

IN THE SUPREME COURT OF THE UNITED KINGDOM

IN THE MATTER OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN
ADMINISTRATION)
AND IN THE MATTER OF LEHMAN BROTHERS LIMITED (IN ADMINISTRATION)
AND IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN
ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

- (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)

APPELLANTS

AND

- (1) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL
(EUROPE) (IN ADMINISTRATION)
(2) CVI GVF (LUX) MASTER SARL

RESPONDENTS

STATEMENT OF FACTS AND ISSUES
(The Supreme Court Rules 2009, Rule 22(1))

1. This Statement is prepared in accordance with Rule 22(1) of the Supreme Court Rules 2009 and Practice Direction 5, paragraph 5.1.3. The issues on the appeal are set out in summary at paragraph 29 below. A Chronology containing a list of the key dates is annexed to this Statement. References in this Statement are to documents in the Appendix filed together with it in the form [*tab/page number*].

Summary of the proceedings

2. The Joint Administrators of three English Lehman Brothers entities issued a joint application for directions [5/148-154] pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 (“IA”)¹ to determine:

¹ References to “Sections” in this document are to sections of the IA unless otherwise stated.

- 2.1 whether, and/or in what order of priority, certain claims rank for payment from the surplus in the administration or subsequent liquidation of Lehman Brothers International (Europe) (“LBIE”) remaining after payment in full of ordinary unsecured creditors in respect of their proved claims² (the “Directions Application”); and
- 2.2 the liability of LBIE's shareholders to contribute to LBIE's estate.
3. The Directions Application was heard by David Richards J for seven days between 12 and 20 November 2013. Judgment was handed down on 14 March 2014 [4/81-147]. The neutral citation is [2014] EWHC 704 (Ch) and the case is reported as Re Lehman Brothers International (Europe) (in administration) (No 4) at [2015] Ch 1, [2014] 3 WLR 466, [2015] 2 All ER 111, [2015] 1 All ER (Comm) 813, [2014] BCC 193 and [2015] 1 BCLC 151.
4. David Richards J granted permission to appeal to the Court of Appeal (“CA”). The appeal was heard by Moore-Bick, Lewison and Briggs LJ for five days between 23 and 27 March 2015. Judgment was handed down on 14 May 2015 [2/6-72]. The neutral citation is [2015] EWCA Civ 485 and the case is reported as Re Lehman Brothers International (Europe) (in administration) (No 4) at [2015] 3 WLR 1205, [2015] BCC 431, [2015] 2 BCLC 433 and [2015] BPIR 1035.

The parties

5. LBIE was the principal trading company within the European Lehman Brothers group of companies. LBIE was incorporated on 10 September 1990 as a limited company and re-registered as an unlimited company on 21 December 1992. LBIE provided a wide range of financial services including trading and broking fixed income and equity instruments, participation in the syndication and underwriting of new security issues and stock broking in relation to securities issued in many major and emerging markets around the world. LBIE went into administration on 15 September 2008, was granted permission to become a distributing administration on 2 December 2009 and gave notice

² One of the issues on this appeal is whether (as the Court of Appeal held) LBHI2's subordinated debt claim (described further below) is a provable debt. As set out below, LBHI2 has submitted a proof for its unsecured subordinated debt claim which has not yet been admitted to proof or paid.

to its creditors, pursuant to Rule 2.95 of the Insolvency Rules 1986 (“IR 1986”)³, of its intention to distribute on 4 December 2009.

