

In the Supreme Court of the United Kingdom

Notice of objection/ Acknowledgement



(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) The Joint Administrators of Lehman Brothers International (Europe) (in administration)
(2) CVI GVF (Lux) Master SARL

Appeal number

Date of filing

2	3	/	J	u	n	/	2	0	1	5
D	D		M	M	M		Y	Y	Y	Y

Name of respondent

CVI GVF (Lux) Master SARL

Respondent's solicitors

(1) Linklaters LLP
(2) Freshfields Bruckhaus Deringer LLP

Name of appellant

The Joint Administrators of Lehman Brothers Limited (in administration)

Appellant's solicitors

DLA Piper UK LLP

1. Respondent

Respondent's full name

CVI GVF (Lux) Master SARL

The respondent was served with the

- ☒ application for permission to appeal
☐ notice of appeal
☐ application

On date

0 9 / J u n / 2 0 1 5
D D M M M Y Y Y Y

The respondent intends to ask the Court to:

- ☒ refuse to grant permission to appeal
☐ order the appellant to give security for costs if permission to appeal is granted
☐ dismiss the appeal
☐ give the respondent permission to cross-appeal
☐ allow the appeal for reasons which are different from, or additional to, those given by the court below
☐ Other (*please specify*)

The respondent wishes to receive notice of any hearing date and to be advised of progress. The respondent's details are:

Solicitor

Name

Freshfields Bruckhaus Deringer LLP

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Fax no.

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DX no.

23 London Chancery Lane

Postcode

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Ref.

CHWR/163511:0001

Email

christopher.robinson@freshfields.com

How would you prefer us to communicate with you?

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

Counsel

Name

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2. Certificate of Service

Either complete this section or attach a separate certificate

On what date was this
form served on the

Appellant

/ /
D D M M M Y Y Y Y

Other

/ /
D D M M M Y Y Y Y

I certify that this document was served on

Please see continuation sheet A

by

Freshfields Bruckhaus Deringer LLP

by the following method

Personal service and email

Signature

3. Other information about the respondent

- ☐ The respondent is in receipt of public funding/legal aid

Certificate number

- ☐ The respondent is applying for public funding/legal aid

Information about the respondent's case

Set out here the respondent's grounds of appeal, reasons why permission to appeal should be refused or why the appeal should be allowed. Include information to explain what the respondent intends to ask the Court to do.

Please see continuation sheet B

Is the respondent seeking a declaration of incompatibility?

☐ Yes ☒ No

☐ The respondent will seek to raise issues under the Human Rights Act 1998
(please give brief details)

☐ The respondent will ask the court to make a reference to the
European Court of Justice (please give brief details)

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

Continuation Sheet A

CVI GVF (LUX) MASTER SARL

SECTION 2 OF FORM SC003: CERTIFICATE OF SERVICE

APPELLANT

The Joint Administrators of Lehman Brothers Limited (in administration)

Date on which this form was served: 23 June 2015

I certify that this document was served on DLA Piper UK LLP (3 Noble Street, London, EC2V 7EE) the solicitors for the Joint Administrators of Lehman Brothers Limited (in administration)

By: Freshfields Bruckhaus Deringer LLP

Method: Email and Personal Service

Signature:

FIRST RESPONDENT

The Joint Administrators of Lehman Brothers International (Europe) (in administration)

Date on which this form was served: 23 June 2015

I certify that this document was served on Linklaters LLP (One Silk Street, London, EC2Y 8HQ) the solicitors for the Joint Administrators of Lehman Brothers International (Europe) (in administration)

By: Freshfields Bruckhaus Deringer LLP

Method: Email and Personal Service

Signature:

OTHER PARTIES

The Joint Administrators of LB Holdings Intermediate 2 Limited (in administration)

Date on which this form was served: 23 June 2015

I certify that this document was served on Dentons UKMEA LLP (One Fleet Place, London, EC4M 7WS) the solicitors for the Joint Administrators of LB Holdings Intermediate 2 Limited (in administration)

By: Freshfields Bruckhaus Deringer LLP

Method: Email and Personal Service

Signature:

Lehman Brothers Holdings Inc

Date on which this form was served: 23 June 2015

I certify that this document was served on Weil, Gotshal & Manges (110 Fetter Lane, London, EC4A 1AY) the solicitors for Lehman Brothers Holdings Inc

By: Freshfields Bruckhaus Deringer LLP

Method: Email and Personal Service

Signature:

GROUND OF OBJECTION

The Second Respondent, CVI GVI (LUX) MASTER SARL (“CVI”), objects to the granting of permission to appeal to the Supreme Court insofar as any of (1) The Joint Administrators of LB Holdings Intermediate 2 Limited (in administration) (“LBHI2”) (2) The Joint Administrators of Lehman Brothers Holdings Inc (“LBH”) (3) The Joint Administrators of Lehman Brothers Limited (in administration) (“LBL”) seek to appeal against paragraphs (ii) and (iii) of the Judge’s order of 19 May 2014, upheld by the Court of Appeal at paragraph (1) of its order of 14 May 2015, being those paragraphs which declare that currency conversion claims exist as non-provable liabilities of LBIE, and that such claims would rank for payment by LBIE after payment in full of all proved debts and statutory interest thereon (“the Currency Conversion Issues”).

