In the Supreme Court of the United Kingdom

Notice of appeal

(or application for permission to appeal)

On appeal from

Court of Appeal (Civil Division)

THE JOINT ADMINISTRATORS OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)

—— V ——

See Continuation Sheet A

Appeal number

Date of filing

D D / M M M / Y Y Y Y

Appellant's solicitors

Dentons UKMEA LLP

Respondent's solicitors

See Continuation Sheet B

1. Appellant

Appellant's full name: THE JOINT ADMINISTRATORS OF LB HOLDINGS INTERMEDIATE 2 LIMITED

Original status:
- [x] Claimant
- [ ] Defendant
- [ ] Petitioner
- [ ] Respondent
- [ ] Pursuer
- [ ] Defender

Solicitor

Name: Dentons UKMEA LLP

Address: One Fleet Place,
London

Telephone no.: 020 7246 1212

Fax no.: 020 7246 7777

DX no.: -

Postcode: EC4M 7WS

Ref.: 058056.00665/NDB/LMF

Email: nigel.barnett@dentons.com; luci.mitchell-fry@dentons.com

How would you prefer us to communicate with you?
- [ ] DX
- [x] Email
- [ ] Post
- [ ] Other *(please specify)*

Is the appellant in receipt of public funding/legal aid?
- [ ] Yes
- [x] No

If Yes, please give the certificate number

Counsel

Name: Robert Miles QC

Address: 4 Stone Buildings,
Lincoln's Inn,
London

Telephone no.: 020 7242 5524

Fax no.: 020 7831 7907

DX no.: 385 Chancery Lane

Postcode: WC2A 3XT

Email: r.miles@4stonebuildings.com

Counsel

Name: Louise Hutton & Rosanna Foskett

Address:
Maitland Chambers,
7 Stone Buildings,
Lincoln's Inn,
London

Telephone no. 020 7406 1200

Fax no. 020 7406 1300

DX no. LDE 326

Postcode: WC2A 3SZ

Email: lhutton@maitlandchambers.com; rfoskett@maitlandchambers.com

2. Respondent

Respondent's full name: See Continuation Sheet C for names of all Respondents and Original Status

Original status

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

Solicitor

Name: See Continuation Sheet C for names of all Respondents' solicitors

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: See Continuation Sheet C for names of all Respondents' counsel

Address:

Telephone no.:

Fax no.:

DX no.:

Postcode:

Email:

Counsel

Name: See Continuation Sheet C

Address:

Telephone no.:

Fax no.:

DX no.:

Postcode:

Email:

3. Decision being appealed

Name of Court: Court of Appeal (Civil Division)

Names of Judges: Lord Justice Moore-Bick
Lord Justice Lewison
Lord Justice Briggs

Date of order/ interlocutor/decision: 14/May/2015
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

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

See Continuation Sheet D

6. Grounds of appeal

See Continuation Sheet E

Counsel's name or signature:

Robert Miles QC, Louise Hutton, Rosanna Foskett

7. Other information about the appeal

Are you applying for an extension of time?

☐ Yes ☑ No

If Yes, please explain why

What order are you asking the Supreme Court to make?

Order being appealed ☐ 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 | | | / | | | | / | | | | |
D D M M M Y Y Y Y

2nd Respondent | | | / | | | | / | | | | |
D D M M M Y Y Y Y

I certify that this document was served on

See Continuation Sheet F

by

See Continuation Sheet F

by the following method

See Continuation Sheet F

Signature

9. Other relevant information

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

2015 / EWCA CIV / 485

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

First instance judgment of David Richards J [2015] Ch1

Subject matter catchwords for indexing.

See Continuation Sheet G

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.uk
www.supremecourt.uk

THE JOINT ADMINISTRATORS OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)

APPELLANT

AND

LEHMAN BROTHERS HOLDINGS INC
AND OTHERS

RESPONDENTS

FORM 1: CONTINUATION SHEET A

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(1) THE JOINT ADMINISTRATORS OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)

APPELLANT

AND

(1) LEHMAN BROTHERS HOLDINGS INC
(2) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS LIMITED (IN ADMINISTRATION)
(3)THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)
(4) CVI GVF (LUX) MASTER SARL
[(5) LYDIAN OVERSEAS PARTNERS MASTER FUND LIMITED]

RESPONDENTS

THE JOINT ADMINISTRATORS OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)

APPELLANT

AND

LEHMAN BROTHERS HOLDINGS INC
AND OTHERS

RESPONDENTS

FORM 1: CONTINUATION SHEET B

Respondent's solicitors

1. The solicitors for LEHMAN BROTHERS HOLDINGS INC are Weil, Gotshal & Manges.

2. The solicitors for THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS LIMITED (IN ADMINISTRATION) are DLA Piper UK LLP.

