

In the Supreme Court of the United Kingdom

Notice of appeal

(or application for permission to appeal)



On appeal from

THE COURT OF APPEAL (CIVIL DIVISION)

**(1) THE JOINT ADMINISTRATORS OF LB HOLDINGS
INTERMEDIATE 2 LIMITED (in administration)**

(2) LEHMAN BROTHERS HOLDINGS INC

**(3) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS
LIMITED (in administration)**

— V —

(1) ANTHONY VICTOR LOMAS

(2) STEVEN ANTHONY PEARSON

(3) PAUL DAVID COPLEY

(4) RUSSELL DOWNS

(5) JULIAN GUY PARR

**(in their capacity as Joint Administrators of Lehman Brothers
International (Europe) (in administration))**

**(6) CVI GVI (LUX) MASTER SARL (joined by order of Patten LJ
dated 2 September 2014)**

Appeal number

Date of filing

1	0	/	J	U	N	/	2	0	1	5
D	D		M	M	M		Y	Y	Y	Y

Appellant's solicitors

WEIL, GOTSHAL & MANGES

Respondents' solicitors

**First, Second, Third, Fourth and Fifth Respondents:
LINKLATERS LLP**

Sixth Respondent:

FRESHFIELDS BRUCKHAUS DERINGER LLP

1. Appellant

Appellant's full name

LEHMAN BROTHERS HOLDINGS INC

Original status

- | | |
|-------------------------------------|--|
| <input type="checkbox"/> Claimant | <input type="checkbox"/> Defendant |
| <input type="checkbox"/> Petitioner | <input checked="" type="checkbox"/> Respondent |
| <input type="checkbox"/> Pursuer | <input type="checkbox"/> Defender |

Solicitor

Name

WEIL, GOTSHAL & MANGES

Address

c/o WEIL, GOTSHAL & MANGES
110 FETTER LANE
LONDON

Telephone no. 020 7903 1000

Fax no. 020 7903 0990

DX no. 110 Chancery Lane

Postcode

E C 4 A 1 A Y

Ref. AP/MJL/CE/58399.0011

Email

mark.lawford@weil.com

How would you prefer us to communicate with you?

- | | |
|-------------------------------|---|
| <input type="checkbox"/> DX | <input checked="" type="checkbox"/> Email |
| <input type="checkbox"/> Post | <input type="checkbox"/> Other (please specify) |

Is the appellant in receipt of public funding/legal aid?

- | | |
|------------------------------|--|
| <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
|------------------------------|--|

If Yes, please give the certificate number

Counsel

Name

BARRY ISAACS QC

Address

SOUTH SQUARE CHAMBERS
3-4 SOUTH SQUARE
GRAY'S INN
LONDON

Telephone no. 020 7696 9900

Fax no. 020 7696 9911

DX no. LDE 338 Chancery Lane

Postcode

W C 1 R 5 H P

Email

barry.isaacs@southsquare.com

Counsel

Name

Address

Telephone no.

Fax no.

DX no.

Postcode

Email

2. Respondent

Respondent's full name

(1) ANTHONY VICTOR LOMAS; (2) STEVEN ANTHONY PEARSON;
(3) PAUL DAVID COPLEY; (4) RUSSELL DOWNS; (5) JULIAN GUY
PARR (The Joint Administrators Of Lehman Brothers International
(Europe) (in administration))

(For Sixth Respondent please see Schedule A appended as pages 13-14)

Original status

☒

Claimant

☐

Defendant

☐

Petitioner

☐

Respondent

☐

Pursuer

☐

Defender

Solicitor

Name

Address

Telephone no.

Fax no.

DX no.

Postcode

Ref.

Email

How would you prefer us
to communicate with you?

☐

DX

☒

Email

☐

Post

☐

Other (please specify)

Is the respondent in receipt
of public funding/legal aid?

