

IOM ADVOCATE UPDATE: 17TH DECEMBER 2008

It is about 10 days since my last report was posted. This is a joint report by myself and those whom have appointed me. I remain responsible, solely, for the legal content.

Most recent matters.

On 16th December 2008 Tynwald voted to apply £11 million to pay each depositor of KSFIOM, including Bond holders, £1,000 sometime early in the New Year. I apologise for the low level and cannot understand why only £1000 per depositor has been agreed when over £100 million of cash assets have been collected to date. It is not clear why a scheme for payment of £5000 per depositor from the collected £100 million could not have been made, other than that this could not be completed prior to liquidation, however the Tynwald could have passed a Court Order or Legislation to allow for it.

On 16th December 2008 Kaupthing hf, the Icelandic Parent Bank, withdrew its application to be released from the Manx proceedings, so that is one application less to consider.

On 16th December 2008 XXXX of Cains (the appointed Advocate for the Liquidator Provisionally) at long last answered my questions dating back to 19th November, although many of these questions have since moved into the public domain. However, the response failed to include the both the requested KSFIOM balance sheet (as at 08 October 2008) and information regarding realization of assets to date. I am therefore still chasing this information. A copy of the Q&A's from 19th of November can be found [here](#)

Some of the questions I have asked are deemed to be matters for FSC/and or Treasury. I am promised a reply by the FSC/and or Treasury before the end of this week.

Although information appears to have become more fluid, nothing is likely to happen now before the circulation of the Treasury proposals on 15th January 2008. We understand 5 or 6 indicative offers have been made. Treasury is now working out what each offer actually means.

Many of you will have wondered why there is no KSFIOM representative on the KSF London Committee of inspection. The UK Government through its Depositors Scheme (FSCS) was the largest creditor and it chose to vote against IOM and in favour of those that were voted onto the committee.

At present, it appears that including shareholder funds and retained profit and other capital, but excluding the money due to the KSFIOM, there is a surplus in London of over £1.3 billion. I cannot know what will be realised or at what price or whether there are any black holes or fraud. The KSF IOM balance sheet at 30 September shows a surplus of approximately £500 million. There will be argument with some debtors for set off and/or discount, anyone buying a loan book in the current climate would be looking for substantial discount. There may be questions about the exact amount due by one company within the Kaupthing group to another. However there would have to be a large shortfall or excessive fees for there to be a shortfall long term. This I think explains the view of IOM Government that we should examine a reconstruction, amalgamation or scheme. I have to say I am not sure why UK, IOM and Iceland are not doing that together for the group outside Iceland, after all any surplus will go back to Kaupthing hf eventually.

Jonathan Spellman has now picked up our suggestion of a Depositors Committee provisionally. This is being explored.

DAG appointed London Lawyers, Edwin Coe, are currently reviewing the merits of Judicial Review. There are other claims, for breach of human rights and European Union discrimination laws, which might give rise to claims out of the UK Government actions including ukxi20082674 on 08 October.

The IOM Treasury are also reviewing the merits of Judicial Review with their appointed advocates Gough&Co and I am sure the two Legal Teams will work together. The process of Judicial Review can be expensive and therefore it would be preferable for the exercise to be a joint consideration.

In the event of liquidation, and on the basis that we had a good case for Judicial Review, we could approach the Court to ask for funds to fight any such case. The court would consider strength of evidence and of legal opinion. This occurred in the case of SIB 20 years ago, when money was advanced to sue the then Finance Board as banking supervisor.

I would like to highlight that the Liquidator Provisionally took advice with regard to Judicial Review, which was negative, and chose therefore not to pursue this avenue, however it would have been extremely helpful for him to have informed earlier.

The Questions in full asked of the LP can be found [here:](<http://www.ksfiomdepositors.org/public-page/questions-ksfiom-dag-legal-representative>)

The responses from Cains, Advocate of Liquidator Provisionally can be

found [here:]()

I also include below:

- Original questions to Liquidator Provisionally in **red**
- Liquidator Provisionally responses in **blue**
- My comments to responses, where required and where the answers are not self-explanatory are in **black**:

Here are my comments. I only comment where I think it is necessary.

Many answers are self-explanatory

1. Action to date and views and proposed actions for future regarding the KSF(IOM) funds in London

1.1 Mike Simpson and, since 20th November 2008 Peter Spratt, are the Liquidators provisionally of Kaupthing Singer & Friedlander (Isle of Man) Limited (“KSF(IOM)”), (the “LP”). The LP has established direct lines of contact with the Administrators appointed by the Court in England in relation to Kaupthing Singer & Friedlander Limited (“KSF”). An active and ongoing dialogue is being conducted with KSF to obtain information concerning the position in relation to all KSF(IOM) assets held with KSF.

