Hogan Lovells

Hogan Lovells International LLP
Atlantic House
Holborn Viaduct
London EC1A 2FG
T +44 20 7296 2000
F +44 20 7296 2001
www.hoganlovells.com

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By email and by hand

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Matter ref 161762/000001

Linklaters LLP (for LBIE)
One Silk Street
London EC2Y 8HQ
For the attention of Mr Euan Clarke and others

Dentons UKMEA LLP
One Fleet Place
London EC4M 7WS
For the attention of Mr Nigel Barnett and others

Dechert LLP
160 Queen Victoria Street
London EC4V 4QQ
For the attention of Mr Paul Fleming and others

Linklaters LLP (for LBEL)
One Silk Street
London EC2Y 8HQ
For the attention of Mr Rory Conway and others

Dear Sirs

THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION) V THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS LIMITED (IN ADMINISTRATION) AND OTHERS ("WATERFALL III")

In accordance with the directions given by Mr Justice Hildyard on 16 January 2017, we enclose by way of service the Position Paper of the LBH Administrators in respect of the Part B Issues. A copy of the Position Paper is also being filed at Court today.

Yours faithfully

Hogan Lovells International LLP

Enc.

IN THE HIGH COURT OF JUSTICE **No. 7942 of 2008**

CHANCERY DIVISION

COMPANIES COURT

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

Applicants

- and -

(1) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS LIMITED (IN ADMINISTRATION)

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

(3) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS EUROPE LIMITED (IN ADMINISTRATION)

(4) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS HOLDINGS PLC (IN ADMINISTRATION)

Respondents

WATERFALL III – PART B ISSUES

POSITION PAPER OF THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS HOLDINGS PLC (IN ADMINISTRATION)

A. INTRODUCTION

1. This Position Paper is filed on behalf of the joint administrators of Lehman Brothers Holdings Plc (in administration) (the "**LBH Administrators**")[1] and sets out the

[1] The LBH Administrators continue to act in this matter through their fellow partner, Robert Nicholas Lewis. Mr Lewis is not one of the LBH Administrators but has been authorised to act on behalf of the LBH

nature of their case in relation to the Part B Issues (as defined in the order of Mr Justice Hildyard dated 4 November 2016), these being Issues 9, 11, 13 and 14.[2]

2. For the purposes of this Position Paper, the LBH Administrators adopt the definitions set out in their Position Paper dated 16 December 2016 produced in relation to the Part A Issues, together with the further definitions set out below.

B. OVERVIEW

3. The LBH Administrators are directly interested in, and therefore adopt a position in relation to, only two of the Part B issues, namely Issues 13 and 14. As to those:

   i) Issue 13 concerns the LBL Administrators' contention that LBIE's register of members (the "**Register**") ought to be rectified by removing LBL's entry as a shareholder. It is the position of the LBH Administrators (in common with the LBIE Administrators and the LBHI2 Administrators) that there is no valid basis for rectification of the Register. Accordingly, Issue 13 should be answered in the negative and the LBL Administrators' cross-application dated 17 October 2016, in which they seek an order rectifying the Register (the "**LBL Cross-Application**"), should be dismissed;

   ii) Issue 14 concerns the LBL Administrators' argument that LBL is entitled by various alternative routes to recover from LBH sums paid or payable by LBL to LBIE in respect of a Contribution Claim.[3] It is the position of the LBH Administrators that LBL has no such right to recover its liability for a Contribution Claim from LBH. Although Issue 14 is focused exclusively on LBH, the LBL Administrators' arguments mirror, to a large extent, the arguments deployed by them in relation to Issue 9 (as against LBIE) and in

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Administrators for the reasons more particularly set out in paragraphs 16 to 27 of his witness statement dated 1 November 2016.

[2] Issue 14 was added by paragraph 8 of the order dated 4 November 2016.

[3] Notwithstanding that Issue 14 only raises the question whether or not LBH is liable for any Contribution Claim paid or payable by LBL, it now appears that the LBL Administrators wish to argue that LBH is also liable for "*Bad Debt Claims*" and also the expenses of LBL's administration (see further paragraph 53 below).

relation to Issue 11 (as against LBEL). There is accordingly a significant overlap between Issues 9, 11 and 14.

4. The LBH Administrators have had sight of the Position Papers filed on behalf of the LBL Administrators, the LBIE Administrators, the LBHI2 Administrators and the LBEL Administrators (each of which were filed and served in respect of both the Part A Issues and the Part B Issues). In order to avoid duplication, where the LBH Administrators adopt the same position as one or more of the other parties in relation to an issue, they have sought to adopt the analysis and reasoning of such other party or parties insofar as possible and appropriate.

5. This Position Paper proceeds on the basis of the decision and reasoning in the Waterfall I Court of Appeal Judgment. Where appropriate, the LBH Administrators' positions and/or arguments may be subject to revision in light of the decision and reasoning: (i) of the Supreme Court in relation to Waterfall I; and (ii) in the judgment upon the Part A Issues (delivery of which is presently deferred pending the outcome of the appeal to the Supreme Court in relation to Waterfall I).

C. THE PART B ISSUES

Issue 9

6. **Whether and to what extent LBL is entitled, under the terms of the Service Agreement between LBL and LBIE dated 20 May 2004 or otherwise, to recover from LBIE:**

   (i) Sums paid or payable by it to LBIE in respect of a Contribution Claim;

   (ii) Sums claimed by LBL from insolvent members of the UK Lehman Group of companies, but not ultimately recovered by LBL from such companies ("Bad Debt Claims"); and

   (iii) Certain (and if so, which) expenses of LBL's administration.

7. At present, the LBH Administrators take no position in relation to Issue 9 as it would appear to concern only LBIE and LBL.

8. However, and for the avoidance of doubt:

   i) Insofar as it may be alleged by the LBL Administrators that LBL has any entitlement under the Service Agreement to recover from LBH any sums paid or payable by LBL in respect of a Contribution Claim, Bad Debt Claims or any expenses of LBL's administration, that is rejected. In this respect, it is crucial to note that LBH is not, and is not alleged to be, a party to the Service Agreement; and

   ii) Furthermore, insofar as the LBL Administrators contend that LBL has a right on some other basis to recover from LBH any liability for a Contribution Claim, that is also rejected. The LBH Administrators' reasoning in relation to that issue is addressed in the context of Issue 14 below.