6. According to Companies House and LBIE’s share register, LBIE has two registered shareholders, LB Holdings Intermediate 2 Ltd (“LBHI2”) (which held 6,273,113,999 ordinary shares of US\$1 each, two million 5% redeemable Class A preference shares of US\$1,000 each, and 5.1m 5% redeemable Class B Shares of \$1,000 each) and Lehman Brothers Ltd (“LBL”) (which held one US\$1 ordinary share). LBL went into administration on the same date as LBIE (15 September 2008), was granted permission to become a distributing administration on 20 June 2014 and gave notice to its creditors, pursuant to Rule 2.95, of its intention to distribute on 8 July 2014. LBHI2 went into administration on 14 January 2009.
7. LBL was the service company for the Lehman group’s operations in the UK, Europe and Middle East and, as regards companies based in the UK, was, inter alia, the principal employer, maintained the IT systems and was the lessee of many of the group’s premises.
8. Lehman Brothers Holding Inc (“LBHI”) is a Delaware-incorporated company and is the ultimate parent of the global Lehman Group. It commenced Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of New York on 15 September 2008. It emerged from Chapter 11 on 6 March 2012 when the Modified Third Amended Joint Chapter 11 Plan of LBHI and its affiliated debtors (confirmed by the US Bankruptcy Court for the Southern District of New York on 6 December 2011) took effect.
9. CVI GVF (Lux) Master SARL (“CVI”) is an unsecured creditor of LBIE whose claims against LBIE include claims denominated in currencies other than sterling. It did not participate in these proceedings at first instance, but was joined to the appeal by Order of Patten LJ on 2 September 2014 in order to represent the interests of those unsecured creditors of LBIE who would benefit from advancing submissions to the CA in favour of the existence of “currency conversion claims” (see below at paragraph 26.2). Arguments in favour of currency conversion claims constituting and ranking as non-provable liabilities of LBIE were made at first instance by another creditor of LBIE, Lydian Overseas Partners Master Fund Ltd (“Lydian”). Lydian indicated at the first instance consequential hearing before David Richards J on 19 May 2014 that it did not intend to be involved in any appeal).

³ References to “Rules” in this Statement are to rules in the IR 1986 unless otherwise stated.

The parties' claims in the various insolvency processes

10. LBHI2 and LBL have both submitted proofs of debt in LBIE's administration as follows:
 - 10.1 LBL on 21 December 2011 for an unsecured claim of around £363m (and subsequently on 23 September 2015 requested leave of LBIE's Joint Administrators to amend its proof of debt to £10.934bn;
 - 10.2 LBHI2 on 24 April 2012 for an unsecured claim of around £38m and for an unsecured subordinated claim in respect of sums advanced to LBIE under three subordinated debt agreements dated 1 November 2006 of around £1.254bn (the "Sub Debt").
11. LBHI2 on 22 July 2014 submitted a proof in the administration of LBL for around £257m.
12. LBIE on 31 October 2014 submitted a claim for £10.4bn in LBL's administration, which includes a £10bn figure which LBIE's Joint Administrators have estimated in respect of LBL's contingent liability to LBIE as a contributory under Section 74.
13. LBIE on 7 November 2014 asserted a £10bn claim against LBHI2 in respect of LBHI2's contingent liability to LBIE as a contributory under Section 74.
14. LBL on 23 September 2015 submitted a proof for £10bn in LBHI2's estate, in respect of a recharge of LBIE's estimate of LBL's contingent liability to LBIE as a contributory under Section 74.
15. Presently:
 - a. neither LBHI2's nor LBIE's proofs have been adjudicated upon by LBL's Joint Administrators; and
 - b. neither LBL's nor LBHI2's proofs have been adjudicated upon by LBIE's Joint Administrators.
16. LBIE's Joint Administrators have not yet responded substantively to LBL's request for leave to amend its proof.
17. LBHI2 is not in a distributing administration and consequently LBHI2's Joint Administrators have not adjudicated upon LBL's proof.

18. CVI holds claims in LBIE's administration as an unsecured creditor (in respect of substantial sums owed to CVI in foreign currencies).

