI/BARCLAYS SETTLEMENT**

29. The discussions which ultimately led to a settlement between LBI and Barclays (the "**LBI/Barclays Settlement**") took place in May and June 2015. The negotiations were conducted through the parties' respective attorneys. LBI was represented by Hughes Hubbard. Myself and BSF partner Tricia Bloomer were closely involved in the discussions on behalf of Barclays. As far as I am aware, there were no principal-to-principal discussions.
30. Barclays' position is that the meaning and effect of the LBI/Barclays Settlement is clear on its face. However, to the extent that it is determined as a matter of expert evidence and/or argument that the background to the negotiations of the LBI/Barclays Settlement, including previous drafts, is relevant and admissible, I include it here to assist the Court. I also include this

as Barclays reasonably relied on certain representations in this background, as set out below.

31. As part of the settlement discussions, it was agreed in principle that Barclays would receive the amounts in the Dedicated Reserve. As a consequence, there were discussions as to how this would impact Barclays' claims against LBIE. On a telephone conference on 22 May 2015 attended by me and Tricia Bloomer (of BSF, on behalf of Barclays) and Sam McCoubrey (of Hughes Hubbard, on behalf of the LBI Trustee), it was made clear that any settlement agreement would have to explicitly provide that once Barclays was paid the US\$777 million from the Dedicated Reserve, Barclays would not seek the same amount by way of its claim into the LBIE estate. As well as confirming that Barclays would not seek to double-recover, the purpose of this was to ensure that LBI would get credit for having paid the US\$777 million from the Dedicated Reserve under the LBI/LBIE Settlement Agreement. Barclays did not, of course, raise any objection to such a provision.
32. LBI and Barclays reached agreement in principle on the terms of the LBI/Barclays Settlement later that day. Subsequently, on 22 May 2015, Mr McCoubrey wrote to BSF to reiterate this point: *"To confirm, below are the terms of our agreement in principle, using whole numbers and subject to documentation in a stipulation that we will present to the Bankruptcy Court (of course, both parties reserve their rights until the final documentation is executed)."* [TT1/15-16]. Amongst the terms of this "agreement in principle" was that *"The Trustee will pay Barclays \$777 million in respect of Margin Assets that were held at LBIE, by which amount Barclays shall reduce any recovery Barclays seeks against LBIE in relation to the Margin Assets."* [TT1/15-16]
33. On 27 May 2015, Hughes Hubbard for the LBI Trustee circulated an initial draft of the written settlement agreement (the "**Stipulation**"), which included the following provision at paragraph 5 [TT1/21]:

*"Within five days of the Effective Date, the Trustee shall pay Barclays \$777,000,000 out of the "Dedicated Reserve" (as defined*

*in the LBIE Settlement Agreement) in respect of the Margin Assets that were held by LBIE. The Trustee shall not pay any interest on this amount. Barclays consents and agrees that upon payment by the Trustee of the \$777,000,000, the maximum aggregate amount that BCI and/or Barclays Bank may recover from LBIE and/or the trustee of the UK statutory trust of client money arising under CASS 7 in relation to LBIE, in respect of the Barclays LBIE ETD Claims shall automatically, unconditionally, and irrevocably be reduced by \$777,000,000.”*

34. On 28 May 2015, Mr McCoubrey informed me and Tricia Bloomer on a call that: his firm had discussed the proposed settlement with the legal representatives for LBIE; that LBIE had not raised any objection to date; and that it appeared that LBIE’s only concern was in ensuring that payment of the US\$777 million from the Dedicated Reserve reduced the amount Barclays could recover from LBIE by the same sum – i.e. that Barclays could not double-recover the US\$777 million from LBIE.