3. The solicitors for THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION) are Linklaters LLP.

4. The solicitors for CVI GVI (LUX) MASTER SARL are Freshfields Bruckhaus Deringer LLP.

THE JOINT ADMINISTRATORS OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)

APPELLANT

AND

LEHMAN BROTHERS HOLDINGS INC
AND OTHERS

RESPONDENTS

FORM 1: CONTINUATION SHEET C

SECTION 2: RESPONDENT

First Respondent

Respondent's full name: **LEHMAN BROTHERS HOLDINGS INC**

Original status: **Respondent**

Solicitor-

Name: **Weil, Gotshal & Manges**

Address: **110 Fetter Lane, London, EC4A 1AY**

Telephone no: **020 7903 1000**

Fax no: **020 7903 0990**

E-mail: **adam.plainer@weil.com**

How would you prefer us to communicate with you?: **E-mail**

Is the respondent in receipt of public funding/legal aid? **No**

Counsel-

Name: **Barry Isaacs QC**

Address: **South Square, 3-4 South Square, Gray's Inn, London WC1R 5HP**

Telephone no: **020 7696 9900**

Fax no: **020 7696 9911**

E-mail: **barryisaacs@southsquare.com**

Second Respondent

Respondent's full name: **THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS LIMITED (IN ADMINISTRATION)**

Original status: **Applicant**

Solicitor-

Name: **DLA Piper UK LLP**

Address: **3 Noble Street, London, EC2V 7EE**

Telephone no: **08700 111 111**

Fax no: **020 7796 6666**

E-mail: **chris.parker@dlapiper.com**

How would you prefer us to communicate with you?: **E-mail**

Is the respondent in receipt of public funding/legal aid? **No**

Counsel-

Name: **David Wolfson QC & Nehali Shah**

Address: **One Essex Court, Temple, London, EC4Y 9AR**

Telephone no: **020 7583 2000**

Fax no: **020 7583 0118**

E-mail: dwolfson@oeclaw.co.uk; nshah@oeclaw.co.uk

Third Respondent

Respondent's full name: **THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)**

Original status: **Applicant**

Solicitor-

Name: **Linklaters LLP**

Address: **1 Silk Street, London, EC2Y 8HQ**

Telephone no: **020 7456 2000**

Fax no: **020 7456 2222**

E-mail: **tony.bugg@linklaters.com**

How would you prefer us to communicate with you?: **E-mail**

Is the respondent in receipt of public funding/legal aid? **No**

Counsel-

Name: **William Trower QC, Daniel Bayfield & Alexander Riddiford**

Address: **3-4 South Square, Gray's Inn, London, WC1R 5HP**

Telephone no: **020 7696 9900**

Fax no: **020 7696 9911**

E-mail: williamtrower@southsquare.com; danielbayfield@southsquare.com; **alexanderriddiford@southsquare.com**

Fourth Respondent

Respondent's full name: **CVI GVI (LUX) MASTER SARL**

Original status: **Respondent (joined to proceedings by the Court of Appeal)**

Solicitor-

Name: **Freshfields Bruckhaus Deringer LLP**

Address: **65 Fleet Street, London, EC4Y 1HS**

Telephone no: **020 7936 4000**

Fax no: **020 7832 7001**

E-mail: **christopher.robinson@freshfields.com**

How would you prefer us to communicate with you?: **E-mail**

Is the respondent in receipt of public funding/legal aid? **No**

Counsel-

Name: **Robin Dicker QC, Richard Fisher & Charlotte Cooke**

Address: **3-4 South Square, Gray's Inn, London, WC1R 5HP**

Telephone no: **020 7696 9900**

Fax no: **020 7696 9911**

E-mail: robindicker@southsquare.com; richardfisher@southsquare.com; charlottecooke@southsquare.com

THE JOINT ADMINISTRATORS OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)

APPELLANT

AND

LEHMAN BROTHERS HOLDINGS INC
AND OTHERS

RESPONDENTS

FORM 1: CONTINUATION SHEET D

SECTION 5: INFORMATION ABOUT THE DECISION BEING APPEALED

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(1) The facts

1 Lehman Brothers International (Europe) ("**LBIE**") was the principal trading company within the European Lehman Brothers group of companies. It went into administration on 15 September 2008 and was granted permission to become a distributing administration on 2 December 2009. It is an unlimited company.

2 LBIE has two shareholders, LB Holdings Intermediate 2 Ltd ("**LBHI2**") and Lehman Brothers Ltd ("**LBL**"). LBL went into administration on the same date as LBIE (15 September 2008) and was granted permission to become a distributing administration on 20 June 2014. LBHI2 went into administration on 14 January 2009.

3 LBHI2 and LBL are both creditors of LBIE. They submitted proofs of debt in LBIE's administration as follows:

3.1 LBL on 21 December 2011 for an unsecured claim of around £363m;

3.2 LBHI2 on 24 April 2012 for an unsecured claim of around £38m and for an unsecured subordinated claim in respect of sums lent to LBIE under three subordinated debt agreements dated 1 November 2006 of around £1.25bn (the "**Sub Debt**").

LBHI2 also has an unsecured claim against LBL for around £257m, for which it has proved in LBL's administration.

