

Made on behalf of

Claimant

Initials and surname of
witness

M Simpson

No. of statement of this
witness (if more than one)

1

Identifying initials and
number of each exhibit (if
any)

Date of statement

20 June 2016

Claim No.

CHP 09/0037

**IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN
CIVIL DIVISION**

CHANCERY

PROCEDURE

Parties

MICHAEL SIMPSON as Liquidator of Kaupthing
Singer & Friedlander (Isle of Man) Limited (In
Liquidation)

Claimant

(1) THE FINANCIAL SUPERVISION COMMISSION
OF THE ISLE OF MAN GOVERNMENT as Scheme
Manager of the Depositors Compensation Scheme

Defendant

(2) THE ISLE OF MAN TREASURY

Full name of witness

Michael Simpson

Address ¹	PricewaterhouseCoopers LLC Sixty Circular Road Douglas Isle of Man IM1 1SA
Position held and name of firm or employer ²	Liquidator of Kaupthing Singer & Friedlander (Isle of Man) Limited (in liquidation)
Occupation or description	Chartered Accountant
Please indicate with an 'X' here if witness is <input checked="" type="checkbox"/> a party <input type="checkbox"/> an employee of a party	
<p>Statement³ (use numbered paragraphs)</p> <p>1. Kaupthing Singer & Friedlander (Isle of Man) Limited (in liquidation) ("KSFION") was wound-up in this matter by Order of His Honour Deemster Corlett dated 27 May 2009. Pursuant to paragraph 3 of the said Order Peter Norman Spratt and I were appointed as Joint Provisional Liquidators of KSFION.</p> <p>2. Subsequently, by Order of Honour Deemster Corlett dated 23 July 2009 Peter Norman Spratt and I were appointed as Joint Liquidators of KSFION. Paragraph 2 of the said Order states that any act required or authorised to be done by Peter Norman Spratt and I as Joint Liquidators may be done by both or any one of us.</p> <p>3. By Order of Court dated 9 June 2015 in this matter, Peter Norman Spratt was removed as a Joint Liquidator of KSFION, and I was confirmed as the sole Liquidator of KSFION.</p>	

¹ Place of residence or, if witness is making statement in a professional, business or other occupational capacity, work address

² Complete if witness is making statement in a professional, business or other occupational capacity

³ The statement must comply with Schedule 8.1 to the Rules of the High Court 2009. Continue on a separate sheet or sheets if necessary (but each page must be numbered, and the last page must contain the above statement of truth and be signed by the witness).

4. The unsecured creditors of KSFIOM ("the Creditors") have now been paid 100 pence in the Pound in relation to the amounts admitted in relation to the proof of debt lodged by each creditor in the liquidation of KSFIOM.
5. I confirm that there is still a small surplus of assets within the liquidation of KSFIOM, from which I now wish to pay interest to the Creditors.
6. However, an issue has arisen as to whether the provisions of Section 248 of the Companies Act 1931 ("Section 248") will continue to apply to the liquidation of KSFIOM in the circumstances set out at paragraph 4 above, for the reasons set out in the skeleton argument of the Applicant filed in support of this Application. Accordingly the directions of this Honourable Court are sought under s.185(3) of the Companies Act 1931 as to:-
 - (i) whether Section 248 (and thereby the provisions of Section 23(4) of the Bankruptcy Code 1892 ("Section 23(4)") continues to apply to the liquidation of KSFIOM, and if so how interest for the period from 9 October 2008 should be calculated; or
 - (ii) whether Section 248 (and thereby Section 23(4)) has ceased to apply now that the Creditors have been paid 100 pence in the pound in respect of their proved debts, and if so how interest for the period from 9 October 2008 should be calculated.
7. The surplus assets of KSFIOM are wholly inadequate to pay interest in full to the Creditors at the contractual rate for their deposits with KSFIOM for the period from 9 October 2008 to the present date.
8. Some Creditors received payments from the Isle of Man Government pursuant to:
 - i. The Kaupthing Singer & Friedlander (Isle of Man) Limited Early Payment Scheme (see Government Circular No. 01/09) ("the EPS/1"); and/or