35. Later on the same day, BSF, on behalf of Barclays, proposed the addition of the following language at the end of paragraph 5 of the draft Stipulation (set out at paragraph 33 above): *“however, neither this nor anything else in this Stipulation affects Barclays’ claim to interest from LBIE relating to the \$777,000,000 or any other balances held by LBIE.”* [TT1/31]

36. On 4 June 2015, BSF and Hughes Hubbard on behalf of the parties agreed language which was a compromise between the language proposed by Hughes Hubbard on behalf of the LBI Trustee on 27 May 2015 and the additional language proposed by BSF for Barclays on 28 May 2015 (which formed Paragraph 5 of the Stipulation):

*“Within five days of the Approval Date, the Trustee shall pay Barclays \$777,000,000 out of the “Dedicated Reserve” (as defined in the LBIE Settlement Agreement) with respect to the Barclays LBIE ETD Claims. The Trustee shall not pay any interest on this amount. Barclays consents and agrees that upon payment by the*

*Trustee of the \$777,000,000, the maximum aggregate amount that BCI and/or Barclays Bank may recover from LBIE, and/or the trustee of the UK statutory trust of client money arising under CASS 7 in relation to LBIE (including the “LBIE Client Money Trustee,” as defined in the LBIE Settlement Agreement), with respect to the Barclays LBIE ETD Claims shall automatically, unconditionally, and irrevocably be reduced by \$777,000,000.*

*Subject to the reduction in the maximum aggregate amount of Barclays’ recovery with respect to the Barclays LBIE ETD Claims provided for by the third sentence of paragraph 5 hereof, and subject to the releases in paragraphs 11 and 12 hereof, nothing in this Stipulation affects Barclays’ claim against LBIE to interest from LBIE relating to the \$777,000,000 referenced in paragraph 5 or any other balances (or interest relating thereto) held by LBIE.”*  
(emphasis added) [TT1/41-2]

37. The language here could not have been plainer: while LBI ensured that payment of the US\$777 million from the Dedicated Reserve would limit Barclays’ aggregate recovery from LBIE by that same amount of principal, Barclays ensured that it preserved in full its claim to statutory interest from the surplus in the LBIE estate.
38. Once LBI and Barclays had agreed upon the terms of the Stipulation, it was submitted to the SDNY Bankruptcy Court for approval. This was because LBI’s creditors were entitled to receive notice of (and object to) any proposed settlement affecting the value of the LBI estate pursuant to 11 U.S.C. § 1109(b) which provides that:

*“A party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.”*  
[TT1/51]

39. In accordance with this provision, it was customary for the LBI Trustee to submit any settlement it proposed to enter into – including the LBI/Barclays Settlement – to the SDNY Bankruptcy Court for approval, thereby giving LBI’s creditors notice and a formal opportunity to object.
40. Creditors have a formal objection period of 21 days following the submission of any settlement to the SDNY Bankruptcy Court to raise an objection to that settlement. Fed. R. Bankr. P. 2002(a)(3); Fed. R. Bankr. P. 9019(a). Where a creditor so objects, it has the right to take discovery and present evidence at a hearing as part of its opposition to the settlement. Fed. R. Bankr. P. 9014(c). The objecting creditor also has the right to appeal any approval of a settlement by the SDNY Bankruptcy Court. Fed. R. Bankr. P. 8003(a)(1).
41. Accordingly, there was a 21-day period following the submission of the Stipulation to the SDNY Bankruptcy Court during which any creditor of LBI – including LBIE – could raise an objection to the terms of the Stipulation. During this period, the LBIE Administrators’ legal representatives raised a number of questions with Barclays concerning the wording and effect of the Stipulation. This led to discussions directly between the lawyers for Barclays and the LBIE Administrators. Barclays endeavoured to ensure that the LBIE Administrators understood and were comfortable with the terms of the Stipulation, including to avoid a formal objection process before the SDNY Bankruptcy Court becoming necessary.
42. During these discussions, the LBIE Administrators requested certain modifications to, amongst other things, the language of paragraph 5 of the Stipulation. I set these out – and the position ultimately agreed between the parties – below. In the process of agreeing to these modifications, Barclays reasonably relied on certain representations made by, or on behalf of, the LBIE Administrators to Barclays, and their legal representative.
43. The discussions as to modifications requested by the LBIE Administrators to paragraph 5 of the Stipulation encompassed:
- (a) On 17 June 2015 legal representatives for LBI, on behalf of LBIE, conveyed to Barclays certain changes requested by the LBIE

Administrators to the Stipulation. Among the changes requested by LBIE was to amend paragraph 5 of the Stipulation. Instead of providing that “*the maximum aggregate amount that BCI and/or Barclays Bank may recover, from LBIE and/or the trustee of the UK statutory trust of client money arising under CASS 7 in relation to LBIE ... shall automatically, unconditionally, and irrevocably be reduced by \$777,000,000*” (see above at para. 36) [TT1/41-2]. LBIE asked that paragraph 5 mirror the language of the LBI/LBIE Settlement by stating that:

*“Barclays consents and agrees that upon payment by the Trustee of the \$777,000,000, (i) the maximum aggregate undischarged liability of LBIE and/or the trustee of the UK statutory trust of client money arising under CASS 7 in relation to LBIE (including the “LBIE Client Money Trustee”, as defined in the LBIE Settlement Agreement) to BCI and/or Barclays Bank, with respect to the Barclays LBIE ETD Claims shall automatically, unconditionally, and irrevocably be reduced by \$777,000,000, and (ii) Barclays hereby releases LBIE (including the LBIE Client Money Trustee) with respect to the Barclays LBIE ETD Claims in such amount.”* [TT1/70-71]

- (b) On 18 June 2015, BSF wrote to Hughes Hubbard agreeing to most of LBIE’s amended language, but only on the condition that LBI and LBIE agree to accept the following language immediately afterwards, providing that Barclays was not in any way affecting its claim to statutory interest by entering into the LBI/Barclays Settlement [TT1/85]):

*“and (ii) Barclays hereby releases LBIE (including the LBIE Client Money Trustee) with respect to the Barclays LBIE ETD Claims in such amount. For the avoidance of doubt, nothing herein affects, waives, releases or reduces Barclays’ claim against LBIE to interest relating to the \$777,000,000 referenced in this Paragraph, and nothing herein affects, waives, releases or reduces Barclays’ LBIE ETD Claim against LBIE with respect to assets (and interest*

with respect thereto) in excess of the \$777,000,000 referenced in this Paragraph.”

- (c) When making this counterproposal, Barclays also made expressly clear that it was seeking to accommodate LBIE’s proposed changes to paragraph 5 in exchange for LBIE’s agreement to forebear from filing an objection to the Stipulation before the SDNY Bankruptcy Court if it did so:

*“We do not believe there to be any basis for an objection by LBIE, nor do we think the requested changes are necessary, but so long as there is no impact on the hearing date, we are nevertheless willing to make certain changes to the stipulation in return for LBIE not filing any objection.*

...

*If the Trustee has no objection to these changes, please share them with your contacts at LBIE and let us know if they are willing to forego any objection in exchange for our willingness to make them.” [TT1/80]*

- (d) On 19 June 2015, Linklaters LLP, the legal representatives of LBIE responded by insisting on the full amended language from its 17 June 2015 proposal. In doing so, Linklaters reaffirmed in its covering e-mail that it had to “ensure that [LBIE] is getting the benefit of its bargain with the [LBI] Trustee with respect to the Dedicated Reserve.” [TT1/94]
- (e) LBIE and Barclays’ representatives subsequently reached a compromise on 23 June 2015. Barclays agreed to LBIE’s amendment to the language of paragraph 5 and LBIE agreed to include Barclays’ “For avoidance of doubt” provision that the settlement would not affect, waive, release, or reduce Barclays’ claim against LBIE to statutory interest on the \$777 million. LBIE agreed to this latter provision on the condition it was amended to add the wording “(or LBIE’s defenses thereto)”, which



LBIE's legal counsel described as forming part of the "general, reciprocal reservation language for LBIE." [TT1/95]

44. With this amendment, Barclays and LBIE concluded negotiations over the terms of the Stipulation. On 23 June 2015, Linklaters, on behalf of the LBIE Administrators, wrote to LBI to announce their agreement to the revised language of the Stipulation:

*"Barclays and LBIE are agreed on the Order language (insofar as it relates to LBIE/Barclays issues) and on the Stipulation."*  
[TT1/97]

45. The final agreed language of paragraph 5 of the Stipulation read as follows:

*Within five days of the Approval Date, the Trustee shall pay Barclays \$777,000,000 out of the "Dedicated Reserve" (as defined in the LBIE Settlement Agreement) with respect to the Barclays LBIE ETD Claims. The Trustee shall not pay any interest on this amount. Barclays consents and agrees that upon payment by the Trustee of the \$777,000,000, (i) the maximum aggregate undischarged liability of LBIE and/or the trustee of the UK statutory trust of client money arising under CASS 7 in relation to LBIE (including the "LBIE Client Money Trustee," as defined in the LBIE Settlement Agreement) to BCI and/or Barclays Bank, with respect to the Barclays LBIE ETD Claims shall automatically, unconditionally, and irrevocably be reduced by \$777,000,000 and (ii) Barclays hereby releases LBIE (including the LBIE Client Money Trustee) with respect to the Barclays LBIE ETD Claims in such amount.*

