

**Serial No. CP 2008/94**

**Serial No. CP 2009/**

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

**IN THE MATTER OF THE COMPANIES ACT 1931**

**AND IN THE MATTER OF KAUPTHING SINGER & FRIEDLANDER (ISLE  
OF MAN) LIMITED**

**AND IN THE MATTER OF THE HUMBLE JOINT PETITION OF  
KAUPTHING SINGER & FRIEDLANDER (ISLE OF MAN) LIMITED AND  
THE FINANCIAL SUPERVISION COMMISSION DATED 9<sup>TH</sup> OCTOBER  
2008**

**AND IN THE MATTER OF THE HUMBLE JOINT PETITION OF  
KAUPTHING SINGER & FRIEDLANDER (ISLE OF MAN) LIMITED AND  
THE TREASURY OF THE GOVERNMENT OF THE ISLE OF MAN DATED  
2nd APRIL 2009**

---

---

**SECOND AFFIDAVIT OF GABRIEL MOSS**

---

---

**I, GABRIEL MOSS, of 3-4 South Square, Gray's Inn, London WC1R 5HP DO  
SWEAR AND MAKE OATH AND SAY as follows:**

1. I am the same Gabriel Moss QC who swore an affidavit herein on 12 February 2009 and my qualifications remain the same.

2. The statements contained in this Affidavit are within my own knowledge (save where from the context otherwise appears) and are true.
3. I make this Affidavit at the request of the Treasury of the Government of the Isle of Man ("the Treasury") and in order to assist the High Court of Justice of the Isle of Man Chancery Division in its determination of the above-named proceedings.
4. This Affidavit is made further to my First Affidavit of 12 February 2009 made in proceedings 2008/94.
5. Further to my First Affidavit, I have been provided with a copy of the proposed scheme of arrangement ("the Scheme") between Kaupthing Singer & Friedlander (Isle of Man) Limited ("the Company") and the Scheme Creditors (as defined in the Scheme) pursuant to the Companies Act 1931 ("the 1931 Act").

#### **The Proposed Scheme**

6. I can confirm, having read the proposed Scheme, that it reflects the type of proposed scheme of arrangement which was the subject of my First Affidavit. Accordingly, the comments made in my First Affidavit apply to the Scheme.
7. The proposed Scheme follows a relatively conventional format adapted to the particular situation and type of entity here and many of its provisions reflect standard provisions which are commonly included in schemes of arrangement sanctioned by the English Court.

#### **Classes**

8. The position in relation to classes of creditors for purposes of convening meetings of creditors to consider the Scheme is as set out in my First Affidavit.

9. In light of the proposed treatment of Scheme Creditors under the terms of the Scheme, it remains my view that there are two classes of Scheme Creditors for these purposes:

- (1) those Scheme Creditors who would be entitled to compensation under the Compensation of Depositors Regulations 2008 (“the DCS Regulations”) in the event that a winding-up order was made in respect of the Company and who accordingly have a right to receive Top-Up Payments under the terms of the Scheme (“Protected Depositors”); and
- (2) all other Scheme Creditors.

10. I understand that it has been suggested that there may be further classes of Scheme Creditors in respect of:

- (1) Protected Depositors who would be entitled to a Top-Up Payment but who would never claim the Top-Up Payment because the *pari passu* distribution on their claim will exceed the £20,000 cap on the first distribution, £35,000 in aggregate by the second distribution and £50,000 in aggregate by the third distribution;
- (2) Protected Depositors with claims of less than £50,000 who will be paid in full and Protected Depositors with claims greater than £50,000 who may not be paid in full.

11. In my opinion, neither of these matters gives rise to class issues. As I explained in my first affidavit, the established test is whether the *rights* of the creditors are so dissimilar as to make it impossible for them to consult together with a view to their common interest (see para. 34 of my first affidavit). This involves considering the rights which the creditors have against the company (in this case, on a liquidation) and the rights which the creditors will receive under the Scheme (see para. 35 of my first affidavit).