The Sub Debt

19. On 1 November 2006, LBIE (as borrower) entered into three subordinated loan agreements with LBHI2 (as lender). The three agreements comprised (i) a €3bn long term facility [6/155-169], (ii) a US\$4.5bn long term facility [7/170-185] and (iii) a US\$8bn short term facility [8/186-205]. They contain the same subordination provisions.
20. The Sub Debt advanced to LBIE under these agreements formed part of LBIE's regulatory capital for the purposes of the capital adequacy requirements of the Financial Services Authority (the "FSA"), as it then was, applicable to LBIE. The agreements were based on templates provided by the FSA for use by investment firms as part of their regulatory capital in the context of pan-European and English rules on capital adequacy.
21. The amount of the Sub Debt fluctuated over time, with both drawdowns and repayments under the relevant agreements. At the date of LBIE's administration, around US\$2.225bn of the Sub Debt was outstanding to LBHI2 (converted to around £1.254bn for the purposes of LBHI2's proof in LBIE's administration).

The progress of the administrations

22. LBIE's Joint Administrators paid a final fourth interim dividend on account of the proved claims of unsecured creditors on 30 April 2014, which took the aggregate dividends paid to LBIE's general unsecured creditors with proved claims to 100p in the £ in respect of their proved claims. There is a surplus in LBIE's estate after the payment in full of the proved claims of all general unsecured creditors. The Progress Report of the LBIE Joint Administrators dated 12 October 2015 (for the period 15 March to 14 September 2015) [9/206-247] estimates the surplus (before payment of post-administration interest, currency conversion claims and any other non-provable claim, the Sub Debt claim and other shareholder claims) to be between £6.2bn and £7.7bn, and currency conversion claims (as described below) are currently estimated to amount to c. £1.3bn.
23. The LBL Joint Administrators' Progress Report (for the period 15 March to 14 September 2015) [11/259-273] states that they have paid a dividend of 100p in the £ to former employees with preferential unsecured claims (comprising claims for unpaid

wages and holiday pay) and a first interim dividend in December 2014 of 1.66p in the £ to ordinary unsecured creditors with proved claims.

24. LBHI2's administration is not presently a distributing administration.

Orders of David Richards J dated 19 May 2014 and of the Court of Appeal dated 14 May 2015

25. Judgment was handed down on 14 March 2014 (the "**First Instance Judgment**") [4/81-147]. The Order giving effect to the First Instance Judgment was made on 19 May 2014 (the "**First Instance Order**") [3/73-80] and contained 10 declarations dealing with the issues.

26. David Richards J held, in summary, that:

- 26.1 **Extent of subordination:** The Sub Debt ranked for payment by LBIE behind all other sums that might be payable out of LBIE's estate, including (in order of priority) provable debts, statutory interest and non-provable liabilities of LBIE (such as currency conversion claims) (declaration (i));
- 26.2 **Currency conversion claims:** Currency conversion claims⁴ constituted non-provable liabilities of LBIE, which claims would rank for payment by LBIE after payment in full of all proved debts and statutory interest thereon (declarations (ii) and (iii));
- 26.3 **Statutory interest accrued during the administration:** If LBIE moved from administration into liquidation without having paid statutory interest accrued in the administration, statutory interest would only be payable to creditors 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 nor would it be payable to the creditor as statutory interest under Rule 2.88 or under Section 189, but creditors whose debts carried interest apart from the administration (whether by contract, judgment interest or otherwise) would have a non-provable

⁴ i.e., a claim that arises if: (a) a creditor had a claim enforceable against the company denominated in a foreign currency; (b) that claim is converted into sterling at the prevailing rate as at the date of administration under Rule 2.86; (c) between that date and the date or dates of the dividends, sterling depreciates against the foreign currency, with the result that; (d) the dividends paid to the creditor in respect of their proved claim are, when converted into the foreign currency at the respective dates of payment, in aggregate lower than the claim denominated in the foreign currency.

claim against LBIE in liquidation for any such interest in respect of the period of administration (declarations (iv) and (v));