*For the avoidance of doubt, nothing herein affects, waives, releases or reduces Barclays' claim against LBIE to interest relating to the \$777,000,000 referenced in this Paragraph (or LBIE's defences thereto), and nothing herein affects, waives, releases or reduces Barclays' LBIE ETD Claim against LBIE with respect to assets (and interest with respect thereto) in excess of the*

*\$777,000,000 referenced in this Paragraph (or LBIE’s defenses thereto”).*”

**[Exhibit to Downs 10, 287–288]**

46. The amended Stipulation was submitted to the SDNY Bankruptcy Court. The LBIE Administrators made no objection to it. The final terms of the LBI/Barclays Settlement were approved by the SDNY Bankruptcy Court five days later, on 29 June 2015 (the “**Stipulation and Order**”). The terms of the SDNY Bankruptcy Court’s Order confirmed and adopted the agreed language of paragraph 5 of the Stipulation:

*“**ORDERED**, that upon payment by the Trustee of the \$777,000,000, (i) the maximum aggregate undischarged liability of LBIE and/or the trustee of the UK statutory trust of client money arising under CASS 7 in relation to LBIE (including the LBIE Client Money Trustee) to BCI and/or Barclays Bank, with respect to the Barclays LBIE ETD Claims shall automatically, unconditionally, and irrevocably be reduced by \$777,000,000 and (ii) Barclays hereby releases LBIE (including the LBIE Client Money Trustee) with respect to the Barclays LBIE ETD Claims in such amount; and it is further*

***ORDERED**, that, for the avoidance of doubt, nothing in the Settlement Agreement or in this Order affects, waives, releases or reduces Barclays’ claim against LBIE to interest relating to the \$777,000,000 referenced in the preceding paragraph (or LBIE’s defenses thereto).”*

Order, June 29, 2015, page 6. **[Exhibit to Downs 10, 334]**

47. The LBIE Administrators did not appeal the Stipulation and Order.

48. As far as I, my colleagues and Barclays are aware, at no point in the LBI/Barclays Settlement negotiations did the LBIE Administrators or the LBI Trustee, nor any of their representatives, state or reference any belief or

position that the entry into the LBI/Barclays Settlement (including the terms thereof and the payment of the US\$777 million provided for therein) would preclude or reduce Barclays' claim against LBIE for statutory interest on the US\$777 million.

49. Contrary to the position now adopted by the LBIE Administrators, there was never any suggestion that this agreement might not be effective under English law, or anything along the lines of the caveat "*save to the extent that such effects follow from the mandatory rules of insolvency law.*" [**Administrators' Reply Position Paper, para. 138(2)**]

50. The position taken by the LBIE Administrators soon after the entry into the Stipulation (that Barclays has no entitlement to interest on the US\$777 million from LBIE, notwithstanding the language of the Stipulation) was therefore of surprise to Barclays and inconsistent with the terms of the extensive negotiations undertaken by the parties acknowledging that the parties' rights in respect of Barclays' claim to interest would be unaffected by Barclays' entry into the Stipulation.

**STATEMENT OF TRUTH**

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

Signed:  .....

Todd Thomas

Dated: 11 August 2017

**First Respondent**  
**T Thomas**  
**First**  
**TT1**  
**11 August 2017**

**No. 7942 of 2008 / CR-2008-000012**

**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**

**BETWEEN:**

**(1) ANTHONY VICTOR LOMAS**  
**(2) STEVEN ANTHONY PEARSON**  
**(3) RUSSELL DOWNS**  
**(4) JULIAN GUY PARR**  
**(in their capacity as the joint**  
**administrators of the above-named**  
**company)**

**Applicants**

**-and-**

**(1) BARCLAYS CAPITAL INC.**  
**(2) WENTWORTH SONS SUB-**  
**DEBT SARL**

**Respondents**

---

**WITNESS STATEMENT OF TODD**  
**THOMAS**

---