4 Complex and inter-related questions arose by reason of, in particular, the possible existence of a surplus in LBIE's administration above unsecured unsubordinated claims, and LBIE being an unlimited company. The main issues were, in summary:

4.1 whether LBHI2's Sub Debt ranked ahead of or behind statutory interest payable under rule 2.88(7) of the Insolvency Rules 1986 ("**IR**");

4.2 what statutory interest would be payable by LBIE to creditors in the event that it moved from a distributing administration into liquidation;

4.3 what was the scope of the liability of LBHI2 and LBL (as shareholders in an unlimited company) under s.74 of the Insolvency Act 1986 ("**IA**") [1];

4.4 whether LBIE could submit a proof of debt in any distributing administration or liquidation of LBHI2 and LBL in respect of its claim against them under s.74;

4.5 whether, if LBIE had a claim against LBHI2 and LBL under this section, LBHI2 and LBL would be prevented from receiving sums from LBIE's distributing administration by reason of the "Contributory Rule"[2] and whether the principle in Cherry v Boultbee (1839) 4 My. & C. 442[3] would apply.

5 The latest progress report by LBIE's administrators (for the period 15 September 2014 to 14 March 2015) shows an estimated surplus (above unsecured unsubordinated claims) of between £6.01bn and £7.59bn.

(2) The Directions Application

6 The Joint Administrators of LBIE, LBHI2 and LBL issued a joint application for directions under para 63 of Sch B1 to the IA on 14 February 2013 ("**the Directions Application**") seeking the determination of a number of questions relating to those matters.

7 Lehman Brothers Holding Inc ("**LBHI**"), the ultimate parent for the Lehman Brothers group of companies worldwide, was joined as a respondent to the Directions Application.

8 On 27 March 2013, Briggs J joined Lydian Overseas Partners Master Fund Limited ("**Lydian**"), a substantial unsecured creditor of LBIE, to the Directions Application, which was amended to raise the further issue of the existence of a "currency conversion claim", ie

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[1] References to "sections" in these Grounds are to sections of the IA unless otherwise stated.

[2] ie the rule that a contributory of a company in liquidation cannot recover anything in respect of the claims he may have as a creditor until he has fully discharged his obligations as a contributory under IA s. 74.

[3] ie the technique of netting off reciprocal monetary obligations where there is no room for set-off. A person (X) who owes an estate money cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. X is paid by holding in his own hand a part of the mass, which, if the mass were completed, he would receive back.

whether, when proved debts and statutory post-insolvency interest had been paid in full, a creditor with a proved debt denominated in a foreign currency but converted into sterling under the insolvency regime was entitled to claim for any currency loss suffered by reason of the depreciation of sterling between the date of the winding-up order (in a liquidation) or the IR2.95 notice (in a distributing administration) and the date of payment to the creditor on his proof of debt.

(i) Hearing before and decision of David Richards J

9 The Directions Application was heard by David Richards J on 12 to 15 and 18 to 20 November 2013. Judgment was handed down on 14 March 2014 (the "**First Instance Judgment**"). The Order giving effect to the First Instance Judgment was made on 19 May 2014 (the "**First Instance Order**") and contained 10 declarations dealing with the issues summarised above. David Richards J held in summary that:

9.1 the Sub Debt ranked for payment by LBIE behind other provable debts, statutory interest thereon and all non-provable liabilities of LBIE including currency conversion claims (declaration (i));

9.2 currency conversion claims existed as non-provable liabilities of LBIE and such a claim would rank for payment by LBIE after payment in full of all proved debts and statutory interest thereon (declarations (ii) and (iii));

9.3 if LBIE moved into liquidation, creditors would only be able to claim statutory interest from the date of liquidation; the interest in respect of the period of LBIE's administration would not be provable by the creditor in the subsequent liquidation and would not be payable to the creditor as statutory interest under s.189 or IR2.88, but the creditor would have a non-provable claim against LBIE in liquidation for any interest to which the creditor was otherwise entitled in respect of the period of administration (declarations (iv) and (v));

9.4 LBHI2's and LBL's liability to LBIE under s.74 extended to all provable debts, statutory interest under s.189 thereon and all non-provable liabilities of LBIE (declaration (vi));

9.5 whilst in administration, LBIE could prove for the potential s.74 liability of LBHI2 and LBL in their distributing administrations or subsequent liquidations and that provable claim would be the subject of mandatory insolvency set-off against any provable claims of LBHI2 and LBL against LBIE (declarations (viii), (ix) and (x));

9.6 whilst LBIE was in administration, neither the "Contributory Rule" nor the rule in Cherry v Boultbee applied so as to allow LBIE to refuse to admit to proof or pay dividends on provable debts of LBHI2 and LBL on the ground that they would or might become liable to calls under s.74 if LBIE went into liquidation (declaration (vii)).

10 All of those declarations were appealed to the Court of Appeal with the permission of David Richards J.

11 Lydian indicated at the hearing on 19 May 2014 (when consequential matters raised by the First Instance Judgment were dealt with) that it did not intend to be involved in any appeal and CVI GVF (Lux) Master SARL ("**CVI**"), a substantial unsecured creditor of LBIE with claims contractually denominated in currencies other than sterling, was joined to the proceedings by Patten LJ on 2 September 2014 to make submissions in the Court of Appeal relating to "currency conversion claims" only, in place of Lydian.