Issue 11

9. **Whether and to what extent LBL is entitled, under the terms of the Service Agreement between LBL and LBEL dated 20 May 2004 or otherwise, to recover from LBEL:**

   (i) Sums paid or payable by it to LBIE in respect of a Contribution Claim;

   (ii) Bad Debt Claims claimed by LBL; and

   (iii) Certain (and if so, which) expenses of LBL's administration.

10. At present, the LBH Administrators take no position in relation to Issue 11. LBH is not, and is not alleged to be, a party to the Service Agreement.

Issue 13

11. **Whether the share register of LBIE ought to be rectified:**

    (i) On the basis that LBL did not hold a share in LBIE; or

    (ii) On any other basis;

    or LBL should, on any other basis, not have the liabilities of a member of LBIE notwithstanding its holding of a LBIE share.

12. It is the position of the LBH Administrators that there is no basis upon which the Register can be rectified and that LBL's name is properly recorded on the Register as a shareholder of LBIE.

The LBL Administrators' position

13. In their Position Paper, the LBL Administrators contend as follows:

    i) The receipt of a share in LBIE by LBL both in 1994 and in 1997 was the result of a mistake and the Register ought to be rectified accordingly (the relevant transactions having been void) **[LBL Position Paper, paragraph 58]**;

    ii) Alternatively, LBL was in receipt of and held a share in LBIE only as a result of acts of the directors of LBL that constituted a breach of their duties and hence was outside their actual authority and in circumstances where it cannot be said that they had any apparent authority to act in the way that they did. Accordingly, it is asserted that the relevant transactions were either void or should be set aside **[LBL Position Paper, paragraphs 59 to 71]**;

iii) In the case of either sub-paragraphs i) or ii) above, the Register should be rectified with retrospective effect pursuant to section 125 of CA 2006 **[LBL Position Paper, paragraphs 72 to 74]**;[4]

iv) Alternatively, it is said that even if LBL was and is rightly registered as a shareholder of LBIE, nevertheless LBL, "*is not to bear the liabilities of a member of LBIE including in respect of a Contribution Claim*" **[LBL Position Paper, paragraph 76]**. The LBL Administrators argue that this is because:

a) LBL at all times held a share in LBIE as nominee for LBH or LBHI2 and had a right of indemnification from LBH / LBHI2 in respect of all costs and expenses incurred as a shareholder in LBIE by virtue of an implied contract or a right arising in restitution **[LBL Position Paper, paragraph 76.2]**; and

b) LBL had a contractual right of recharge in respect of all costs and liabilities incurred in the course of its business from other entities within the Lehman Group (*i.e.* as a service provider to other entities within the Lehman Group) which included costs and liabilities associated with holding a share in LBIE **[LBL Position Paper, paragraph 76.3 and LBL Supplementary Position Paper, paragraph 12]**.

14. The LBL Administrators' argument summarised in paragraph 13(iv) above duplicates the arguments advanced by the LBL Administrators in relation to Issue 14 and so they are addressed in the context of Issue 14.

[4] The LBL Administrators' Position Paper refers to section 148 of IA 1986 (which empowers the court to rectify the register after a company has entered liquidation) and section 160 (which enables the court's power of rectification to be delegated to the liquidator). However, LBIE is not in liquidation and the LBL Administrators have confirmed in a letter from Dechert LLP dated 24 November 2016 that they rely upon section 125 of CA 2006 for the claim for rectification. They say that sections 148 and 160 of IA 1986 "*may also be relevant by analogy (i.e. as demonstrating best practise)...*".

Common mistake

15. The LBL Administrators contend that LBL became a shareholder in LBIE as a result of a common mistake by which the boards of LBL, LBH and LBIE, "... *incorrectly believed that [CA 1985] made the requirement for two shareholders in LBIE mandatory, with there being no option to continue with one shareholder lawfully*" **[LBL Position Paper, paragraph 58]**.

16. More particularly, it is said that:

    i) In 1994, LBH transferred a single share in LBIE to LBL (as nominee for LBH) as a result of an operative mistake common to LBL, LBH and/or LBIE that CA 1985 required an unlimited company to have two shareholders;

    ii) But for this alleged mistake, LBH would not have transferred one ordinary share in LBIE to LBL in 1994. As a consequence, the transfer in 1994 was "*void*" and should be "*set aside and/or cancelled*";

    iii) Operating under that same mistake, upon the restructuring of LBIE's share capital (which took place in 1997), a $1 share was allotted by LBIE to LBL; and

    iv) Save for the aforesaid mistake, the resolution of LBIE's board of directors allotting a $1 share to LBL and the resolution of the board of directors of LBL accepting such allotment would not have been passed, and no such share would have been allotted to LBL. Accordingly, the allotment of one share in LBIE to LBL in 1997 "*was also void and should be set aside and/or cancelled*" **[LBL Administrators' Supplementary Position Paper, paragraphs 3.1 to 3.4]**.

17. The LBH Administrators deny that there is any entitlement to rectify the Register on the basis of any mistake or, indeed, at all. In summary, that is because:

i) The boards of directors of each of LBL, LBH and LBIE did not positively believe in 1994 and/or in 1997 that CA 1985 required LBIE to have at least two shareholders. Accordingly, it is irrelevant whether or not it was in fact mandatory for LBIE to have at least two shareholders;

ii) Further and in the alternative, the CA 1985 did in fact impose a requirement for LBIE to have at least two shareholders; and

iii) Yet further (and in the further alternative), the alleged mistakes were not fundamental and so do not invalidate the 1994 transfer or the 1997 allotment of a share to LBL.

18. The LBH Administrators' reasons for adopting this position are set out in more detail below.

<u>There was no mistake as there was no belief that it was mandatory for LBIE to have at least two shareholders</u>

19. It is the position of the LBH Administrators that there was no mistake of law, for the simple reason that, as a matter of fact, the boards of directors of each of LBL, LBH and LBIE did not positively believe that CA 1985 required LBIE to have at least two shareholders and, moreover, nor was any transfer or allotment of a share to LBL made on that basis.