12. In the present case, all Scheme Creditors would have the same rights against the Company on a liquidation, since the right of Protected Depositors to compensation under the DCS Regulations is not a right against the Company. In relation to rights under the Scheme, there is a distinction between the rights conferred on Protected Depositors and rights conferred on other Scheme Creditors. However, within the class of Protected Depositors, there is no distinction in the rights which are conferred: all Protected Depositors receive the same rights under the Scheme.
13. The fact that these rights may result in Protected Depositors receiving different amounts and payments in respect of their claims is simply a function of the fact that the quantum of the claims of individual Protected Depositors differ. It is not a function of any difference in rights being conferred on different Protected Depositors under the Scheme.
14. Even if this were wrong, and different rights were conferred by the Scheme on different Protected Depositors, then, in my view, it would be unlikely that this difference would be such as to make it impossible for the Protected Depositors to consult together with a view to their common interest.

#### **Claims against third parties**

15. As noted in my First Affidavit, claims of the Company and investigative powers in relation to potential claims in respect of third parties appear to fall into three categories:
  - (1) Those claims which are vested in the Company and which the Company by its authorised agent, such as a provisional liquidator or scheme supervisor may bring in its own capacity: for example, claims to recover assets and for breach of duty, breach of contract and so on.
  - (2) Those powers vested in the Court which are only exercisable by the Court whilst an office-holder is in office. For example, the power of

the Court under Section 206 of the 1931 Act to summon before the Court any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the Company for examination on oath.

- (3) Those claims which are only capable of being brought in the event that a winding-up order is made. The principal examples would appear to be the setting aside of fraudulent preferences under Section 250 of the 1931 Act or a claim for fraudulent trading against directors under Section 259 of the 1931 Act.

16. In relation to the first category, under the terms of the Scheme, the Company (by the Joint Liquidators Provisional) would be able to bring such claims notwithstanding the sanction of the Scheme.
17. In relation to the second category, these powers will continue to be exercisable so long as the Joint Liquidators Provisional (or any Liquidator) remain in office. I am informed by the Treasury that it is proposed that the Company will continue in provisional liquidation after the Scheme has been sanctioned. This approach has been used in England in insolvent insurance company schemes of arrangement where there has been a continued need to have a provisional liquidator.
18. In relation to the third category, these claims would only be available (to Liquidators) in the event that a winding-up order was made. Thus, if investigations undertaken by the Joint Liquidators Provisional established a reasonable prospect of an action in respect of a fraudulent preference or for fraudulent trading under the 1931 Act, then it might be necessary for a winding up order to be made in the future. The Scheme contains provision enabling a winding-up order to be made if the Joint Liquidators Provisional consider this to be necessary. As I pointed out in my first affidavit, these would be unusual claims in the context of a regulated financial institution.

SWORN at London *Gabriel Moss*  
(314 South Square Tower WCI)

This 7<sup>th</sup> day of April 2009

Before me:

*[Signature]* (I.S. GRLEN)

A Solicitor/~~Commissioner~~ for Oaths

**Serial No. CP 2008/94**

**Serial No. CP 2009/**

**IN THE MATTER OF THE COMPANIES ACT  
1931**

**AND IN THE MATTER OF KAUPTHING  
SINGER & FRIEDLANDER (ISLE OF MAN)  
LIMITED**

**AND IN THE MATTER OF THE HUMBLE  
JOINT PETITION OF KAUPTHING SINGER  
& FRIEDLANDER (ISLE OF MAN) LIMITED  
AND THE FINANCIAL SUPERVISION  
COMMISSION DATED 9<sup>TH</sup> OCTOBER 2008**

**AND IN THE MATTER OF THE HUMBLE  
JOINT PETITION OF KAUPTHING SINGER  
& FRIEDLANDER (ISLE OF MAN) LIMITED  
AND THE TREASURY OF THE  
GOVERNMENT OF THE ISLE OF MAN  
DATED 2<sup>ND</sup> APRIL 2009**

---

---

**SECOND AFFIDAVIT OF GABRIEL MOSS**

---

---