(ii) Hearing before and decision of the Court of Appeal

12 The Court of Appeal (Moore-Bick, Lewison and Briggs LJJ) heard the appeal from 23 to 27 March 2015. Judgment was handed down on 14 May 2015 (the "**CA Judgment**"). The Order giving effect to the CA Judgment was made on 14 May 2015 (the "**CA Order**"). The CA Order refused the applications for permission to appeal made by LBHI2, LBHI, LBL and LBIE: Lewison LJ said when the CA Judgment was handed down that it would be left to the Supreme Court to decide whether to grant permission.

13 The CA's treatment of the issues was as follows, in summary:

13.1 **Extent of subordination:** The CA agreed with the Judge that the Sub Debt ranked for payment by LBIE after payment of all proved debts, statutory interest thereon and non-provable liabilities, even though it accepted LBHI2's argument that the Sub Debt was provable (and thus disagreed with the Judge's decision that clause 7(d) and/or 7(e) had the effect of precluding the lodging of a proof). The CA held that the right to repayment of the Sub Debt was a contingent right, contingent on the satisfaction of clause 5(1)(b) and, if appropriate, clause 5(1)(a) as well.

13.2 **Currency conversion claims:** The CA by a majority (Moore-Bick and Briggs LJJ) agreed with the Judge that currency conversion claims exist as non-provable liabilities of LBIE to be paid after all proved debts and statutory interest thereon. The conversion

into sterling of foreign currency debts was for the purpose of proof and for the purpose of set-off but had no (other) substantive effect. Lewison LJ dissented and, at [100], identified 10 reasons why currency conversion claims should not be recognised.

13.3 **Statutory interest accrued during the administration:** In relation to interest accruing on proved debts during the period of LBIE's administration, the CA departed from the Judge's reasoning and from the submissions made by LBIE at first instance and in its appeal skeleton and found that, once a surplus had arisen (or could be shown to have arisen) in the administration after payment of all proved debts, r2.88(7) had the effect of requiring the surplus funds to be used in discharging statutory interest on the debts proved in the administration before being used for any other purpose such that it continued to burden so much of the surplus arising in the administration as passes into the hands of the liquidator.

13.4 **Scope of the s.74 liability:** The CA agreed with the Judge that LBHI2's and LBL's s.74 liability extended to provable debts, statutory interest thereon and non-provable liabilities of LBIE.

13.5 **Ability of LBIE's administrators to prove for the s.74 liability:** the CA agreed with the Judge that LBIE could (whilst in administration) prove for the potential s.74 liability in the distributing administrations or subsequent liquidations of LBHI2 and LBL because the benefit of the contributory's liability to contribute is an asset of the company and the liability to contribute fell within rule 13.12(1)(b) applying the three stage test in relation to statutory liabilities laid down by the Supreme Court in Re Nortel GmbH [2013] UKSC 52, [2014] AC 209.

13.6 **The Contributory Rule:** The CA agreed with the Judge that the contributory rule did not apply in a distributing administration. Applying the contributory rule in a distributing administration would be a serious injustice to a solvent contributory because it would disable him from ever proving in a distributing administration: in the absence of a call, there was nothing which he could pay to free himself and put himself in a position to receive distributions.

(3) The application in this Court

14 For the reasons set out in the Grounds of Appeal in Section 6, LBHI2 seeks permission to appeal on the points of law of public importance which ought now to be considered by the Supreme Court arising from the decisions at 13.1 to 13.5 above.

THE JOINT ADMINISTRATORS OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)

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RESPONDENTS

FORM 1: CONTINUATION SHEET E

SECTION 6: GROUNDS

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1 The decision involves several complex and inter-related points of law of general public importance which ought now to be considered by the Supreme Court, concerning -

1.1 the important and relatively little-litigated topic of subordinated debt, which plays a key role in the provision of "regulatory capital" for banks and financial institutions as well as being a common funding mechanism for companies more generally; and

1.2 the true construction and effect of the statutory insolvency regime including, in particular, (a) the existence, nature and ranking of non-provable claims (including currency conversion claims), (b) the ability (if any) of a liquidator or administrator to deal with non-provable claims and (c) the nature of the requirement for the payment of post-insolvency interest.

David Richards J, who gave the judgment at first instance, described the case as raising *"a number of novel and important questions"* (para 4 of the First Instance Judgment).

2 The issues of law are numerous and complex and this is acknowledged, expressly and implicitly, in the CA Judgment. For example:

2.1 The CA divided on one key point, namely the existence of currency conversion claims (with Lewison LJ disagreeing with the decision of Moore-Bick and Briggs LJJ and identifying ten reasons as to why he disagreed). There is very little authority at all about the nature of so-called non-provable claims and how they feature, if at all, in the statutory insolvency scheme, which is an important question of principle.