20. The LBH Administrators' position will be evidenced in due course, but the foregoing is to be inferred from, amongst other matters, the following:

i) LBIE was incorporated as a private company limited by shares on 10 September 1990. As at 21 December 1992, when LBIE was re-registered as an unlimited company, there was no change in its shareholding, and LBH remained the sole shareholder, as had been the position immediately before LBIE's re-registration as an unlimited company;

ii) In October 1992, the Lehman Group obtained legal advice, from the solicitors' firm Simmons & Simmons, in connection with the conversion of certain limited liability companies into unlimited companies for the purposes of enabling such companies to be treated as partnerships under US tax law. In a memorandum dated 16 October 1992 produced by Mr Peter Gamester, who was Senior Vice President of European Taxation at this time, reference was made to a meeting with Mr Edward Troup of Simmons & Simmons the previous week. The said memorandum recorded, amongst other things, that:

> *"We **can** arrange for each of the unlimited liability companies to have more than one shareholder. For example, a proportion of the shares in each company **could be owned**, by, say, Shearson UK Holdings Limited.*
>
> *In view of the above it would appear that we could use unlimited liability companies in the UK without adverse UK tax, legal or regulatory consequences ..."* (emphasis added).

As such, the advice provided to the Lehman Group in 1992 was to the effect that an unlimited company could (but was not legally obliged to) have more than one shareholder;

iii) Further, a memorandum dated 27 November 1992, produced by Mr Dan McHugh and Mr Gamester (entitled "*London Profitability Review – Tax Planning*") summarised the rationale for and the steps necessary for converting LBIE (then known as Lehman Brothers International Limited) into an unlimited company. Consistent with the memorandum of 16 October 1992 summarising the advice received from Simmons & Simmons, no reference was made to any obligation or necessity that LBIE had to have more than one shareholder. It was recorded that:

> *"In order to achieve further improvements in tax efficiency in 1993 and subsequent years a corporate reorganisation in London is proposed whereby profits from two smaller subsidiaries, Lehman Brothers Gilts Limited ('LGBL') and Lehman Brothers Money Brokers Limited ('LBMBL') can be consolidated with the results of LBIL [Lehman Brothers International Limited]. This would be accomplished by*

making LGBL and LBML subsidiaries of LBIL to take advantage of the fact that US tax law permits the netting off of a parent's losses against a subsidiary's profits under the 'chain deficit' rules.

The reorganisation involves the following steps:-

i) Shearson UK Holdings Ltd ('SUKHL') will be converted into a dual incorporated/resident company ...

ii) LBGL and LBMBL will be transferred from Shearson Lehman Brothers Holdings PLC ('PLC') to LBIL.

iii) LBIL will become an unlimited company and will make certain other changes to its Memorandum and Articles of Association.

The proposed reorganisation must be implemented prior to 31st December 1992 if it is to be effective for tax purposes in 1993. ***We will work closely with the legal department and other areas to ensure that this deadline is met***" (emphasis added);

iv) It is to be inferred that the Lehman Group acted in accordance with the advice received and worked closely with its legal department (as foreshadowed in the memorandum of 27 November 1992) to achieve the objective described. Had the boards of directors of LBIE and LBH actually believed that an unlimited company required two shareholders to comply with the mandatory provisions of the CA 1985, the boards of directors would have ensured that LBIE had two shareholders at the time when it was re-registered as an unlimited company on 21 December 1992. The fact that LBIE was re-registered as an unlimited company with only one shareholder demonstrates that the directors of the said companies (and therefore the directors of LBL) did not act upon any belief that it was mandatory for an unlimited company to have at least two shareholders as at December 1992;

v) By virtue of section 122(1)(e) of IA 1986, there existed the jurisdiction to wind up LBIE, as its membership had been reduced to below two shareholders. It may reasonably be inferred that the rationale for the transfer of a share to LBL was to avoid the risk of the court exercising its jurisdiction

to place LBIE into liquidation (which was achieved by the transfer of the share to LBL in 1994). The said transfer was accordingly beneficial for LBIE and (since it was the Lehman Group's centre for trading, income and profit generation in the UK and in Europe) also beneficial for other members of the Lehman Group, including LBL, since LBL derived a significant proportion of its income from LBIE through its recharge arrangements;

vi) Further, after 6 months, as a consequence of sections 1(1) and 24 of CA 1985, LBH became jointly and severally liable, with LBIE, for LBIE's debts. The effect of the 1994 transfer and the 1997 allotment of a share to LBL relieved LBH from being jointly and severally liable with LBIE for the debts of LBIE by virtue of section 24 of CA 1985; and

vii) That the foregoing was the rationale and/or purpose for the transfer of a share to LBL in 1994 (and the allotment of a share to LBL in 1997) is also consistent with the approach taken by the Lehman Group to the re-registration of LB GCS Financing Ltd as an unlimited company in 2006, which was ultimately premised on legal advice to the effect that it was possible to re-register LB GCS Financing Ltd as an unlimited company with only one shareholder but that it would be desirable to add a second shareholder to avoid the consequences which would otherwise follow under section 122(1)(e) of IA 1986 and section 24 of CA 1985.

21. Accordingly, the LBH Administrators will say that the addition of LBL as a shareholder of LBIE on 23 November 1994 was not intended to satisfy any perceived legal requirement as to the minimum number of shareholders in a company, but rather was seen to be a desirable option to relieve LBIE and LBH from the consequences which flowed from LBIE having only one shareholder, as set out above.

22. Furthermore, the 1997 allotment of a share to LBL was not the result of any mistake. In this respect, the LBH Administrators adopt the reasoning and analysis set out in paragraph 78(8) of the LBIE Administrators' Position Paper.

23. Consequently, the boards of directors of LBL, LBH and LBIE did not believe that CA 1985 required LBIE to have more than one shareholder; they believed that it was possible and/or desirable for LBIE to have more than one shareholder. In that belief, the boards of LBL, LBH and LBIE were correct and so no mistake was made (whether of law or of fact).

24. Further contrary to the position contended for by the LBL Administrators **[LBL Position Paper, paragraphs 58.3 and 63]**, the holding by LBL of a single share in LBIE did not prevent LBIE from being a branch of LBH for the purposes of the US tax regime.

There was no mistake of law since the relevant law is not as stated by LBL

25. Alternatively, even if (contrary to the LBH Administrators' primary position) the 1994 transfer and the 1997 allotments were carried out by the boards of LBH, LBL and/or LBIE acting in the belief that it was mandatory for LBIE to have at least two shareholders, then such a belief was correct and there was no mistake of law.