- 26.4 **Scope of the Section 74 liability:** The liability of members under Section 74 to contribute to LBIE's liquidation estate in response to calls extended not only to provable debts but also to statutory interest and liabilities not provable as part of the statutory scheme (such as currency conversion claims) (declaration (vi));
- 26.5 **Ability of LBIE's Joint Administrators to prove for the Section 74 liability:** Whilst LBIE remains in administration, LBIE (acting by its Joint Administrators) could prove on a contingent basis in the distributing administrations or subsequent liquidations of LBHI2 and LBL for their Section 74 liabilities (the relevant contingencies including LBIE's entry into liquidation and a call being made under Section 74 by LBIE's liquidators) and those provable claims would be the subject of mandatory insolvency set-off against any provable claims of LBHI2 and LBL against LBIE (declarations (viii), (ix) and (x));
- 26.6 **The Contributory Rule:** Whilst LBIE remains in administration, neither the "Contributory Rule"⁵ nor the rule in *Cherry v Boulton* (1839) 4 My. & C. 442 applied so as to allow LBIE to refuse to admit to proof or pay dividends on the provable debts of LBHI2 and LBL on the ground that LBHI2 and LBL would or might become liable to calls under Section 74 if LBIE subsequently went into liquidation (declaration (vii)).
27. The CA's treatment of the issues [2/6-72] was as follows, in summary:
- 27.1 **Extent of subordination:** The CA held that the Sub Debt was a provable debt in LBIE's insolvency and that it ranked for payment by LBIE after payment of all proved debts, statutory interest thereon and non-provable liabilities. The CA held that the right to repayment of the Sub Debt was contingent on the satisfaction of clause 5(1)(b) of the Sub Debt agreements and, if appropriate, clause 5(1)(a) as well.
- 27.2 **Currency conversion claims:** The CA by a majority (Moore-Bick and Briggs LJ) agreed with the Judge that currency conversion claims exist as the balance of a creditor's original contractual claim which has not been discharged by the process

⁵ i.e., 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.

of conversion, proof and dividend under the relevant part of the insolvency scheme, and rank as non-provable liabilities of LBIE to be paid after all proved debts and statutory interest thereon. The majority held that conversion into sterling of foreign currency debts required by the Rules was for the limited purposes of proof and set-off. Lewison LJ dissented and, at [100], identified 10 reasons why he considers currency conversion claims should not be recognised, which reasons were addressed by Briggs LJ at [154]-[165], and Moore-Bick LJ at [257]-[259].

27.3 **Statutory Interest accrued during the administration:** In relation to statutory interest accruing on proved debts during the period of LBIE's administration, the CA departed from the Judge's reasoning and found that, once a surplus had arisen (or could be shown to have arisen) in the administration after payment of all proved debts, Rule 2.88(7) had the effect of requiring the surplus funds in the administration 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.

27.4 **Scope of the Section 74 liability:** The CA agreed with the Judge that the liability of members under Section 74 extended not only to provable debts but also to statutory interest and liabilities not provable as part of the statutory scheme (such as currency conversion claims).

27.5 **Ability of LBIE's Joint Administrators to prove for the Section 74 liability:** the CA agreed with the Judge that LBIE could (whilst in administration and acting through its Joint Administrators) prove for the contingent Section 74 liabilities of its members in their distributing administrations or subsequent liquidations 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.

27.6 **The Contributory Rule:** The CA agreed with the Judge that the Contributory Rule did not apply in a distributing administration.

The issues on this appeal

28. All the issues determined by the lower Courts are in issue before the Supreme Court.

29. In summary:

29.1 **Extent of subordination:** LBHI2 and LBHI contend that (1) contrary to the Judge's and CA's decisions, the Sub Debt is payable by LBIE after payment of unsecured unsubordinated creditors and before payment of post-insolvency statutory interest thereon and any non-provable claims of LBIE's creditors and (2) the CA's decision that the Sub Debt is a provable debt should be upheld. LBIE contends that (1) the CA's decision as to the ranking of the Sub Debt should be upheld but that (2) LBHI2 cannot prove in LBIE's estate for the Sub Debt until all prior-ranking claims have been satisfied in full.