- ii. The Kaupthing Singer & Friedlander (Isle of Man) Limited Early Payment (No. 2) Scheme (see Government Circular No. 04/09) ("the EPS/2"); and/or
 - iii. The Depositors' Compensation Scheme 2008 (Statutory Document No. 826/08 (as Amended)) ("DCS").
9. In relation to the EPS/1 and EPS/2, the Creditors who received payments under these schemes assigned to the Treasury of the Isle of Man Government all of their title to the fixed sum of £10,000 in the liquidation of the KSFIOM (or such lesser sum as they received under the Scheme(s)), but did not assign any entitlement to interest on that sum.
10. In relation to the DCS, the Creditors who received payments under the DCS assigned to the Scheme Manager of the DCS their full right to prove in the liquidation of KSFIOM, which includes their right to prove for interest. I understand that the Scheme Manager of the DCS has now recovered the full amount that the DCS paid to each creditor under the DCS, pursuant to the assignments.
11. Accordingly, as Liquidator of KSFIOM I will calculate the amount of interest to be paid to each Creditor in respect of their admitted proof of debt for the period since the date that the Winding Up Petition was filed, on 9 October 2008, once the directions of this Honourable Court have been obtained as to how the provisions relating to interest should be applied. A sum representing interest will then be paid directly to each relevant Creditor who has not assigned their right to prove in the liquidation of KSFIOM to the DCS, and a sum will also be paid to the Scheme Manager of the DCS itself, in respect of those rights to prove in the liquidation of KSFIOM that have been assigned to the DCS by Creditors.
12. As stated above, however, the issue has arisen as to whether Section 248 still applies to the liquidation of KSFIOM, now that the Creditors have been paid 100p in the pound in relation to their admitted Proofs of Debt for the period to the 9th October 2008 (the date that the Winding Up Petition was lodged in respect of KSFIOM).

13. In very broad terms, the provisions of Section 248 apply the law of bankruptcy in the Isle of Man to the winding up of insolvent companies. For the purposes of the liquidation of KSFIOM, the most relevant provisions of Manx bankruptcy law are as follows: -
- (i) Section 21(1) of the Bankruptcy Code 1892 ("the 1892 Code"), which states that demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable;
 - (ii) Section 23(3) of the 1892 Code which caps interest which will be paid at the rate of 5%, without prejudice to the right of a creditor to receive the balance of any higher rate of interest to which he may be entitled up to the date of the Winding-Up Petition after all the debts proved in the liquidation have been paid in full;
 - (iii) Section 23(4) of the 1892 Code which states that if there is any surplus after payment of the debts, it should be applied in payment of interest from the date of the Receiving Order at the rate of 4% per annum on all debts proved in the bankruptcy. (For the purposes of corporate insolvency, it is considered that "the date of the Receiving Order" equates to the date that the Winding Up Petition was filed, which was 8 October 2008 in relation to KSFIOM).
14. If Section 248, and thereby the above provisions of the 1892 Code, apply to the liquidation of KSFIOM, then the surplus assets will be used, initially, to pay the balance of interest above 5% for the period up to the 9th October 2008 to those Creditors who have had their right to interest capped at 5% by virtue of Section 23(3) of the Code and I confirm that there are enough surplus assets for this to be done. Thereafter the remaining surplus assets will be used to pay all Creditors interest at the rate of 4% per annum upon their admitted Proofs of Debt for the period from 9th October 2008. In reality, it is anticipated that the amount of such interest payable to Creditors will be very small.

15. However, as stated above, I am advised that there is an argument that Section 248 no longer applies to the liquidation of KSFIOM, now that its Creditors have been paid 100p in the pound in relation to their admitted Proofs of Debt. In this regard Section 248 is in identical terms to Section 317 of the Companies Act 1948 (of England & Wales) ("Section 317"), and English case law upon Section 317 states that its provisions no longer apply to the liquidation of an insolvent company, once the company's creditors have been paid their admitted debts in full, for the period up to the date of the filing of the winding up petition. However, I am further advised that whilst English case law upon English statutes which are identical to the equivalent Manx statutes is usually followed in the Isle of Man, there may be good reasons not to do so in respect of Section 317.
16. I understand that if English case law relating to Section 317 is applied to the interpretation of Section 248, then the effect would be that KSFIOM would be treated as solvent (even though patently it is not), and the Creditors of KSFIOM would be remitted to their rights under their contracts for the period since 9th October 2008. This would cause a number of difficulties in the calculation of interest, which would inevitably require a great deal of work to be done within the liquidation of KSFIOM, thereby reducing the amount of the surplus assets available for distribution to the Creditors. The issues that would arise if KSFIOM is now treated as being solvent, and its Creditors are treated as being remitted to their rights under their contracts, include the following (which should not be considered to be exhaustive): -
- (i) the principal in the case of *Bower v Marris* (1841) Cr & P351, 41 ER525 is likely to apply. This principal states that where an insolvent company is administered on the basis that distributions are made to creditors in respect of the principal of their debts as at the date of commencement of the winding-up, and it subsequently transpires that there is a surplus of assets, the usual rules as to the appropriation of payments for debts revive, and the distributions already made are treated as having been appropriated first to interest accrued at the date of the distribution and then, to the extent of any balance, to the principal amount of the debt. The

work necessary to undertake such re-allocation of distributions already made in the liquidation of KSFIOM, as between principal and interest, would undoubtedly incur costs, which would reduce the amount of the surplus assets available to Creditors;