26. In this regard, the LBH Administrators adopt the reasoning and analysis of the LBIE Administrators **[LBIE Position Paper, paragraphs 78(4) and (5)]**. By way of further elaboration:

    i) As at 21 December 1992, when LBIE became re-registered as an unlimited company, section 1(1) of CA 1985 provided that, "*any two or more persons associated for a lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without liability*". (Section 1(1) of CA 1985 was derived from section 48 of the Companies Act 1862, which had originally imposed the need for a minimum of 7 members, and was entitled "*Prohibition against carrying on business with less than seven members*");

    ii) Whilst section 1(3A) of CA 1985 (which was in force as from 15 July 1992) removed the requirement for at least two members in relation to private

companies limited by shares or guarantee, it did not remove the requirement for there to be at least two members in relation to unlimited companies. It was accordingly incumbent upon LBIE, upon its re-registration as an unlimited company in September 1992, to have at least two members in order to comply with the companies legislation then in force (specifically, section 1(1) of CA 1985);

iii) The consequences of a failure to comply with the requirement for at least two shareholders were provided for in section 122(1)(e) of IA 1986 and section 24 of CA 1985, as referred to above:

a) Section 122(1)(e) of IA 1986 provided (both at the time of the 1994 share transfer to LBL and at the time of the allotment of a $1 share to LBL in 1997) that, except for a private company limited by shares or guarantee, a company may be wound up if, "*the number of its members is reduced below 2*". To avoid the possibility of such an order being made, it was therefore necessary for LBIE to comply with section 1(1) of CA 1985 and to have and maintain at least two shareholders; and

b) Section 24 of CA 1985 imposed joint and several liability (with the company) in respect of the company's liabilities upon a sole member after 6 months and thereby imposed a sanction for failing to comply with the requirement under section 1(1) of CA 1985;

iv) Contrary to the assertion made by the LBL Administrators, the need for two shareholders was not a mere formality: *Salomon v Salomon & Co* [1897] AC 22.

27. In the premises, even if (contrary to the LBH Administrators' case) the boards of LBL, LBH and/or LBIE at the time of the 1994 transfer and the 1997 allotment operated under the belief that it was a mandatory requirement of CA 1985 for LBIE to have a minimum of two shareholders, that belief was correct.

28. At the present time, in addition to the statutory provisions and authority referred to above, the principal authority upon which the LBH Administrators anticipate relying is *Nisbet v Shepherd* [1994] 1 BCLC 300 at 305.

If there was a mistake it was not fundamental

29. Yet further, the mistakes that the LBL Administrators contend were made by the boards of LBL, LBH and/or LBIE in 1994 and 1997 would not vitiate the 1994 transfer or the 1997 allotment. In this regard, the LBH Administrators adopt the reasoning and analysis of the LBIE Administrators **[LBIE Position Paper, paragraphs 78(3) and 78(7)]** and of the LBHI2 Administrators **[LBHI2 Position Paper, paragraph 13.3]**. The following additional observations are made:

i) For a contract to be void for common mistake, the mistake must render the subject matter of the contract impossible of performance or essentially and radically different from the subject matter which the parties believed to exist;

ii) The alleged mistakes contended for by the LBL Administrators are mistakes of law. Whilst a mistake of law can, in principle, render a contractual adventure impossible of performance, that is only in exceptional circumstances and cannot be established merely on the basis that "but for" the mistake, the parties would not have entered into the agreement;

iii) The LBL Administrators' argument accordingly depends upon establishing that: (a) enabling LBIE to comply with the requirements of CA 1985 was the "contractual adventure"; and (b) the alleged common mistake rendered this impossible;

iv) However:

a) The transfer of a share to LBL did not prevent LBIE from complying with CA 1985. On the contrary, LBIE was required to have more than one shareholder. Accordingly, the alleged mistakes did not render the contractual adventure impossible. This is equally the case if the

contractual adventure was for LBL to be a member of LBIE (which was, on the face of it, the purpose of the share transfer and allotment);

b) It is insufficient for the LBL Administrators to say that, but for the alleged mistakes, the parties would not have entered into the transactions; and

c) Moreover, as explained by the LBHI2 Administrators **[LBHI2 Position Paper, paragraph 13.3]** there was no relevant mistake even on the LBL Administrators' own case: on their case, all relevant parties intended for LBIE to have two shareholders (both in 1994 and 1997) and for LBL to be one of those shareholders, and that is what in fact occurred.

30. At present, the principal authorities upon which the LBH Administrators anticipate relying are: *Bell v Lever Bros Ltd* [1932] AC 161; *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255; *Great Peace Shipping Limited v Tsavliris Salvage Ltd* [2003] QB 679; *Brennan v Bolt Burdon* [2005] QB 303; and *Kyle Bay Ltd t/a Astons Nightclub v Underwriters Subscribing under Policy No. 019057/08/01* [2007] EWCA Civ 57.

Pitt v Holt

31. It was originally contended by the LBL Administrators that, "*this was a case of common mistake as to a matter fundamental to the contract for the transfer of a share in LBIE to LBL and rendered the transaction void*" **[LBL Position Paper, paragraph 58.4]**. However, in the LBL Administrators' Reply Position Paper, the LBL Administrators advance a further (alternative) basis for the setting aside of the 1994 transfer and the 1997 allotment by reliance upon *Pitt v Holt* [2013] UKSC 26. It is contended that **[LBL Reply Position Paper, paragraph 35]**:

i) The 1994 transfer and/or the 1997 allotment was, "*a voluntary disposition of a **share to LBL***" (emphasis added) because there is, "*no evidence that LBL in fact paid for its shareholding*";

ii) Alternatively, the "*...custodianship of the share in LBIE was a voluntary disposition* ***by LBL***" (emphasis added) because LBL received, "*no consideration or benefit from its holding a share in LBIE*"; and

iii) In both instances, the mistake made (namely that there was a mandatory obligation that LBIE had to have two shareholders) was sufficiently serious as to make it unconscionable for LBL to remain a shareholder.