2.2 On the question of whether post-administration interest is payable in a subsequent liquidation, the CA differed from the conclusion reached by the Judge below, and adopted its own analysis rather than upholding any of the various arguments advanced by LBIE on its appeal on this issue. Both Lewison LJ and Briggs LJ acknowledged that their conclusion only produced a sensible solution to what they saw as a problem created by the legislation in circumstances where there was a distributing administration followed by liquidation, and identified the need for legislation to address the issue fully.

2.3 Lewison LJ described the issue as to proof of the contingent s.74 liability as "an *exceptionally difficult issue on which I have changed my mind more than once*" (at [122]) and reached his conclusion *"[A]fter a good deal of hesitation"* (at [131]). Briggs LJ said that LBHI's arguments on the point (which were adopted by LBHI2 and LBL) *"do give rise to real concern about the question whether the statutory regime for contributory liabilities is consistent with proof of such liabilities ahead of liquidation"* (at [225]) and that he found the answer very much more difficult than it seems to have appeared to the Judge (at [232]).

3 The declarations made in the CA Order raise a number of common issues, in particular:

3.1 the existence, nature and treatment of non-provable liabilities within or without insolvency proceedings under the 1986 Act and Rules, which arises in relation to subordination, currency conversion claims and scope of the s.74 liability;

3.2 the inter-relationship between provable claims (including subordinated provable claims), non-provable claims and statutory interest, which arises in relation to each of the declarations just mentioned and also in relation to the declarations concerning post-administration interest; and

3.3 the nature and scope of the liability of a member of an unlimited company, which arises in relation to subordination and the scope and provability of the s.74 liability.

4 The decision is an important one in relation to all these issues and is the only recent decision which covers them in any detail. Absent any appeal, the decision will be applied in future cases concerning (a) the ranking of subordinated debt, (b) non-provable claims, (c) statutory interest and (d) the provability and scope of the s.74 liability. (The issues as to s.74 are

applicable to limited as well as unlimited companies; and unlimited companies have continued to be used, as David Richards J commented at [132], in particular as estate or investment companies, for complex corporate restructurings and transactions, and for corporate planning for US tax purposes. It is therefore to be expected that the CA's decision on the scope of the s.74 liability, as well as its provability will, absent an appeal, be referred to and applied in other cases in the future concerning unlimited companies.)

5 Further, as to the declaration of the extent of the subordination of LBHI2's subordinated debt, the subordination provisions in issue are taken from standard form agreements in effect when LBIE entered into them (November 2006) and produced by LBIE's regulator for use by investment firms as part of their regulatory capital and to give effect to pan-European and English rules on capital adequacy. Although the relevant regulator (now the Prudential Regulation Authority) no longer publishes standard form agreements, the relevant regulations remain in similar form to those in force at the time LBIE went into administration. The question how far such subordinated debt should be subordinated and, in particular, whether it should be subordinated by the language used in these agreements to statutory interest and to non-provable liabilities (i.e. liabilities that do not form part of, and are not recognised by, the statutory insolvency regime) is undoubtedly a question of general public importance going beyond the facts of this particular case which ought now to be considered by the Supreme Court.

6 The sums involved are extremely large. LBIE's administrators estimate that, after full payment of unsecured unsubordinated creditors, they will have a surplus of between £6.01bn and £7.59bn (according to the 13th progress report dated 10 April 2015 for the six month period ending 14 March 2015). The decision in this case will determine the sums payable to the holders of the various classes of LBIE debt, which has been widely speculated in and traded (as it has for some time been clear that there might be a surplus available for distribution after payment in full of unsecured unsubordinated creditors). The determination of the respective rankings for payment by LBIE in these proceedings is accordingly being closely followed by the worldwide financial industry. As to the value of the particular questions in issue: (a) the Sub Debt is £1.25bn (excluding interest); (b) LBIE's administrators have estimated that interest accruing on debts since the commencement of the administration in September 2008 is around £10bn; and (c) currency conversion claims are estimated by LBIE's administrators to be around £1.3bn.

7 As set out above, the issues are inter-related. Although the CA addressed construction of the Sub Debt agreements first, for clarity of exposition it is more convenient to deal with currency conversion claims first.

Currency conversion claims and non-provable liabilities

8 The CA erred in law in recognising the existence of currency conversion claims (estimated by LBIE's administrators at around £1.3bn in this case) as non-provable liabilities.

9 The statutory insolvency scheme is a scheme for the collective enforcement of debts and distribution amongst those who have participated in such scheme by *pari passu* distribution. Proving a debt is the mandatory mechanism by which a creditor becomes entitled to participate in distributions (IR2.72) and there has been a general trend towards the inclusion of as many claims as possible within the proof process so that the statutory insolvency scheme itself can deal comprehensively with all the sums that should be paid when a company has gone into an insolvency process (see eg Re Nortel at [92]-[93] per Lord Neuberger).

10 Accordingly, non-provable claims should be, and are, very rare indeed. Lord Neuberger's dictum in Re Nortel at [39], which included non-provable claims in the list of payments to be made out of the assets, should not be treated as if it were a statute rather than a summary introduction to the different issues under consideration in that case. Generally, the Courts have recognised non-provable claims in situations where the factual situation which has arisen was genuinely unforeseen by the legislature, e.g. the tort claims in Re T&N Ltd [2006] 1 WLR 1728. In that case, Parliament swiftly enacted legislation to make the (unforeseen) non-provable claim provable (Insolvency (Amendment) Rules 2006, SI2006/1272, amending IR13.12), continuing the process of bringing as many claims into the proof process as possible.