☐

Yes

☒

No

If Yes, please give the certificate number

Counsel

Name

WILLIAM TROWER QC

Address

SOUTH SQUARE CHAMBERS
3-4 SOUTH SQUARE
GRAY'S INN
LONDON

Telephone no. 020 7696 9900

Fax no. 020 7696 9911

DX no. LDE 338 Chancery Lane

Postcode

W C 1 R 5 H P

Email

william.trower@southsquare.com

Counsel

Name

DANIEL BAYFIELD

Address

SOUTH SQUARE CHAMBERS
3-4 SOUTH SQUARE
GRAY'S INN
LONDON

Telephone no. 020 7696 9900

Fax no. 020 7696 9911

DX no. LDE 338 Chancery Lane

Postcode

W C 1 R 5 H P

Email

daniel.bayfield@southsquare.com

3. Decision being appealed

Name of Court

COURT OF APPEAL (CHANCERY DIVISION)

Names of Judges

LORD JUSTICE MOORE-BICK
LORD JUSTICE LEWISON
LORD JUSTICE BRIGGS

Date of order/
interlocutor/decision

1 4 / M A Y / 2 0 1 5
D D M M M Y Y Y Y

4. Permission to appeal

If you have permission to appeal complete **Part A** or complete **Part B** if you require permission to appeal.

PART A

Name of Court granting permission

Date permission granted

D D M M M Y Y Y Y

Conditions on which
permission granted

Case no.	Age	Sex	Occupation	Duration of disease (years)	Onset of disease	Family history	Previous treatment	Current treatment	Outcome	Histopathological findings		Immunohistochemical findings	Molecular findings	Genetic findings	Clinical course	Follow-up	Comments
										Microscopic	Immunohistochemical						
1	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical	Molecular findings	Genetic findings	Clinical course	Follow-up	Comments	
2	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical						
3	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical	Molecular findings	Genetic findings	Clinical course	Follow-up	Comments	
4	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical						
5	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical	Molecular findings	Genetic findings	Clinical course	Follow-up	Comments	
6	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical						
7	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical	Molecular findings	Genetic findings	Clinical course	Follow-up	Comments	
8	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical						
9	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical	Molecular findings	Genetic findings	Clinical course	Follow-up	Comments	
10	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical						
11	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical	Molecular findings	Genetic findings	Clinical course	Follow-up	Comments	
12	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical						
13	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical	Molecular findings	Genetic findings	Clinical course	Follow-up	Comments	
14	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical						
15	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical	Molecular findings	Genetic findings	Clinical course	Follow-up	Comments	
16	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical						
17	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical	Molecular findings	Genetic findings	Clinical course	Follow-up	Comments	
18	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical						
19	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical	Molecular findings	Genetic findings	Clinical course	Follow-up	Comments	
20	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical						
21	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical	Molecular findings	Genetic findings	Clinical course	Follow-up	Comments	
22	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical						
23	65	M	Farmer	10	2005	None	None	None	None	Microscopic	Immunohistochemical	Molecular findings	Genetic findings	Clinical course	Follow-up	Comments	

PART B

☒ The appellant applies to the Supreme Court for permission to appeal.

5. Information about the decision being appealed

Please set out

- Narrative of the facts
- Statutory framework
- Chronology of proceedings
- Orders made in the Courts below
- Issues before the Court appealed from
- Treatment of issues by the Court appealed from
- Issues in the appeal

Lehman Brothers Holdings, Inc adopts the information contained at part 5 of the Notice of Appeal filed in the same proceedings by the joint administrators of LB Holdings Intermediate 2 Limited (in administration) on 10 June 2015.

6. Grounds of appeal

See the attached Schedule B on pages 15-19, which contains the grounds of appeal for Lehman Brothers Holdings, Inc.

Counsel's name or signature:

BARRY ISAACS QC

7. Other information about the appeal

Are you applying for an extension of time?

☐ Yes ☒ No

If Yes, please explain why

Order being appealed

What order are you asking the Supreme Court to make?

☐ set aside ☒ vary

Original order

☐ set aside ☐ restore ☒ vary

Does the appeal raise issues under the:

Human Rights Act 1998?

☐ Yes ☒ No

Are you seeking a declaration of incompatibility?

☐ Yes ☒ No

Are you challenging an act of a public authority?