32. In summary, it is the position of the LBH Administrators that this argument must fail, for at least the following reasons:

i) There was no relevant mistake, for the reasons given in paragraphs 19 to 28 (inclusive) above;

ii) Further, the principle described in *Pitt v Holt*, applies where the donor of a gift wishes to set it aside on the basis that the donor acted under a mistake in circumstances which would render it unconscionable for the recipient to be entitled to retain that gift. The transfer of a share by LBH to LBL in 1994, and the allotment to LBL of a $1 share by LBIE in 1997, were both transactions under which LBL was the recipient, not the donor. Neither LBH nor LBIE seek to set aside either of the transactions;

iii) Further, it is irrelevant that the LBL Administrators say that there is no evidence that LBL paid for its shareholding in 1994 or 1997. By holding a share, LBL clearly provided valuable consideration to LBH and LBIE, not least by: (a) removing the court's discretionary jurisdiction to wind up LBIE under section 122(1)(e) of IA 1986; (b) removing and enabling LBH to avoid joint and several liability with LBIE under section 24 of CA 1985; and/or (c) by taking on the risk of liability as a shareholder of an unlimited company in the event that the company goes into insolvent liquidation. Further, at a meeting of LBIE's board of directors held on 1 May 1997, LBIE resolved to allot a $1 share to LBL, "*for cash at par pursuant to its [LBL's] application*", which obligation also constituted adequate consideration;

iv) Moreover, insofar as the LBL Administrators seek to contend that by holding on to the LBIE share there was a voluntary disposition by LBL (as donor) on the basis that LBL "*received no consideration*", the same is unsustainable:

a) Even assuming in the LBL Administrators' favour that LBL did act in some way as custodian of the share, acting as such did not involve any disposition by LBL of the share or indeed any property (whether voluntarily or otherwise); and

b) Further, LBL received the share and the usual bundle of rights that accompany a share. The mere fact that a transaction ultimately proves to be loss-making or a bad bargain, does not mean that valuable consideration was not given at the time the transaction was entered into;

v) Yet further, it is insufficient for the LBL Administrators to establish that, but for the alleged mistake the transaction would not have taken place. The LBL Administrators must establish that the mistake was of so serious a character that the consciences of LBH (in relation to the 1994 transfer) and LBIE (in respect of the 1997 allotment) are affected to such an extent as to render it unconscionable for LBL to retain the share. However, no mistake was made as to LBL's potential liability if it became a member of LBIE. Accordingly, the alleged mistake (which relates only to the reasons why LBL became a member, not the consequences of membership) cannot render it unconscionable for LBL to now carry the very obligations that it was intended that it would assume.

33. At present, the principal authorities upon which the LBH Administrators anticipate relying are: *Pitt v Holt* [2013] 2 AC 108 and *Van der Merwe v Goldman* [2016] EWHC 790 (Ch).

Authority/breach of duty

34. The LBL Administrators contend that **[LBL Position Paper, paragraphs 59 to 71]**:

i) In relation to the 1994 transfer and the 1997 allotment, the directors of LBL acted in breach of fiduciary duty by: (a) failing to exercise independent judgment; (b) acting for an improper purpose, and/or (c) failing to avoid a conflict of interest;

ii) The directors therefore acted outside their actual authority and without ostensible authority;

iii) The transactions are void and LBL is therefore entitled to rectification of the Register.

35. In summary, it is the position of the LBH Administrators that there is no basis for rectification of the Register by reason of any breach of duty on the part of the directors of LBL. The LBH Administrators adopt the reasoning and analysis of the LBIE Administrators **[LBIE Position Paper, paragraph 79]** and the LBHI2 Administrators **[LBHI2 Position Paper, paragraph 13.4]**.

No breach of duty

36. On 23 November 1994:

i) The board of directors of LBH resolved to transfer to LBL (as nominee) one ordinary share in LBIE (which resolution was recorded in the minutes of the meeting of 23 November 1994) and executed a stock transfer form to that effect;

ii) The board of directors of LBL resolved to hold (as nominee for LBH) the share in LBIE (which resolution was recorded in the minutes of the meeting of 23 November 1994); and

iii) The board of directors of LBIE resolved to approve the transfer of the share from LBH to LBL (which resolution was recorded in the minutes of the meeting of 23 November 1994).

37. In the premises, if it is intended to be alleged by the LBL Administrators that the directors of LBL did not, in 1994, take account of the separate existence of LBL and the need for it separately to resolve to hold a share in LBIE, the same is denied.

38. In any event, even if the LBL directors failed subjectively to consider the separate interests of LBL (which is not accepted), then, applying an objective test, the decision of LBL to take a share in LBIE was one which an intelligent and honest director would have believed, in the whole of the prevailing circumstances, was for the benefit of LBL. LBIE was the centre for trading, income and profit generation within the Lehman Group in the United Kingdom and in Europe. Given the inter-relationship between the various Lehman Group entities, the optimisation of LBIE's financial success and stability was not only in the best interests of LBIE, but also the Lehman Group in the United Kingdom and Europe as a whole, particularly LBL. LBL derived income and profits (through its recharge arrangements) from the operational success of other trading companies within the Lehman Group, most notably and most obviously LBIE. The LBH Administrators further adopt the facts and matters relied upon by the LBIE Administrators **[LBIE Position Paper, paragraphs 79(3) to 79(5)]**.

39. The principal authorities that the LBH Administrators anticipate relying upon are: *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 *Re Regentcrest plc v Cohen* [2001] 2 BCLC 80; *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598; and *Re HLC Environmental Projects Ltd (in liquidation)* [2013] EWHC 2876 (Ch).

Approval / ratification

40. Further and in any event:

    i) The 1994 transfer was approved by LBH (as the sole shareholder of LBIE and as the sole shareholder in LBL) on 23 November 1994 when its board of directors resolved to transfer one ordinary £1 share in LBIE to LBL;

ii) In so doing and/or in executing the share transfer form, LBH necessarily and/or implicitly authorised the holding by LBL of the £1 share in 1994; and/or granted (prospectively) authority for LBL to receive one $1 share when LBIE's share capital was re-denominated in 1997;

iii) In the premises, the resolution of the LBH directors in 1994 operated as a grant of actual authority for LBL to become the holder of one share in LBIE; and

iv) It follows that the actions of the directors of LBL in resolving in favour of the share transfer to LBL in 1994 and the allotment to LBL of a $1 share in 1997 cannot have been in breach of duty.