29.2 **Currency conversion claims:** LBHI2, LBHI and LBL contend that, contrary to the CA majority decision, currency conversion claims do not exist and should not be recognised as non-provable liabilities of LBIE. They contend that the position of foreign currency creditors is dealt with comprehensively by the legislative scheme, which is a complete code, and no residual claim exists as a non-provable liability. LBIE and CVI contend, consistent with the Judge's and the CA majority's decisions, that currency conversion claims exist as the balance of a creditor's original contractual claim which has not been discharged by the process of conversion, proof and dividend under the relevant part of the insolvency scheme, and rank as non-provable liabilities of LBIE to be paid after all proved debts and Statutory Interest thereon and before any distributions are made to subordinated creditors or shareholders. CVI further contends that the legislative scheme is not a complete code which prevents a creditor whose claim is denominated in a foreign currency from relying on its unsatisfied underlying rights in the event of a surplus.

29.3 **Statutory Interest accrued during the administration:** LBHI2, LBHI and LBL contend that post-administration statutory interest accruing on proved debts is not payable in a subsequent liquidation of LBIE: (1) the CA's decision that any surplus fund remaining after payment of debts proved in the administration should be used in discharging post-administration statutory interest even if LBIE passes into liquidation is wrong on a proper construction of the IR 1986, (2) such interest is not provable in a subsequent liquidation of LBIE and (3) such interest is not a non-provable liability of LBIE in a subsequent liquidation. LBIE contends that (1) the CA's decision was correct, alternatively (2) that any right to statutory interest accrued during LBIE's administration will be provable in a subsequent liquidation of LBIE, alternatively (3) that, in accordance with the reasoning of David Richards

J, creditors whose debts carried interest prior to the administration would have a non-provable claim against LBIE in liquidation for such interest.

29.4 **Scope of the Section 74 liability:** LBHI2, LBHI and LBL contend, contrary to the Judge's and CA's decisions, that the obligation to contribute under Section 74 to LBIE's estate extends only to proved debts and not to statutory interest or non-provable liabilities. LBIE contends that the Judge's and the Court of Appeal's decisions on this point were correct.

29.5 **Ability of LBIE's Joint Administrators to prove for the Section 74 liability:** LBHI2 and LBHI contend, contrary to the Judge's and CA's decisions, that LBIE's Joint Administrators are not entitled to prove (whilst LBIE is in administration) for the potential Section 74 liability in the distributing administrations or subsequent liquidations of LBHI2 and LBL. LBIE contends that the Judge and CA were correct in holding that it can prove.

29.6 **Insolvency set-off:** If any Section 74 liability is not provable by LBIE (acting by its Joint Administrators) in the estates of LBHI2 and LBL (see paragraph 27.5 above), LBIE contends that it can nevertheless set off LBHI2's and LBL's claims against the Section 74 liability.

29.7 **The Contributory Rule:** Alternatively, if any Section 74 liability is not provable by LBIE's Joint Administrators in the estates of LBHI2 and LBL (see paragraph 27.5 above) and not available for set off (see paragraph 27.6 above), LBIE contends that, despite it not having a provable claim against LBHI2 and LBL, the Contributory Rule should be applied (whilst LBIE is in distributing administration) to prevent LBHI2 and LBL from having their claims admitted to proof and receiving dividends. LBHI2, LBHI and LBL contend that the decisions of the CA and David Richards J should be upheld (ie that the Contributory Rule does not apply to prevent them proving and receiving dividends in LBIE's administration).

Signed by:



Robert Miles QC – leading counsel for LBHI2

Barry Isaacs QC pp

Barry Isaacs QC – leading counsel for LBHI

David Wolfson

David Wolfson QC – leading counsel for LBL

William Trower

William Trower QC – leading counsel for LBIE

Robin Dicker

Robin Dicker QC – leading counsel for CVI

Annex: Chronology of key dates

Date	Event	Relevant pages in Appendix [tab/page]
10 Sept 1990	LBIE incorporated (as limited company)	
21 Dec 1992	LBIE re-registered as unlimited company	
Nov 1994	LBL was registered as a shareholder in LBIE	
5 Oct 2006	LBHI2 incorporated	
1 Nov 2006	LBIE's previous parent company transferred its shareholding indirectly to LBHI2	
1 Nov 2006	3 subordinated loan agreements entered into between LBIE and LBHI2	6-8/155-205
15 Sept 2008	LBIE and LBL entered into administration	
14 Jan 2009	LBHI2 entered into administration	
2 Dec 2009	LBIE granted permission to become a distributing administration and LBIE's Joint Administrators issued a notice pursuant to Rule 2.95	
4 Dec 2009	LBIE gave notice to its creditors pursuant to Rule 2.95 of the Insolvency Rules 1986 of its intention to distribute	
21 Dec 2011	LBL's proof lodged in LBIE's administration (~£363m)	
24 Apr 2012	LBHI2's proof in lodged LBIE's administration (~£38m unsecured unsecured and ~£1.25bn unsecured subordinated)	
14 Feb 2013	Directions Application under paragraph 63 of Schedule B1 to the IA issued by the Joint Administrators of LBIE, LBHI2 and LBL	5/148-154
27 Mar 2013	Order of Briggs J joining Lydian Overseas Partners Master Fund Ltd to the Directions Application as a respondent; amendments made to the application notice to include issues relating to currency conversion claims	
12-20 Nov 2014	First instance hearing of the Directions Application before David Richards J	
14 Mar 2014	First instance judgment handed down	4/81-147
30 April 2014	LBIE paid fourth interim dividend to unsecured creditors resulting in a surplus in the administration	
19 May 2014	Consequential hearing before David Richards J at which Order is made giving effect to judgment of 14 March 2014 and granting permission to appeal to the Court of Appeal. Lydian indicates that it will not take part in any appeal. Various creditors, including CVI, apply to David Richards J to be added as respondents to the appeal proceedings, but David Richards J decides that that application should be determined by the Court of Appeal.	3/73-80
9 June 2014	Appellants' notices filed for Court of Appeal (LBIE, LBHI2, LBL, LBHI)	
16 June 2014	Various creditors, including CVI, apply to the Court of Appeal to be added as respondents to the appeal proceedings	

20 June 2014	LBL granted permission to become a distributing administration	
8 July 2014	The Joint Administrators of LBL issued a notice pursuant to Rule 2.95	
8 July 2014	LBL gave notice to its creditors pursuant to Rule 2.95 of the Insolvency Rules 1986 of its intention to distribute	
22 July 2014	LBHI2's proof lodged in LBL's administration (~£257m)	
2 Sept 2014	Order of Patten LJ joining CVI as a respondent to the appeals to deal with currency conversion claims	
30 October 2014	LBIE claim in LBL's administration (£10.4bn)	
31 October 2014	LBIE claim in LBHI2's administration (£10bn)	
23 to 27 March 2015	Oral hearing of the appeal before Moore-Bick, Lewison and Briggs LJ	
14 May 2015	Court of Appeal judgment handed down and Order made, including a refusal of LBHI2's, LBHI's, LBL's and LBIE's applications for permission to appeal to the Supreme Court	2/6-72 1/3-5
9 June 2015	LBL's application for permission to appeal to the Supreme Court	14/330-357
10 June 2015	LBHI2's and LBHI's applications for permission to appeal to the Supreme Court	12/274-309 13/310-329
23 June 2015	LBIE's and CVI's notices of objection to the applications for permission to appeal filed by LBHI2, LBL and LBHI	15/358-389 16/390-425
23 September 2015	LBL requested leave to amend proof in LBIE's administration to £10.934bn LBL's proof lodged in LBHI2's administration (£10bn)	
4 Nov 2015	Supreme Court grants permission to LBHI2, LBL and LBHI to appeal and to LBIE to cross-appeal	
Nov 2015	Resealed Notices of Appeal of LBHI2, LBL and LBHI, and LBIE's Cross-Appeal	12-15/274-389
Dec 2015	Acknowledgements of LBIE's cross-appeal by LBHI2, LBHI and LBL, and Acknowledgements of the Notices of Appeal of LBHI2, LBL and LBHI by LBIE and CVI	17-23/426-485