- (ii) calculation of the interest due to individual Creditors under the terms of their contracts with KSFIOM would be complex for a number of reasons including the following, (which should not be considered exhaustive) -
 - (a) KSFIOM had circa 60 different financial products and account types on offer at 9th October 2008;
 - (b) apart from certain fixed deposit accounts and some other specific products, KSFIOM frequently had a discretion to vary interest rates, which included a discretion to reduce interest rates to a figure as low as 0%, in some cases immediately, and in other cases after a fixed period (often 1 year). Trying to assess what KSFIOM would have done during the period from 9th October 2008 to the present date with regard to flexible interest rates would be very difficult, and any assumptions made in relation to likely variable interest rate setting after 9th October 2008 (in a volatile market) would be open to challenge;
 - (c) some accounts will be deemed to have been closed upon a date after 9th October 2008, and would not thereafter attract interest at all;
 - (d) some accounts would be deemed to have changed account types after a specific date, or else matured after a specific date, thereby attracting no further interest, or interest at a different rate;
 - (e) exchange rate variations would need to be considered. In this regard KSFIOM deposit accounts are mainly GBP, USD or

Euro, but there are other currencies including AUD, NZD, ISK and ZAR. For the purposes of the liquidation all accounts were converted to GBP at the exchange rates that applied at the date of the Winding-Up Order (on 27th May 2009), and all liquidation distributions have been made in GBP. Difficulties will be encountered if those accounts are restored to their original currency, and variations in currency exchange rates for the period since 27th May 2009 may have to be considered, which could be either to the benefit or detriment of an individual Creditor;

- (f) some accounts were linked to the funds rates of foreign governments. By way of example, certain accounts guaranteed interest at 0.3% above the US Federal Funds Rate ("FFR") until 1st February 2012. However, the FFR fell to zero on 16th December 2008.

17. It is anticipated that a number of other difficult issues will arise if KSFIOM is now treated as being solvent, and that the cost of dealing with these issues will inevitably reduce the amount of the surplus assets available for its Creditors.
18. The amount of the surplus assets as at the date of this Witness Statement is anticipated to be between £11,236,435 (on a worst-case scenario) and £12,595.388 (on a best case scenario). In addition I have retained sufficient assets to pay in full those Creditors who have had their proofs of debt admitted, but who have not yet been paid, for operational reasons.
19. I set out at paragraph 20 (below) a Schedule setting out the likely amounts that Creditors will receive if Section 248 continues to apply to the Liquidation of KSFIOM, in the following alternative scenarios –
 - 19.1 Scenario 1 - if the surplus assets ultimately amount to £11,236,435 (on a worst-case scenario); and
 - 19.2 Scenario 2 - If the surplus assets ultimately amount to £12,595,388

(on a best-case scenario).

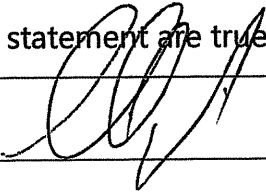
20. If interest is paid to the Creditors at 4% per annum pursuant to Section 23(4), and interest is calculated on a day-to-day basis from 9 October 2008, then I anticipate that the surplus assets will be exhausted after the equivalent of 112 days from 9 October 2008 (i.e. by 30 January 2009) under scenario 1 in the Schedule and after the equivalent of 126 days from 9 October 2008 (i.e. by 13 February 2009) under scenario 2.

Balance		Interest Rate	Start date	End Date worst case	End Date best case	Interest worst case	Interest best case	Difference
50,000	GBP	4%	09/10/2008	30/01/2009	13/02/2009	619.18	695.89	76.71
100,000	GBP	4%	09/10/2008	30/01/2009	13/02/2009	1,238.36	1,391.78	153.42
200,000	GBP	4%	09/10/2008	30/01/2009	13/02/2009	2,476.71	2,783.56	306.85
500,000	GBP	4%	09/10/2008	30/01/2009	13/02/2009	6,191.78	6,958.90	767.12
1,000,000	GBP	4%	09/10/2008	30/01/2009	13/02/2009	12,383.56	13,917.81	1,534.25

21. However, there is clearly an issue as to whether Section 248 continues to apply to the liquidation of KSFIOM, and it is for this reason that I seek the directions of this Honourable Court pursuant to Section 185(3) of the Companies Act 1931.
22. Further, whilst I consider, upon advice, that Section 248 does still apply to the liquidation of KSFIOM, I also consider that it is proper that any Creditors who disagree should be given the opportunity to put their arguments to the Court that they should be remitted to their rights under their contracts with KSFIOM.

If you need to continue on a separate sheet please use prescribed form – 'HCC CONTINUATION SHEET'

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

Date	20 June 2016	Signature	
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