

16 December 2016

By email and courier

Our ref D3/JAT/WJM/F1JBB/5950870
Matter ref 161762/000001

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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 4 November 2016, we enclose by way of service the position paper of the LBH Administrators in respect of the Part A Issues. A copy of the position paper is also being filed at Court today.

Yours faithfully



Enc.

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 A

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

I. Introduction

1. This position paper is filed on behalf of the joint administrators of Lehman Brothers Holdings Plc (in administration) (the “**LBH Administrators**”). The LBH Administrators act in this matter through their fellow partner, Robert Nicholas Lewis (“**Mr Lewis**”). Mr Lewis is not one of the LBH Administrators. He has been authorised to act on behalf of the LBH Administrators in this matter for the reasons more particularly set out in paragraphs 16 to 27 of his witness statement dated 1 November 2016. This position paper sets out the LBH Administrators’ position in relation

to the Part A Issues (as defined in the order of Mr Justice Hildyard dated 4 November 2016) and first raised in the application notice dated 22 April 2016 (the “**Waterfall III application**”).

2. In this position paper, the LBH Administrators adopt the further definitions set out in the table below and subsequently:

Lehman Brothers Holdings Plc (in administration)	LBH
Lehman Brothers International (Europe) (in administration)	LBIE
LB Holdings Intermediate 2 Limited (in administration)	LBHI2
Lehman Brothers Europe Limited (in administration)	LBEL
Lehman Brothers Limited (in administration)	LBL
The joint administrators of LBIE	the LBIE Administrators
The joint administrators of LBHI2	the LBHI2 Administrators
The joint administrators of LBEL	the LBEL Administrators
The joint administrators of LBL	the LBL Administrators
The Insolvency Act 1986	IA 1986
The Insolvency Rules 1986	IR 1986
Section 74 of IA 1986	section 74
LBIE’s liability to LBHI2 under 3 subordinated loan agreements entered into on 1 November 2006	the Sub-Debt
The issue added to the Waterfall III application by paragraph 5 of the order dated 4 November 2016 ¹	Issue 9A

3. Pursuant to the order dated 4 November 2016, the Part A Issues are to be argued and decided on the premise of each of the following alternative assumptions of fact²:

- i) LBL is the legal and beneficial owner of a single share in LBIE and is not entitled to rectification of the share register of LBIE.

¹ As at the date of this position paper, the terms of the order of Mr Justice Hildyard dated 4 November 2016 have been agreed by all of the parties save for the LBL Administrators.

² This is without prejudice to the LBH Administrators’ (presently anticipated) position in relation to the issues arising in the Part B trial to the effect that: (i) LBL is not entitled to rectification of LBIE’s share register, substituting LBH in its place, whether as asserted by LBL or at all; (ii) LBL does not hold its share in LBIE as nominee for LBH (and is not entitled to an indemnity from LBH), whether as asserted by LBL or at all; and (iii) LBL is not entitled to recharge any of its liabilities to LBH, whether as asserted by LBL or at all.

- ii) LBL is entitled to rectification of the share register of LBIE with the effect that the single share in LBIE, currently registered in LBL's name, is: (a) cancelled; or (b) registered in the name of LBH; or (c) registered in the name of LBHI2.
 - iii) LBL holds the single share in LBIE as nominee for LBH and/or LBHI2 and is entitled to an indemnity from LBH and/or LBHI2 (as appropriate) in respect of its liability under section 74.
 - iv) LBL is otherwise entitled to recharge its liabilities to LBH (and/or LBIE and/or LBHI2 and/or LBEL), including its liability to make contribution to LBIE's estate under section 74.
4. Save where expressly stated otherwise in this position paper, the LBH Administrators' position with regard to each of the Part A Issues is the same whichever of the above assumptions is under consideration.
5. The LBH Administrators' position in respect of the Part A Issues proceeds on the basis of the decision and reasoning of the Court of Appeal in *The Joint Administrators of LB Holdings Intermediate 2 Limited (in administration) and others v Lomas and others* [2015] EWCA Civ 485 ("**Waterfall I CA**"). Where appropriate, the LBH Administrators' position and/or arguments may be subject to revision in light of the decision and/or reasoning of the Supreme Court in relation to Waterfall I.
6. The LBH Administrators were joined to the Waterfall III application by the order dated 4 November 2016, and have had sight of the position papers filed on behalf of the LBL Administrators, the LBIE Administrators, the LBHI2 Administrators and the LBEL Administrators. In this position paper and in order to avoid duplication, where they adopt the same position as one or more other party in relation to an issue, the LBH Administrators have stated as much and, insofar as possible and appropriate, adopt the analysis and reasoning of such other party or parties.