Permission to appeal in respect of the Currency Conversion Issues should be refused:

1. None of the grounds of appeal relied upon by LBHI2, LBH and LBL raise any material new points which were not the subject of argument before the Court of Appeal. The reasons given by Lewison LJ for differing from the Judge’s conclusion (in particular, at [100]) were specifically addressed and rejected by Moore-Bick and Briggs LJ at [136]-[166], [247]-[260].
2. The position for which the Appellants contend in relation to the Currency Conversion Issues is self-evidently unjust: i.e. that monies held in the estate should be paid to subordinated debt and equity holders, notwithstanding the fact that existing creditors, who bargained for payment in USD or other foreign currencies, have not received (and will as a result never receive) the full amount that they are owed. The unpaid balance of such claims is as much as £1.3 billion. The majority’s analysis, like that of the Judge, meets this obvious potential injustice (see Briggs LJ at [136] and [137]; Moore-Bick at [252]).
3. Those with claims which rank after non-provable claims do not suffer an equivalent or any injustice if the majority’s decision relating to the Currency Conversion Issues stands. They cannot complain if the estate is required to satisfy, per Briggs LJ at [137], “the

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balance of the creditor's original contractual claim which has not been discharged by the process of early conversion, proof and dividend under the relevant part of the insolvency scheme". See also Moore-Bick LJ at [257]. That is because those debts (including non-provable aspects of the debts) always had priority over the rights of the subordinated creditors and equity holders. Were that not the case, those with claims ranking after non-provable claims would in this instance benefit from a £1.3 billion windfall (of monies that would otherwise be used to meet LBIE's contractual obligations) as well as the appreciation in value of the USD assets held in the estate (LBIE's functional currency having been USD).

4. The outcome for which the Appellants contend is unprecedented, and unsupported by principle. There is no case in which a liquidation or administration estate has permitted the return of capital to members before payment in full of debts that are currently due and owing. Authorities relating to future and contingent debts do not assist the Appellants. As both the Judge (at [109]) and majority concluded (at [156] and [257]), there is nothing in the materials leading to the introduction of the 1986 regime (including the Cork Report) which is sufficient to conclude that the obvious injustice inherent in the Appellants' position was the intended outcome of those reforms.
5. Insofar as criticism is made of the reasoning of the majority for reasons other than those reflecting Lewison LJ's analysis, CVI makes three observations for the purpose of the permission application:
 - (1) First, LBL (at Grounds [13]) is wrong to suggest that it is impossible to fathom how Currency Conversion Claims will work in practice:
 - (a) The non-provable aspect of the underlying claim that forms the Currency Conversion Claim continues to exist, and is quantified by reference to the underlying claim and the extent to which it has been paid through the process of collective enforcement represented by the insolvency proceedings.
 - (b) Payment of non-provable claims on a *pari passu* basis (see Briggs LJ at [165]) can be achieved by measures such as calculating and paying claims on the same date (such as to avoid any risk of further currency movements) and, if necessary, by the setting of deadlines for the

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submission of claims. The Companies Court regularly adopts such steps, ensuring that creditors are treated fairly and equally.

- (c) As observed by both Briggs LJ at [165] and Moore-Bick LJ at [252] (c/f Lewison LJ at [96]), principles can and will be developed by the Companies Court where necessary to deal with issues arising in relation to particular estates. Certain issues relating to the calculation of Currency Conversion Claims, and the interplay with claims for statutory interest, are already the subject of consideration by the Judge in the Waterfall II proceedings commenced by LBIE's administrators. There is no suggestion by the LBIE administrators that the decisions in relation to the Currency Conversion Issues have created insoluble difficulties.
 - (d) Any practical challenges cannot begin to outweigh the fundamental injustice that otherwise arises if the outstanding balance of creditors' unsatisfied foreign currency claims is simply lost when there remains sufficient assets to meet such claims.
- (2) Second, the result of the Court of Appeal's decision does not give rise to any anomaly as compared to the position where judgment is obtained and enforced against a solvent company (c/f LBL's grounds at [16]):
- (a) Foreign currency creditors are entitled to recover judgment in the proper currency of the obligation in which they sue: *Milangos v. George Frank Textiles Ltd* [1976] AC 443.
 - (b) The terms of any such judgment normally provide that the Defendant pay the Claimant the foreign currency sum "*or the sterling equivalent at the date of payment*".
 - (c) If it is necessary to resort to execution measures, and such measures do not lead to the Claimant receiving the sterling equivalent of the foreign currency sum as at the date of payment, there is no reason why further proceedings cannot be taken to recover the shortfall. As with a Currency Conversion Claim, such a claim reflects the unsatisfied balance of the underlying foreign currency entitlement which has not been satisfied by the execution process. See Moore-Bick LJ at [250].

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- (3) Third, although LBHI2 (at Grounds [17]) is correct that insolvency set-off in an administration takes effect on the date when the administrator gives notice that he intends to make a distribution (IR 2.85(3)), not on the date on which the company enters administration (which is the conversion date for the purpose of debts that are subject to set-off: IR 2.86(1)), this does not undermine the strength of the majority's reasoning:
- (a) Set-off does have a substantive effect on the underlying debts, but only because (and to the extent that) it leads to payment in fact of the debt: see Briggs LJ at [152].
 - (b) Set-off (and the conversion necessary for the purpose of set-off) only affects the underlying debt owed by the company to the extent necessary to enable set-off against any claim that the company has against the creditor: see Moore-Bick LJ at [250] and the decision of the CA in *Re Kaupthing Singer & Friedlander Ltd (in administration)* [2010] Bus LR 1500 at [34]-[37].
 - (c) Where the effect of set-off (including the conversion of the foreign currency debt to sterling as at the date of the commencement of the insolvency process, and payment by way of set-off as at the date of the notice of distribution) leaves the underlying foreign currency debt unsatisfied in part, a residual claim for the balance which was not needed for the purpose of set-off therefore remains and a currency conversion claim may exist.