☐ Yes ☒ No

If you have answered Yes to any of the questions above please give details below:

Court's devolution jurisdiction?

☐ Yes ☒ No

If Yes, please give details below:

**Are you asking the
Supreme Court to:**

depart from one of its own
decisions or from one made
by the House of Lords?

☐ Yes ☒ No

If Yes, please give details below:

make a reference to
the European Court of
Justice of the European
Communities?

☐ Yes ☒ No

If Yes, please give details below:

Will you or the
respondent request an
expedited hearing?

☐ Yes ☒ No

If Yes, please give details below:

8. Certificate of Service

Either complete this section or attach a separate certificate

The date on which this form was served on the

1st Respondent

1	0	/	J	U	N	/	2	0	1	5
D	D		M	M	M		Y	Y	Y	Y

2nd Respondent

1	0	/	J	U	N	/	2	0	1	5
D	D		M	M	M		Y	Y	Y	Y

I certify that this document was served on

The parties listed in the attached Schedule C (see page 20)

by

WEIL, GOTSHAL & MANGES

by the following method

PERSONAL SERVICE AND EMAIL

Signature

9. Other relevant information

Neutral citation of the judgment appealed against
e.g. [2009] EWCA Civ 95

2	0	1	5	/	E	W	C	A		C	I	V		/	4	8	5	
				/										/				
				/										/				
				/										/				

References to Law Report in which any relevant judgment is reported.

High Court of Justice, Chancery Division, Companies Court: [2014] EWHC 704 (Ch)

Subject matter catchwords for indexing.

Company – Administration – Assets available for creditors – Ranking of claims – Proceedings arising in course of administration of Lehman Brothers – Unexpected surplus of assets existing after payment of unsubordinated proved debts – Shareholder also being subordinated debt-holder and submitting claim in company's administration – Administrators commencing proceedings, seeking decision of court on number of issues – Whether subordinated debt-holder's claim ranking before or after claims for statutory interest on proved debts – Whether subordinated debt-holder's claim ranking before or after claims of foreign currency creditors – Whether right to statutory interest accruing during administration lost if company going into liquidation – Whether shareholders' contribution obligation including payment of statutory interest and non-provable liabilities – Whether liability for future calls could be subject of proof in administration or liquidation

Please return your completed form to:

The Supreme Court of the United Kingdom, Parliament Square, London SW1P 3BD
DX 157230 Parliament Square 4

Telephone: 020 7960 1991/1992

Fax: 020 7960 1901

email: registry@supremecourt.gsi.gov.uk

www.supremecourt.gov.uk

Sixth Respondent

Respondent's full name

CVI GVI (LUX) MASTER SARL (joined by order of Patten LJ dated 2 September 2014)

Original status

- ☐ Claimant
 ☐ Defendant
☐ Petitioner
 ☒ Respondent
☐ Pursuer
 ☐ Defender

Solicitor

Name

FRESHFIELDS BRUCKHAUS DERINGER LLP

Address

 c/o FRESHFIELDS
 BRUCKHAUS DERINGER LLP
 65 FLEET STREET
 LONDON

Telephone no. 020 7785 5781

Fax no. 020 7108 4503

DX no. LDE No 23

Postcode

E C 4 Y 1 H S

Ref. CHWR/KB/159614-0002

Email

christopher.robinson@freshfields.com

How would you prefer us to communicate with you?

- ☐ DX
 ☒ Email
☐ Post
 ☐ Other (please specify)

Is the respondent in receipt of public funding/legal aid?