41. Further or alternatively, even if the LBL directors did act in breach of their fiduciary duties (which is denied), the decisions taken by LBL's directors to cause LBL to hold a share in LBIE, whether as a consequence of the transfer from LBH in 1994 and/or as a consequence of the allotment of a share in 1997, were ratified by LBH (as the sole shareholder of LBL) as evidenced by (at least), the following:

i) The execution by Mr Oliver Backhouse (as a director of both LBH and LBL) of the stock transfer form in 1994;

ii) The meetings of the boards of directors of LBL, LBH and LBIE held on 1 May 1997 (all attended by Mr Oliver Backhouse and Ms Teresa South) at which: (a) LBL resolved to apply for an allotment of a $1 ordinary share in LBIE; (b) LBH resolved to apply for an allotment of 59,999,999 $1 ordinary shares in LBIE; and (c) LBIE resolved to allot such shares to LBL and LBH;

iii) LBH's acknowledgement that LBL held a share in LBIE in a letter to the Edinburgh Stamp Office dated 16 July 2001 making known LBH's intention to apply for stamp duty tax relief;

iv) Further acknowledgement of LBL's shareholding in LBIE in an email from Ms Emily Upton (legal counsel for the Lehman Group, including LBH) regarding the proposed opening of a branch of LBIE in Korea. The email was sent on 1 October 2001 and copied to Mr Ian Jameson, who was a director of LBH (as well as LBL and LBIE) at the time;

v) On 6 October 2006, LBIE lodged a 'change in controller' application with the FSA, signed by Mr Marcus Jackson as a director of LBIE. He was, at the time, also a director of LBH and LBL. The application recorded the holding of a single share in LBIE by LBL;

vi) In a letter to Allen & Overy LLP dated 30 October 2006 and signed by Ms Jackie Dolby on behalf of and with the authority of LBIE, LBL and LBH, it was stated that, "*All the common shares of the Issuer [LBIE] are owned by [LBL] and [LBH] (together, the Shareholders)*";

vii) The share exchange agreement between LBH and LBHI1 dated 1 November 2006 which expressly recorded the transfer of LBH's shares in LBIE to LBHI1 and the separate existence of LBL's shareholding in LBIE;

viii) At meetings of the boards of directors of LBIE, LBL and LBH, held on 26 October 2006 and 1 November 2006 (and attended by Mr Antony Rush, Mr Marcus Jackson and Mr Ian Jameson, who were directors of each of the three companies), it was recorded that LBL held a single share in LBIE; and

ix) In an email from Emily Upton, dated 7 November 2007 and copied to Mr Ian Jameson (a director of each of LBL, LBIE and LBH at the time), reference was made to LBL's share in LBIE.

42. On the basis of the matters referred to above, the LBH Administrators rely upon the principle of ratification as established by *Re Duomatic Ltd* [1969] 2 Ch 365. Contrary to the LBL Administrators' contention, the *Duomatic* principle applied so as to ratify any breach of fiduciary duty because: (i) taking a share in LBIE in 1994 and in 1997 was not likely to and did not jeopardise LBL's solvency at those times; and (ii) LBIE was not insolvent or on the verge of insolvency, whether in 1994 or

1997 (and the contrary is not alleged). In both respects, the LBH Administrators will rely upon:

i) LBIE's financial statements for the year ended 30 November 1994 which showed a balance sheet surplus of US$408,882,000;

ii) LBIE's financial statements for the year ended 30 November 1997 which showed a balance sheet surplus of US$762,596,000; and

iii) LBL and LBIE's continued trading on a solvent basis until (at least) 2007.

43. At present, in addition to *Re Duomatic Ltd* and the principal authorities cited by the other parties, the LBH Administrators anticipate relying upon: *Re Bailey, Hay & Co Ltd* [1971] 1 WLR 1357; *Bowthorpe Holdings Ltd v Hills* [2002] EWHC 2331 (Ch); *Euro Brokers Holdings Ltd v Monecor (London) Ltd* [2003] 1 BCLC 506; *EIC Services Ltd v Phipps* [2004] 2 BCLC 589; *Sharma v Sharma* [2013] EWCA Civ 1287; and *Dawson v Bell* [2016] 2 BCLC 59.

Rectification of the register not available

44. In any event, rectification of the Register is not available by reason of limitation, delay, acquiescence, laches, affirmation and/or estoppel by convention. The LBH Administrators adopt the same position as the LBHI2 Administrators **[in paragraph 13.5 of their Position Paper]**.

45. Further:

i) The LBL Administrators seek rectification of the Register pursuant to section 125 of CA 2006. The claim for such relief is an action upon a specialty and subject to the 12-year limitation period provided for in section 8 of the Limitation Act 1980 ("**LA 1980**"). Any claim under or in reliance upon section 125 of CA 2006 to rectify the Register upon the basis of alleged

mistakes made when LBL's name was placed on the register in 1994 and/or 1997, is accordingly time-barred;[5]

ii) Further and in any event, the underlying claims relied upon are barred by laches, delay and/or affirmation:

a) If the directors of LBL acted in breach of their duties in the manner alleged by the LBL Administrators, the transactions in question would be voidable and not void: *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 and *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 (CA);

b) Yet further, the allotment of a new share to LBL in 1997 (even if it was the result of a breach of duty, which is denied) was voidable not void. The allotment of a share is the exercise of a power to create an asset recognised as the object of legal property rights, and the rights of a member (once on the register) derive from statute: see *Snell's Equity*, 33rd ed., paragraph 10-030;

c) In the premises, no jurisdiction can or should be exercised by the court to rectify the Register, particularly in circumstances where rectification is sought by the LBL Administrators with retrospective effect and where LBL's shareholding was a matter of public record for many years prior to the insolvency and thus available to all those dealing with LBIE. Further, depending on what order might be made, rectification would potentially prejudice third-parties, *i.e.* LBH and LBHI2.

[5] As a technical matter, the claim is in any event improperly constituted since the only persons with standing to apply for relief under section 125 of CA 2006, are LBIE or LBL (and such application should be made by way of a CPR Part 8 Claim form). The LBL Cross-Application is made by the LBL Administrators, not LBL. This point was identified in the letter from Hogan Lovells on behalf of the LBH Administrators dated 9 November 2016, but the LBL Administrators have not taken any steps to regularise the position. Further, it would be necessary for LBL to name LBIE as a defendant and so, due to the moratorium imposed by paragraph 43(6) of Schedule B1 to IA 1986, such proceedings would need the consent of the LBIE Administrators or the permission of the court.

46. Alternatively, if the Register were capable of rectification and it was appropriate for the court to exercise its discretion to do so (which is denied), the appropriate relief would be to remove LBL's name from the Register and order cancellation of the share allotted in 1997 (leaving LBHI2 as the holder of the entirety of LBIE's shares).