11 The decision of the majority of the CA to recognise a currency conversion claim as a non-provable liability, in effect treating the insolvency scheme as bifurcating the single contractual obligation by the mandatory conversion into sterling for proof (see per Lewison LJ at [100]) is wholly inconsistent with the principled approach to proof recognised and upheld in Nortel for sound reasons of policy.

12 Humber Ironworks (1868-69) LR 4 Ch App 643 does not support the conclusion that currency conversion claims exist as non-provable liabilities alongside the insolvency scheme now in place pursuant to the 1986 Act and Rules. The 1986 scheme now provides expressly and exhaustively for the payment of interest in respect of the period after the commencement of liquidation (or administration) and there is simply no room for the concept of a creditor being *"remitted to his rights under his contract"* in the event of a surplus.

13 As Lewison LJ emphasised (at [65] and [82]-[87]), the position of foreign currency creditors was expressly considered prior to the introduction of the 1986 scheme. The legislative history demonstrates that the Law Commission and Cork Committee expressly considered the questions of (i) how to deal with proof of foreign currency claims, and (ii) whether to compensate foreign currency creditors for adverse exchange rate fluctuations after the process of proof; and that they specifically decided against allowing for compensation to be claimed from the assets of the company if the company turned out to be solvent.

14 The fact that a creditor is not required to refund any excess he receives by reason of currency movements must be because the statutory scheme operates substantively to entitle the creditor to the payment that he has received. There is nothing in the wording of the Rule, or as a matter of principle, to justify the decision that IR2.86 creates substantive entitlements for foreign currency creditors (to sterling payments) when sterling appreciates, but raises only procedural bars (to foreign currency payments) when sterling depreciates.

15 The CA should have held, as Lewison LJ did, that IR2.86 operates with substantive effect and causes the mandatory conversion of a (foreign currency) debt into sterling and renders the sterling equivalent of the debt provable in the administration of the debtor, such that payment of the proved – sterling – sum satisfies the creditor's claim. The words *"for the purpose of proving a debt"* in IR2.86 do not indicate that the process of proof and distribution amongst creditors with admitted proofs does not extinguish the underlying contractual obligation. Rather, the reference to the proof process goes to show that the conversion has substantive effect because the proof process is the fundamental mandatory step by which a creditor becomes entitled to participate in distributions from an insolvent estate.

16 The majority of the CA erred in considering Wight v Eckhardt Marine [2004] 1 AC 147 to be authority for the *"general principle that the insolvency code did not affect the underlying debt"* (per

Briggs LJ at [139] and see also per Moore-Bick LJ at [249]-[251]). It should have rejected that submission as Lewison LJ did at [93]-[95].

17 The decision that currency conversion claims exist as non-provable liabilities is inconsistent with the rules of insolvency set-off and the interpretation of those rules in Stein v Blake [1996] AC 243, from which it is clear that the net (sterling) balance resulting from set-off is the only surviving substantive debt that is owed, and that the two original cross-claims no longer exist. Briggs LJ erred in distinguishing the substantive permanent effect of conversion when set-off applies on the basis that, *"set-off is self-executing at the moment of the conversion, when the foreign currency's amount is worth exactly the same as the sterling equivalent"* (at [152]). By IR2.85(3), set-off takes effect when the administrator gives notice that he intends to make a distribution, not on the date on which the company enters administration, but it is at the earlier date at which, by IR2.86(1), the debts are converted into sterling. Thus, in an administration, set-off is not *"self-executing at the moment of the conversion"* but at a later date.

Construction of the Subordinated Debt Agreements

18 The CA erred in law in holding that, on the proper construction of the Sub Debt agreements, LBHI2's Sub Debt was a contingent debt which was not to be repaid until LBIE had paid statutory interest and non-provable liabilities as well as unsecured unsubordinated creditors. Although the CA was correct to hold that the Sub Debt is a provable contingent debt, the CA should have held that its repayment is contingent only on payment in full of unsecured unsubordinated creditors, and not on payment of statutory interest and non-provable liabilities.

19 On their true construction, cl.5(1)(b) and 5(2)(a) limit the *"Liabilities"* which are to be taken into account in ascertaining whether the Borrower is "solvent" to the debts provable in a formal insolvency process: that is the meaning of the language directing that *"obligations which are not payable or capable of being established or determined in the Insolvency of the Borrower"* are to be disregarded. Provable debts are (a) debts which are currently due and payable (ie *"payable"*) and also (b) prospective and contingent liabilities which would be admitted to proof in any insolvency process under the insolvency legislation (ie *"capable of being established or determined in the Insolvency of the Borrower"*). Contrary to the approach adopted by the Judge and by the CA, it is important to have regard to the clause as a whole. Focusing on the word *"payable"* and simply linking it to the words *"in the Insolvency of the Borrower"* (which was the error made

by the CA and David Richards J) distorts the structure of the clause and renders otiose the words *"or capable of being established or determined in the Insolvency of the Borrower"*. It is obvious that the draftsman meant those words to mean something different to *"payable"*.