1.2 KSF(IOM) ranks as an unsecured creditor in respect of its banking deposits held with KSF. A major task following the appointment of the LP was to address the status of transfer requests from depositors whose funds had been debited from their account balance at KSF(IOM) but not credited to the account of destination. In the majority of these cases, the instructions were routed via KSF which has caused the LP to have to seek specific information from KSF regarding the status of such instructions. Certain depositors have alleged that such “in-flight funds” are the subject of a “Quistclose” type trust in favour of the depositor. The LP has taken legal advice on this point and, in reliance of such advice, does not accept that “in-flight funds” are subject to a “Quistclose” type trust. A depositor has served a claim seeking a declaration that KSF(IOM) holds certain in-flight funds on a “Quistclose” type trust for it and this claim has been set down to be heard by the Manx High Court on the 16th January 2009.

1.2 Quistclose. I am surprised that there is only one depositor involved and that there is a hearing on 16th January 2008. I am attempting to find out more. I am also surprised this has not been advertised and others invited to set out their cases. There will be different dates and direction for money in transit. It would be better to have as many different scenarios before the Court, so all can be resolved at once.

1.3 Representatives of the LP attended the creditors meeting of KSF convened by the Administrators of KSF held in London on 1st December 2008. KSF(IOM) sought very hard to be appointed onto the KSF Creditor’s Committee. This request was out-voted and therefore unsuccessful. At the meeting on the 1st December, the Administrators of

KSF would not speculate as to the timing of any announcement concerning the future level or timing of dividends from KSF.

1.4 Issues relating to KSF(IOM)'s non bank deposit assets held by KSF are more complex. The LP has instructed and continues to work with his team of legal advisers in the Isle of Man and London to resolve them. The LP has instructed Cains Advocates in the Isle of Man and solicitors (Nabarro LLP) and various Counsel in London to advise in relation to securing control of KSF(IOM) assets. Such assets include (but are not limited to) certificates of deposit (CDs) purchased by KSF on behalf of KSF(IOM), and a portfolio of securities acquired by KSF(IOM) under a Global Master Repurchase Agreement (GMRA) with KSF (commonly referred to as a "Repo agreement").

1.5 The LP is taking steps to secure the CDs and/or their maturity proceeds. Demand for the transfer of these assets to KSF(IOM) has been made by the LP. This has given rise to unresolved set-off issues. The LP is hopeful that the majority of the legal issues delaying the transfer of the proceeds of those CDs which have currently matured will be resolved with KSF and its lawyers (Freshfield Bruckhaus Deringer). Unfortunately, a set-off claim as against KSF made by one third party CD issuer is now the subject of legal proceedings issued in London and the recovery by KSF(IOM) of the maturity proceeds of this CD will not be known until these proceedings are concluded. KSF(IOM) is seeking to be joined as a party to these proceedings and the LP will endeavour to have the hearing of the case dealt with as quickly as possible, although it is unrealistic to expect this to be before at least February 2009. The LP is also aware that a further third party CD issuer has instructed lawyers to advise it concerning a CD which KSF purchased on behalf of KSF(IOM) which is yet to mature. As at the date of writing, the LP is not on notice of whether or not this party is intending to raise any ground to resist payment of this CD.

1.6 Notices of default under the Repo agreement have been issued by both KSF(IOM) and KSF which in turn requires the parties to net off their respective positions under the GMRA. Steps are being taken to arrange for the sale of the securities owned by KSF(IOM). Legal issues between KSF(IOM), KSF and third parties, principally relating to ownership of certain other securities that were dealt with under the Repo agreement, continue to be addressed by the LP and the lawyers.

2. Actions to date and possible future actions regarding any legislation or procedures used in the UK by HM Government against KSF

2.1 The LP has received advice from Blackstone Chambers (Michael Beloff QC and Brian Kennelly) regarding the steps taken by the UK authorities against KSF in London. This advice covered, inter alia, potential grounds to bring a judicial review against the decision by the UK Treasury to make The Kaupthing Singer & Friedlander Limited Transfer of Certain Rights and Liabilities Order 2008 on the 8th October 2008 and/or claims in damages for breaches of the UK Human Rights Act and/or unlawful discrimination against

KSFIOM. On the basis of the advice taken, it is highly unlikely that the LP will seek to take any steps to challenge the legal procedures used in the UK against KSF.

3. Action to date by the Liquidator Provisionally and Views for Future Action Regarding the Parental Guarantee

3.1 The LP has provided you with a copy of the Parental Guarantee.

3.2 The LP has taken advice from Icelandic lawyers regarding the validity and effect of the Parental Guarantee. This advice is subject to legal privilege. However, based on the advice received, the LP has no reason to believe that the document is not valid or enforceable in accordance with its terms. Having regard to the terms of the Parental Guarantee, the LP is advised that it is a guarantee of last resort. The LP has put Kaupthing Bank Hf on formal notice of the intention to rely upon the Parental Guarantee in the event of a shortfall in recovery of assets by KSF(IOM). The economic value of the Parental Guarantee will be dictated by the solvency of Kaupthing Bank Hf and measures taken against Kaupthing bank Hf in Iceland.