47. As regards the inability of the LBL Administrators to obtain rectification of the Register because of limitation, laches and delay, the principal authorities on which the LBH Administrators anticipate that they will rely are as follows:

    i) In relation to s.8 of LA 1980: *Cork and Brandon Railway Co. v Goode* (1853) 13 CB 826; *Aylott v West Ham Corporation* [1927] 1 Ch 30; *Collin v Duke of Westminster* [1985] QB 581 at 602-603; and *Rahman v Sterling Credit Limited* [2001] 1 WLR 496;

    ii) In relation to delay and laches: *Leaf v International Galleries* [1950] 2 KB 8; *Gwembe Valley Development Co Ltd v Koshy* [2004] 1 BCLC 131; *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App. Cas. 1218; and *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 WLR 173; and

    iii) In relation to rectification: *Sewells's Case* (1868) 3 Ch App 131; *Re RW Peak (King's Lynn) Ltd* [1998] BCC 596; *First National Reinsurance Co v Greenfield* [1921] 2 KB 260; *Dulai v Isis Factors Plc* [2003] 2 BCLC 411; and *Re Sussex Brick Co* [1904] 1 Ch 598.

Issue 14

48. **Whether and to what extent LBL is entitled to recover from LBH sums paid or payable by it to LBIE in respect of a Contribution Claim.**

49. As referred to above, Issue 14 was added by paragraph 8 of the order of Mr Justice Hildyard dated 4 November 2016, as a consequence of the LBL Cross-Application.

50. The LBL Administrators contend that LBL has a right to recover any sums paid or payable in respect of a Contribution Claim upon the basis that:

i) LBL has a contractual right to "*recharge*" LBH for certain costs, expenses and liabilities that it incurred on LBH's behalf;

ii) Alternatively, LBL held a share in LBIE as "*nominee*" for LBH until 2006, and as nominee for LBH or LBHI2 thereafter, and as such has a right to an indemnity against LBH and/or LBHI2.[6]

51. In summary, it is the position of the LBH Administrators that LBL has no entitlement to recover from LBH any sums paid or payable by it to LBIE in respect of a Contribution Claim whether on the bases alleged or otherwise.

Contractual right of recharge

52. As presently understood, the LBL Administrators' case is based upon the contention that:

i) There was an oral agreement made between unidentified persons on an unspecified date, using unspecified words, under which LBH and other parties agreed that all costs, expenses and liabilities, howsoever incurred by LBL, would be recharged to the entity on whose behalf such costs, expenses and liabilities were incurred **[see paragraph 34 of the "Response of LBL to the Schedule to the Order of 16 January 2017" (the "LBL Further Information")]**;[7]

[6] Paragraph 37 of the LBL Reply Position Paper summarises the LBL Administrators' arguments in relation to Issue 14 and in so doing cross-refers to paragraphs 101 to 102 of the LBL Position Paper. It is not understood how the facts and matters alleged in those paragraphs of the LBL Position Paper (which relate to Issue 7 – one of the Part A Issues) can have any bearing upon Issue 14.

[7] In their "*Response of LBL to Paragraph 3(B) of the Schedule to the Order of 16 January 2017*", the LBL Administrators allege (at paragraph 10) that the amounts recharged to LBH were directly allocated costs, expenses and liabilities.

ii) Alternatively, the alleged recharge agreement is, "*to be inferred or implied from the conduct of, among others, LBHI2, LBEL and LBH*" **[LBL Further Information, paragraph 50]**; and

iii) In the further alternative, the alleged recharge agreement is an agreement created by custom and/or where applicable, constitutes a collateral contract **[LBL Further Information, paragraph 52]**.[8]

53. Although the question raised under Issue 14 is whether or not LBL is able to pass on liability to LBH for a Contribution Claim, it would appear to be the LBL Administrators' intention now to argue that LBH is also liable for Bad Debt Claims and the expenses of the LBL administration **[LBL Further Information, paragraphs 31 and 48]**. However, Bad Debt Claims are defined in Issue 9 as, "*sums claimed by LBL from insolvent members of the Lehman group of companies but not ultimately recovered from such companies*". Accordingly, it is not understood how (on the LBL Administrators' own case) LBL could be entitled to recharge LBH for liabilities that LBL incurred on behalf of different entities and which cannot therefore be characterised as a service for or as a charge incurred on behalf of LBH.

54. In relation to this issue more generally, the LBH Administrators adopt the reasoning and analysis of the LBIE Administrators **[LBIE Position Paper, paragraphs 63 to 66]** and the LBEL Administrators **[LBEL Position Paper, paragraphs 62, 63.4, and 64 to 72]**.

55. Further:

i) Although reference is made to occasions on which certain expenses were recharged by LBL to LBH, the LBL Administrators have failed to properly explain how such gives rise to any contractual or other binding right of LBL to recharge any expenses or liabilities (let alone all of them). In this regard, the LBH Administrators will rely upon the following, amongst other things:

[8] It is assumed that no argument based upon collateral contract is advanced in respect of LBH as there was no written agreement made between LBH and LBL.

a) The absence of any written recharge or service agreement between LBH and LBL;

b) In an email exchange between Ms Teresa South and Ms Jackie Dolby on 11 and 13 July 2000, Ms Dolby referred to the fact that LBL makes a small profit by recharging its costs plus an uplift to the front office legal entities. She then stated that she was, "*unsure if we have a legal agreement to support this recharge*" and Ms South responded that she had only been able to locate, "*an intercompany service agrt between LBL and Bankhaus London branch*". Although the LBH Administrators accept that other documents exist which support the ability of LBL to recharge certain amounts to certain other Lehman Group entities, no such agreement granting a right to LBL to recharge LBH has been found;

c) Not all operating expenses were in fact recharged by LBL to other Lehman Group companies. By way of example, in LBL's notes of a meeting held on 16 October 2008 it is recorded that, as regards staff, LBL, "*recharges to the seconding entity: (a) salary, (b) employer national insurance contributions, (c) new joiner bonuses and (d) a fee management fee for the running of the pension scheme on behalf seconded staff*", but that, "***all other employee related costs*** *such as (a) pension scheme contributions, (b) staff benefits such as private healthcare, (c) staff loans, (d) discretionary bonuses and (e) awarding LB stock options,* ***are borne by LBL and not recharged***" (emphasis added). The said arrangement is inconsistent with the existence of a recharge agreement covering all expenses incurred by LBL;

ii) In any event, even assuming the existence of LBL's right to recharge LBH for operating expenses, such right would not extend to all liabilities of LBL, let alone LBL's liabilities for a Contribution Claim, Bad Debts and/or to the expenses of LBL's administration:

a) Such expenses and liabilities are not incurred in respect of the provision of services to LBH and such expenses and liabilities necessarily arise in an insolvency context in which LBL is no longer able to offer the operating services for which it might have previously recharged LBH;

b) There is no allegation (still less evidence) of such liabilities being recharged by LBL to LBH in the past, let alone evidence of a course of consistent conduct in relation to such expenses or liabilities; and

c) As noted above, Bad Debt Claims are by definition liabilities that LBL incurred on behalf of entities other than LBH, and which cannot be said to be operating expenses incurred on behalf of LBH;