- ☐ Yes
 ☒ No

If Yes, please give the certificate number

Counsel

Name

ROBIN DICKER QC

Address

 SOUTH SQUARE CHAMBERS
 3-4 SOUTH SQUARE
 GRAY'S INN
 LONDON

Telephone no. 020 7696 9900

Fax no. 020 7696 9911

DX no. LDE 338 Chancery Lane

Postcode

W C 1 R 5 H P

Email

robin.dicker@southsquare.com

Counsel

Name

RICHARD FISHER

Address

**SOUTH SQUARE CHAMBERS
3-4 SOUTH SQUARE
GRAY'S INN
LONDON**

Telephone no. **020 7696 9900**

Fax no. **020 7696 9911**

DX no. **LDE 338 Chancery Lane**

Postcode

W C 1 R 5 H P

Email

richard.fisher@southsquare.com

Grounds of Appeal

1. LBHI appeals against paragraphs 1, 2, 3 and 4 of the Order of the Court of Appeal. LBHI adopts the Grounds of Appeal of LBHI2 and relies on the further Grounds of Appeal set out below.
2. As was recognised by the Judge, this case raises a number of novel and important questions, and the legal issues are important, complex and in some instances obscure. The issues are of general public importance, relating in particular to the proper construction and effect of the statutory insolvency regime; the existence or non-existence of non-provable claims; and the proper application of the test for provable liabilities laid down in *Re Nortel GmbH* [2013] UKSC 52, [2014] AC 209.

Dismissal of appeal against declarations (ii) and (iii): existence of non-provable currency conversion claims

3. The majority of the Court (Moore-Bick and Briggs LJJ) erred in law in holding that LBIE's creditors may make currency conversion claims and that they rank in LBIE's administration as non-provable liabilities, for the following reasons:
 - (1) A company's obligation to pay in foreign currency is substantively replaced by an obligation to pay the sterling equivalent at the date of the winding up.
 - (2) *Wight v Eckhardt Marine GmbH* [2003] UKPC 37, [2004] 1 AC 147 is not authority for the proposition that a winding up order does not have a substantive effect on the underlying debt, as is clear from insolvency set-off, disclaimer and future debts.
 - (3) It does not accord with legislative and judicial policy to widen the class of putative creditors with non-provable claims.

Grounds of Appeal (cont.)

- (4) In order to achieve equality between different kinds of non-provable creditors it would be necessary to value their claims in a common currency. There would therefore have to be a second conversion of foreign currency claims, which is contrary to the decision in *Re Lines Bros* [1983] Ch 1; is not provided for in the Insolvency Rules; and there is no appropriate date which does justice as between different classes of non-provable claim.
- (5) There is no reason to impose the risk of currency fluctuations on creditors with non-provable claims.
- (6) When rules 2.86(1) and 4.91(1) were introduced Parliament did not intend to split a unitary obligation to pay a sum in a foreign currency into two claims, one of which was provable and the other of which was not.
- (7) The existence of foreign currency claims is not supported by the Cork Committee or the Law Commission (Working Paper No 8).
- (8) The existence of currency conversion claims is discriminatory and unjust, since there is no revaluation as against a foreign currency creditor against which sterling has appreciated between the date of the winding up and the date of payment.

Dismissal of appeal against declaration (vi): scope of the member's liability under section 74(1)

4. The Court erred in law in holding that the scope of the member's liability under section 74(1) (the **Liability**) extends to statutory interest and non-provable liabilities, for the following reasons:
 - (1) If "debts and liabilities" included debts and liabilities which were incurred in the winding up, there would be no need to refer to the expenses of the winding up.

Grounds of Appeal (cont.)

- (2) The natural meaning of section 189(2) and rule 2.88(7) is that statutory interest is payable to the extent that there is a surplus remaining after the payment of the debts proved (**Surplus**) and that the company has no liability to pay statutory interest independently of a Surplus.
- (3) The creation of statutory interest followed a recommendation in the Cork Report, which gives no support to the view that statutory interest is payable where there is no Surplus.
- (4) Parliament did not intend to create a liability which will be not be paid in full in all but rare cases where there is a Surplus sufficient to pay interest at 8% per annum or more on all the debts proved.
- (5) If statutory interest existed independently of a Surplus, section 328(4) would impose a like liability on a bankrupt to pay such interest (**Bankruptcy Interest**). The bankrupt would not be released from this liability upon his discharge and would be exposed to a succession of bankruptcies based on unpaid Bankruptcy Interest. This would undermine the policy of bankruptcy law.