II. Overview

7. The LBH Administrators note that there appears to be an element of agreement or common ground as to the position in relation to certain of the Part A Issues. In particular, it appears to be agreed by the LBIE Administrators and the LBHI2 Administrators that:
- i) The liability of LBIE's members to contribute to LBIE's assets, when in liquidation under section 74 and section 150 of IA 1986, is a free-standing statutory obligation of each member individually.

- ii) There is no right, as between LBIE's members, to seek or obtain a contribution and / or indemnification from each other in respect of any contribution they are required to make to the assets of LBIE under section 74 or section 150 IA 1986.
 - iii) This is because the ultimate objective underlying the power to make adjustment under section 74 and section 150 IA 1986 is to ensure that LBIE's members contribute to the assets of LBIE rateably to their respective shareholding.
8. It would appear to follow from the positions adopted by the LBIE Administrators and the LBHI2 Administrators that:
- i) If (which is not at present entirely clear) LBIE has sufficient assets to discharge all its debts that rank in priority to the Sub-Debt, LBL's ultimate liability (or possibly that of LBH on the assumption that LBH were the registered holder of a single share in LBIE) to contribute to LBIE's assets in respect of the Sub-Debt would be *de minimis* in amount. This is on the footing that the amount of the Sub-Debt is £3 billion³ and that there would be no significant further costs or expenses to be paid and on the basis that LBIE's claim for a contribution would be the subject of a set-off and thereby extinguished by LBHI2's cross-claim against LBIE for payment of the Sub-Debt.
 - ii) The decision of the Supreme Court in Waterfall I and/or the facts in any event may have a relevance in determining whether LBIE has a sufficient surplus to pay all prior-ranking debts. This may, therefore, further impact upon the issues that require determination, so that:
 - a) If the position is that LBIE has a surplus after having discharged all of its debts that rank in priority to the Sub-Debt, and if the Sub-Debt is then due, then this would serve to reduce the amount of any call to be made by LBIE on LBHI2 under section 74 in order to enable LBIE to pay its debts and liabilities. This would, in turn, reduce the amount for which LBL (or possibly LBH on the assumption that LBH were the registered holder of a single share in LBIE) was liable for the purposes of adjustment as between LBL/LBH and LBHI2;
 - b) If the position is that LBIE has insufficient funds actually to discharge all of its debts that rank in priority to the Sub-Debt, then the Sub-Debt will not be payable and there can be no claim for a contribution in order to enable LBIE to pay the

³ Which is the amount of the Sub-Debt suggested in paragraph 109 of the LBL Administrators' position paper.

Sub-Debt. The Sub-Debt and the Sub-Debt Contribution Claim are contingent and would need to be valued at nil (as *per* Waterfall I CA);

- c) Any Contribution Claim by LBIE as against LBL and LBHI2 in respect of statutory interest and non-provable claims will be the subject of proof as against each of LBL and LBHI2. To the extent that such proof or proofs, in respect of the claim for contribution, do not result in LBIE receiving payment in cash sufficient for it to be able to discharge in full the claims against it in respect of statutory interest and non-provable claims, the Sub-Debt will not become payable and there can be no Sub-Debt Contribution Claim.
- d) If it transpires that the Contribution Claim by LBIE in respect of statutory interest and the non-provable claims are actually paid in full by LBHI2 / LBL then the position as between the three companies in respect of the Sub-Debt will be as in sub-paragraph (i) above, subject to there having to be a further adjustment as between LBHI2 and LBL as regards the payment of calls to LBIE in respect of statutory interest and the non-provable claims.