4. Actions to date and Views and Proposed Actions regarding the Sealed Court Papers in the UK

4.1 On the basis of the advice received from Blackstone Chambers, the LP does not intend to make an application to seek access to the sealed Court papers in the UK.

5. Request to Constitute an Informal Creditors Committee of Inspection Provisionally

5.1 The LP is an officer of the Court and as such will abide by any Order the Court may make. The LP has been advised that there is no statutory power pursuant to which the Court could constitute an informal creditor's committee provisionally, and without some proper basis in law for the constitution of a creditor's committee, the LP has a concern that its constitution may give special privileges to a small number of depositors. However, the establishment or otherwise of an informal creditor's committee is a matter which the LP will be happy to revisit on an ongoing basis, especially if the liquidation provisionally becomes further protracted.

5.1 Creditors Committee provisionally. This seems at odds with the attitude of the FSC, and Mike Simpson attended the FSC meeting!

6. Details of the Total Number of Account Holders, Single and Joint and Total Number of Accounts and Value

6.1 Please see the schedule attached [HERE](#). Please note that (i) the total number by customer shown for insurance companies reflects the total number of policyholders for whom insurance companies have deposited funds – the actual number of insurance companies

having a banking customer relationship with KSF(IOM) is only 15, all of which hold a balance of over £1000; (ii) the amounts shown in the schedule reflect certain foreign currency balances converted to sterling as at 8th October 2008; and (iii) some of the figures shown within the schedule are still subject to final reconciliation checks.

6. This shows 14,449 accounts held by 10,447 customers. It is a shame the breakdown of size is not more detailed and if required I will go back for further information

7. Latest Balance Sheet for KSF

7.1 Following the creditor's meeting of KSF held on the 1st December 2008, the Administrators of KSF have written to the creditors of that company and a copy of that letter is attached. It includes details of the creditors of KSF which were voted onto the KSF creditor's committee. In addition Appendix B to this letter produces the Statement of Affairs produced by the directors of KSF detailing KSF's book values (and not realisable values) as at 8th October 2008. The Statement of Affairs is the most recent statement of KSF's financial position. However, the Notes referred to at the foot of the Statement of Affairs state that it cannot be relied upon in estimating any recoveries for claims ranking for distribution purposes. The LP is aware that there are significant set-off issues which are still to be resolved by the Administrators of KSF and which are not reflected in the Statement of Affairs.

7. I had asked for the KSF(IOM) figures to 08 October 2008, I am chasing these still. They have produced the UK figures; again, view the statement of affairs for UK [here:]()

8. The Current Estimate of the Likely Shortfall for Unsecured Creditors of KSF(IOM)

8.1 The LP appreciates that it will be important to all creditors to receive information estimating the likely level of recovery for unsecured creditors of KSF(IOM) as soon as possible. However, given the uncertainty over the realisable value of certain of KSF(IOM)'s assets, including its claim against KSF, it is not currently possible to provide a meaningful estimate of the likely recovery for creditors of KSF(IOM).

8. But see what I say above. In SIB the total deposit base in 1962 was £40 million. After 23.5 years 33p in the pound was distributed. Liquidators fees and legal fees amounted to 35p in the pound. The liquidation had fraud involved and black holes. One debtor was alleged to have 12 million of the banks money. The last 6 years were spent tracing his assets and a settlement at £100,000 was achieved. You will see why I and the liquidator are cautious but also why I am cautiously optimistic. However do not go out spending on the strength of this.

9. Better Dissemination of Information and Updates

9.1 An update is posted approximately every 7 days on the website and more frequently where there is information that the LP is able to provide to creditors.

9.2 It is regrettable that the LP is unable to provide more information to creditors, but this is due to the commercially sensitive nature of much of the information and to the limitations inherent in a process intended primarily to protect and preserve a company's assets.

10. Appointing a Second IOM Liquidator from outside the current Liquidator's firm

10.1 By Order dated 20th November 2008, the Court appointed Peter Spratt, a Partner of PwC in London, as Joint Liquidator provisionally. Michael Simpson and Peter Spratt's powers, which may be exercised jointly and/or severally, are set out in the terms of the Court Order dated 20th November 2008. The LP sees no economic or practical benefit in a proposal to appoint a further LP from outside PwC. Issues relating to tax and residence were considered by the LP prior to seeking the appointment of Peter Spratt. Specifically the LP took tax advice to ensure that the appointment of Peter Spratt will not have any prejudicial tax impact upon KSF IOM. Based on such advice, a protocol to ensure that KSF(IOM) does not become UK tax resident has been adopted