56. As regards the LBL Administrators' contention that the holding of a share in LBIE was a "*service*" provided by LBL within the ambit of the alleged recharge agreement:

i) The holding of a share in LBIE cannot sensibly be characterised as a service to LBH or any other Lehman entity (such as LBHI2), let alone a service within the ambit of the alleged recharge agreement, particularly where LBL was itself a beneficiary of the consequences of LBIE having more than one shareholder (as set out in paragraph 20(v) above);

ii) Further, the LBL Administrators' contention that the holding of a share in LBIE was a service is based largely, if not wholly, upon the allegations that LBL's directors agreed in both 1994 and 1997 to hold the share in LBIE in breach of their fiduciary duties and that the said transactions were the result of a mistake as to the requirements of CA 1985 **[LBL Further Information, paragraphs 59 to 60]**. In the premises, the LBL Administrators' argument is dependent upon the LBL Administrators' case in relation to Issue 13, as to which the LBH Administrators position is set out in paragraphs 17 to 47 above;

iii) Yet further, the LBL Administrators have failed to provide an adequate explanation of the precise basis upon which it is contended that the costs and expenses of holding a share in LBIE are analogous to the types of expenses that were recharged by LBL to LBH and other Lehman Group companies historically **[LBL Further Information, paragraph 63]**. It is the position of the LBH Administrators that, even assuming the existence of a recharge agreement to which LBH was privy, LBL's liability for a Contribution Claim and the expenses of its administration and Bad Debts cannot be characterised as falling within the scope of such an agreement;

iv) Further still, if (which is denied) the holding of a share in LBIE was a "*service*" carried out by LBL for another entity, the said "*service*" was carried out primarily for LBIE (for the reasons set out in paragraph 20(v) above) and/or for LBL and other Lehman Group companies;

v) Alternatively, if the "*service*" was carried out for LBH, the said "*service*" was provided, for the purpose (amongst others) of ensuring that LBH would not be solely liable to contribute to LBIE's liabilities in the event of LBIE's insolvent liquidation. In such circumstances, the existence of LBL's alleged right to recharge LBH for a Contribution Claim is totally inconsistent with the purpose for which, on this analysis, the "*service*" was provided by LBL; and

vi) In any event, LBHI2 became interposed between LBIE and LBH in or about November 2006, as a consequence of which, LBL ceased to hold the share for LBH (even assuming that it held the share on behalf of LBH at any time after 1997 – which is denied). Accordingly, if (which is denied) the holding of a share in LBIE was a "*service*":

    a) any liabilities incurred by LBL as a consequence of or in connection with its shareholding in LBIE after November 2006, were incurred for the benefit of or for the purposes of LBIE and as a "*service*" to LBIE or LBHI2, and (to the extent that they fall within the alleged recharge agreement) are rechargeable to either or both LBIE and LBHI2; and

b) any "*service*" previously carried out by LBL in holding a share in LBIE ceased to be provided to or for the benefit of LBH in November 2006 (at the latest; but in reality, could not have been a "*service*" for the benefit of LBH at any time after 1997), and thereafter any such "*service*" was provided to or for the benefit of either or both LBIE and LBHI2.

Indemnity by reason of nomineeship

57. The LBL Administrators contend that on the footing that LBL held a share in LBIE as a nominee for LBH, LBL was entitled, "*either by virtue of an implied contract or in restitution*" to indemnification in respect of all "*costs and expenses*" it incurred as a shareholder in LBIE **[LBL Position Paper, paragraph 76.2]**.

58. The LBH Administrators' position is as follows:

i) The 1994 stock transfer form effecting the transfer of a single share in LBIE from LBH to LBL on 24 November 1994 was a transfer to LBL as "*nominee of the transferor*" (*i.e.* LBH). However, the expression "*nominee*" is not a legal term of art and the LBL Administrators, by merely asserting that LBL held the share as nominee, have failed to advance any legal premise for contending that there existed and continues to exist a right on the part of LBL to an indemnity from LBH.

ii) Further:

a) The LBL Administrators have not articulated any proper basis for the alleged implied contract (the existence of which is denied); and

b) The LBL Administrators' references to passages in *Goff & Jones on The Law of Unjust Enrichment*, and to the decisions in *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App. Cas. 1 and *Niru Battery Manufacturing Co v Milestone Trading Ltd (No. 2)* [2004] 2 All ER (Comm), are of no relevance. They address the circumstances in which, where a party has paid money for which another party is liable, a claim

for reimbursement might arise. In the present case, LBH has no liability to LBIE and a payment by LBL of sums due in respect of its liability as a member, cannot give rise to the contended right to reimbursement;

iii) Yet further, LBL's liability for a Contribution Claim is not, on any sensible view, a "*cost and expense*" of being a shareholder;

iv) Even if it were possible for the LBL Administrators to articulate a legally significant form of "*nomineeship*" arising in 1994, any such "*nomineeship*" was brought to an end on 1 May 1997 when LBL's single £1 share (and any right to or interest which LBH had in that share) was unilaterally cancelled and extinguished by LBIE and replaced by a $1 share, allotted by LBIE to LBL. The LBH Administrators will rely upon the following:

a) The said allotment was made as between LBIE and LBL without any reference to nomineeship and without any transfer of property between LBL and LBH;

b) Further, and consistent with the foregoing, LBL was itself liable for the subscription price for the single $1 share in LBIE; and

c) In an email from Emily Upton sent on 3 July 2001 to Ms Prudence Maloney and Mr Rob Northam in connection with the preparation of a section 42 Stamp Duty relief application, Ms Upton confirmed that, "*the 1 LBIE share owned by LBL is not held as trustee/nominee/agent for another person*";

v) In any event, LBHI2 became interposed between LBIE and LBH in or about November 2006, as a consequence of which, LBL ceased to hold the share for LBH, and (if and to the extent that LBL held the share as nominee) it did so as nominee for LBHI2.

59. In the premises, LBH has no liability to LBL whether on the basis alleged, or at all.

STEPHEN ATHERTON Q.C.

TONY BESWETHERICK

TOM LEARY

20 Essex Street

17 March 2017

Counsel for the LBH Administrators