Dismissal of appeal against declaration (viii): whether LBIE, acting by its administrators, may prove in a distributing administration or liquidation of LBL or LBH12 in respect of those companies' liabilities under section 74(1)

5. Lewison LJ described this issue as an exceptionally difficult one on which he had changed his mind more than once, and said that he reached his conclusion with a good deal of hesitation. Briggs LJ said that he found the answer to the question raised by stage (c) in the *Re Nortel* analysis of the scope of rule 13.12(1)(b) to be very much more difficult than it seems to have appeared to the Judge.

Grounds of Appeal (cont.)

6. The Court erred in law in holding that LBIE, acting by its administrators, may prove in a distributing administration or liquidation of LBL or LBHI2 in respect of those companies' liabilities under section 74(1), for the following reasons:

- (1) The statutory provisions which give the power to make calls in respect of the Liability to the court and, by delegation, to the liquidator as an officer of the court, do not apply to directors or administrators. These statutory provisions are inconsistent with the existence of a power in a director or administrator to prove in respect of a call.
- (2) The Court of Appeal was bound by *Re Pyle Works* (1889) 44 Ch D 534 (CA), which held that the liquidator is the only person empowered to make a call in respect of the Liability; that the statutory fund created by the call comes into existence only when the company is in liquidation; that, when paid, the call is payable to the liquidator as an officer of the court, and not to the company; and that there can be no anticipation of future calls. The Court's decision is inconsistent with *Re Pyle Works*.
- (3) If the decision of Court was correct:
 - i. where the company is not in administration, the moneys paid in respect of the Liability could be applied for purposes other than the statutory purposes (viz., payment of the debts and liabilities of the company in winding up, the expenses of winding up and the adjustment of the rights of contributories among themselves), for example, in payment of trading debts;
 - ii. where the company is in administration, the moneys paid in respect of the Liability could be applied for purposes other than the statutory purposes, for example, in payment of the administrators' costs and expenses;

Grounds of Appeal (cont.)

- iii. the ability of the contributory to seek an adjustment between itself and other contributories would be undermined, particularly if the company never moved from administration into winding-up;
 - iv. the contributory of a company which is not in winding up would be subject to the burden of the Liability without the protections and qualifications which are an essential part of the scheme which imposes it.
- (4) The Court relied very heavily on the trend of expanding provable claims; this does not justify treating the Liability as provable where to do so is inconsistent with the statutory scheme which creates the Liability.
- (5) The Court held that an administrator could prove for the Liability in order to avoid a defect in the insolvency code if members of a contributory were entitled to be paid out before a claim under section 74 could be made; there is in fact no defect, because the administrator could put the company into liquidation, and a call could then be made by the liquidator.

Counsel's name or signature:

BARRY ISAACS QC

The date on which this form was served on the

Certificate of Service

Either complete this section or attach a separate certificate

Respondents

1	0	/	J	U	N	/	2	0	1	5
D	D		M	M	M		Y	Y	Y	Y

Other Parties

1	0	/	J	U	N	/	2	0	1	5
D	D		M	M	M		Y	Y	Y	Y

I certify that this document was served on

Respondents:

1. **The Joint Administrators of Lehman Brothers International (Europe) (in administration)** at Linklaters LLP, One Silk Street, London, EC2Y 8HQ
2. **CVI GVI (Lux) Master Sarl** at Freshfields Bruckhaus Deringer LLP, 65 Fleet Street, London, EC4Y 1HS

Other Parties:

3. **The Joint Administrators of LB Holdings Intermediate 2 Limited (in administration)** at Dentons UKMEA LLP, One Fleet Place, London, EC4M 7WS
4. **The Joint Administrators of Lehman Brothers Limited (in administration)** at DLA Piper UK LLP, 3 Noble Street, London, EC2V 7EE

by

WEIL, GOTSHAL & MANGES

by the following method

PERSONAL SERVICE AND EMAIL

Signature

Please return your completed form to:

The Supreme Court of the United Kingdom, Parliament Square, London SW1P 3BD
DX 157230 Parliament Square 4

Telephone: 020 7960 1991/1992

Fax: 020 7960 1901

email: registry@supremecourt.gsi.gov.uk

www.supremecourt.gov.uk