20 Statutory interest is not a provable debt and is therefore (for the reasons set out above) neither *"payable"* nor *"capable of being established or determined in the Insolvency of the Borrower"* within the meaning of cl.5(2)(a), and is therefore to be disregarded when determining whether the Borrower is "solvent" for the purposes of cl.5(1)(b).

21 Non-provable liabilities are not *"payable or capable of being established or determined in the Insolvency of the Borrower"* because they are neither currently due and payable (ie *"payable"*) nor otherwise provable (ie *"capable of being established or determined in the Insolvency of the Borrower"*, particularly given that *"Insolvency"* here denotes a formal insolvency process).

22 Further or alternatively, the CA should have held that non-provable liabilities are not "*payable or capable of being established or determined in the Insolvency of the Borrower*" even if clause 5(2)(a) is not read as referring only to provable debts. By definition, any claim for payment of a non-provable liability is not made *"in the Insolvency"* but is entirely outside the statutory process. There is no mechanism for establishing or determining non-provable liabilities in an insolvency process; that would have to be done by the Court in a non-insolvency process. And the payment of such non-provable liabilities is also outside the scope of the insolvency proceedings referred to as the *"Insolvency of the Borrower"*.

23 The following alternative analysis points to the same conclusion, and echoes the above, thus further indicating that, on its true construction, the Sub Debt is subordinated only to unsecured unsubordinated debts and not to statutory interest and non-provables:

23.1 Cl.5(1)(b) makes payment of the Sub Debt conditional on LBIE being *"solvent"* (as defined in cl.5(2)) *"at the time of, and immediately after, the payment by the Borrower and accordingly no such amount which would otherwise fall due for payment shall be payable except to the extent that the Borrower could make such payment and still be 'solvent'"*.

23.2 Neither statutory interest nor non-provable liabilities are payable unless there are surplus assets remaining after payment of all proved debts.

23.3 As the CA held, the Sub Debt is itself a provable debt. Since the Sub Debt is provable, it is only possible to work out whether there is a surplus at all for the payment of statutory interest and non-provables by paying the Sub Debt.

23.4 There is therefore (and can be) no liability to pay statutory interest or non-provables in any sum exceeding whatever surplus is left after payment of the Sub Debt (because it is a provable debt).

23.5 Accordingly, once the unsecured unsubordinated debts have been paid and the administrators are deciding whether they can pay the Sub Debt consistent with the requirements of cl.5(2), they can be confident that payment of the Sub Debt will always leave the company *"solvent"* because the sum to be applied in payment of statutory interest (and in payment of non-provables, if and so far as that is required) is only whatever remains once the Sub Debt is paid (because the Sub Debt is a provable debt).

24 The CA's decision that the Sub Debt is subordinated to the payment of statutory interest, despite the Sub Debt being a provable debt, also gives rise to a peculiar result. Statutory interest is, by IR2.88(8), payable on all proved debts regardless of how those proved debts rank amongst themselves. But the result of the CA's decision is that the office-holder is required to pay some statutory interest on unsubordinated proved debts before the Sub Debt is paid and then, in the event of there being further surplus funds, statutory interest would be paid later on the Sub Debt. There is no suggestion in the legislation that there can be more than one "trigger" for the payment of statutory interest and any contention that the Sub Debt draftsman sought to introduce such a double trigger is implausible.

25 In any event, the CA erred in failing to declare expressly that the Sub Debt was available for set-off as well as being provable (it having followed from David Richards J's decision that the Sub Debt was not provable that it was not available for set-off, and it likewise following from the CA's decision that the Sub Debt is provable that it is available for set-off).

Whether statutory interest accrued during LBIE's administration would be payable in LBIE's subsequent liquidation

26 The CA erred in law in holding that, if the administration of LBIE is immediately followed by a liquidation, any statutory interest in respect of the period of the administration which was payable under rule 2.88(7) but was not paid before the commencement of the

liquidation will be payable in the liquidation under rule 2.88(7) from any part of the fund which constituted the "surplus" in the administration (as defined in rule 2.88(7)) and which subsequently comes into the hands of the liquidator(s).

27 The conclusion fashioned by the CA is unwarranted judicial legislation, and even the members of the CA did not agree on the nature of the "charge" imposed on the surplus. The provisions of the statutory scheme are inconsistent with the survival of rule 2.88(7) into a liquidation following an administration. The Act and the Rules clearly provide for two regimes for statutory interest, (a) that provided by rule 2.88(7) to be followed by the administrator during the administration and (b) that provided by s.189 to be followed by the liquidator in a liquidation.

28 There is no basis for requiring the liquidator to follow rule 2.88(7) which, as rule 2.1(1) makes clear, applies only in an administration. Rule 2.88(7) therefore has no application once the company is no longer in administration, and is to be contrasted with paragraph 99 of Schedule B1 of the IA, which shows that where the draftsman intended to create an obligation binding on the assets after they passed from the hands of the administrator into the hands of the liquidator, specific provision was made for such a continuing obligation by way of statutory charge. Instead, the wording in IR2.88(7) simply echoes that in s.189.

The scope of the s.74 liability

29 The CA erred in law in holding that the obligation of members to contribute under s.74(1) extends to provide for statutory interest on proved debts and unprovable liabilities.

30 The CA should have held that the obligation under s.74 extends only to provable debts and not to statutory interest or non-provable liabilities, given in particular:

30.1 S.74 is triggered only upon winding up. The s.74 liability is part of the statutory scheme under which creditors receive distributions in payment of their proved debts. The statutory scheme makes no provision for the determination, still less the payment, of non-provable debts. Accordingly, the liability to contribute to an amount sufficient for payment of "debts and liabilities" is limited to a liability to contribute for the payment of proved debts.

30.2 This is consistent with the use of the word "surplus" in s.189(2) to identify the moneys from which statutory interest is to be paid: as a matter of ordinary language, a contributory is liable to contribute to a fund but not to a "surplus" of that fund. An obligation to contribute to pay "debts and liabilities" is not an obligation to create the very surplus without which no statutory interest is payable.

30.3 The CA in any event erred in holding that the s.74 obligation extended to the payment of non-provable liabilities. The statutory insolvency scheme includes no mechanism for establishing such liabilities and the obligation to pay such liabilities is no part of the statutory scheme (see [22] above) and thus no part of s.74. The CA erred in basing its decision on the scope of a contributory's liability on the liability of members of limited or unlimited companies in 1862 (see [182]-[184] and [202]), when non-provable debts were (as the CA held at [140]) a recognised and established part of the insolvency scheme, rather than on the current statutory scheme, as it now exists following the fundamental changes made in 1986.

Whether LBIE's administrators can prove in a distributing administration or liquidation of LBHI2 or LBL in respect of those companies' liabilities under s.74

31 The CA erred in law in holding that LBIE, acting by its administrators, would be entitled to lodge a proof in a distributing administration or liquidation of LBL or LBHI2 in respect of those companies' liabilities under s.74. The CA should have held that the administrators of LBIE will not be entitled to lodge any such proof of debt because in particular:

31.1 The power to make calls on contributories to the extent of their liability under s.74 is a power given to the Court in a liquidation by s.150, which is delegated to the liquidator (IR4.195 and IRR4.202–4.205). Thus the potential ability of a liquidator who might subsequently be appointed to LBIE to make calls is not an asset of LBIE falling under the control of the administrators and is not capable of being asserted by them as the basis of any prospective or contingent claim.

31.2 S.74 can have no application unless and until LBIE is being wound up.

ROBERT MILES QC
LOUISE HUTTON
ROSANNA FOSKETT

THE JOINT ADMINISTRATORS OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)

APPELLANT

AND

LEHMAN BROTHERS HOLDINGS INC
AND OTHERS

RESPONDENTS

FORM 1: CONTINUATION SHEET F

SECTION 8: CERTIFICATE OF SERVICE

First Respondent

Date on which this form was served: 10 June 2015

I certify that this document was served on: Weil, Gotshal & Manges, the solicitors for LEHMAN BROTHERS HOLDINGS INC

By: Dentons UKMEA LLP

By the following method: Personal Service and by e-mail

Signature:

Second Respondent

Date on which this form was served: 10 June 2015

I certify that this document was served on: DLA Piper UK LLP, the solicitors for THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS LIMITED (IN ADMINISTRATION)

By: Dentons UKMEA LLP

By the following method: Personal Service and by e-mail

Signature:

Third Respondent

Date on which this form was served: 10 June 2015

I certify that this document was served on: Linklaters LLP, the solicitors for THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

By: Dentons UKMEA LLP

By the following method: Personal Service and by e-mail

Signature:

Fourth Respondent

Date on which this form was served: 10 June 2015

I certify that this document was served on: Freshfields Bruckhaus Deringer LLP, the solicitors for CVI GVI (LUX) MASTER SARL

By: Dentons UKMEA LLP

By the following method: Personal Service and by e-mail

Signature:

THE JOINT ADMINISTRATORS OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)

APPELLANT

AND

LEHMAN BROTHERS HOLDINGS INC
AND OTHERS

RESPONDENTS

FORM 1: CONTINUATION SHEET G

SECTION 9: SUBJECT MATTER CATCHWORDS FOR INDEXING

Insolvency—Administration—Distribution of assets—Ranking of claims which might be made against available assets of unlimited company after payment of general unsecured unsubordinated creditors—Potential liability of members for liabilities of company—Whether claim of subordinated debt holder ranking ahead of or behind statutory interest—Whether claim ranking ahead of or behind foreign currency conversion claims—Whether foreign currency conversion claims payable out of assets—Whether contractual interest provable or statutory interest payable for period of administration if immediately followed by liquidation—Whether members' liability to contribute in liquidation limited to funds required to pay debts and liabilities proved in liquidation—Whether contributory rule applying in administration