9. The LBH Administrators' position in relation to each of the Part A Issues is set out below.

III. The Part A Issues

Issue 1

10. **Whether the obligations of (i) LBHI2 and/or (ii) LBL to contribute to the assets of LBIE pursuant to section 74 include an obligation to contribute to the assets of LBIE to the extent necessary to enable LBIE to pay sums owed to LBHI2 pursuant to the Sub-Debt.**

11. In summary, the LBH Administrators' position is as follows:

- i) There is no reason in principle why a lender that is also a shareholder of the borrower should not be liable under section 74 to contribute to the assets of that borrower to enable the borrower to pay the debt owed by it to the lender shareholder.
- ii) However, in the circumstances of the present case, the LBH Administrators' primary position is that none of LBHI2, LBL or LBH (on the assumption that LBH is the registered holder of a single share in LBIE) is liable under section 74 to contribute to the assets of LBIE to enable it to meet its liability to LBHI2 in respect of the Sub-Debt:
 - a) at all; or

- b) alternatively, unless LBIE is able to pay all its prior-ranking claims without recourse to any contribution made pursuant to a call under section 74.
- iii) The LBH Administrators' secondary position is that, if there is such an obligation, then the existence of LBHI2's obligation to contribute to the assets of LBIE in respect of the Sub-Debt and the effect of insolvency set-off in LBIE's administration has the consequence in the present case that there is no obligation upon LBL or LBH (on the assumption that LBH is the registered holder of a single share in LBIE) to contribute to LBIE's assets for the purposes of enabling LBIE to pay the Sub-Debt (as opposed to being subject to a contingent liability in respect of any adjustment to be made under section 74 as between LBL or LBH (on the assumption that it is the registered holder of a single share in LBIE) and LBHI2).

12. The LBH Administrators' primary position is explained below:

- i) As a matter of interpretation of the Sub-Debt agreements or by reason of a term to be implied into the Sub-Debt agreements, none of LBHI2, LBL or LBH (on the assumption that LBH is the registered holder of a single share in LBIE) is liable under section 74 to contribute to the assets of LBIE to enable LBIE to meet its liability to LBHI2 in respect of the Sub-Debt. The LBH Administrators adopt, to that extent, the analysis and reasoning of the LBL Administrators in paragraphs 104 to 116 of the LBL Administrators' position paper.
- ii) Alternatively, on a proper interpretation of the Sub-Debt agreements (and in particular clause 5 thereof) LBIE has no liability to pay the Sub-Debt, and hence a Sub-Debt Contribution Claim is impossible, unless LBIE's own assets – excluding any possible right to make a future call under section 74 – are sufficient to pay all prior-ranking claims. This is because:
 - a) The effect of clause 5(1) of the subordinated loan agreements is that the Sub-Debt is only payable if LBIE is “solvent” within the meaning of clause 5(2).
 - b) LBIE is only “solvent” within the meaning of clause 5(2) if “*it is able to pay its Liabilities (other than the Subordinated Liabilities) in full*” disregarding the liabilities identified in clauses 5(2)(a) and (b).
 - c) The form of the Sub-Debt agreements is based upon templates provided by the Financial Services Authority (LBIE's regulator at the applicable time) for

institutions that wished to rely upon subordinated loans to meet their capital adequacy requirements - *per* David Richards J (as he then was) at paragraph [60] in the first instance decision of *Waterfall I* ([2014] EWHC 704 (Ch)). The “*concept*” is that “*subordinated loan capital qualifying as part of the institution’s regulatory capital is, as against creditors, to be treated as part of the ‘capital’ of the institution*” (paragraph [63]).

- d) Prior to a company’s liquidation, the ability to make calls upon members for unpaid capital is governed by the company’s articles. In a limited company, sums unpaid on shares could be the subject of a call prior to liquidation. However, there is no such ability to make a call on members of an unlimited company before liquidation and the members’ liability (if any) under section 74 crystallises only after the company enters liquidation.

- e) Accordingly, on a true interpretation of clause 5(2), having regard to the context and place in which the word “*it*” is used, the reference to “*it*” (*i.e.* LBIE) being able to pay its relevant liabilities “*in full*” is a reference to LBIE’s ability to pay such liabilities from its own assets and without reliance upon a possible call under section 74 should LBIE enter liquidation in the future:
 - 1) Clause 5(2) applies not only when the borrower is in an insolvency situation but also prior to that, when the borrower is considering making a payment in respect of the Sub-Debt. The clause must have the same meaning whether or not the borrower is in liquidation.

 - 2) It would be contrary to the regulatory context underpinning the Sub-Debt loan agreements if, in deciding whether it could legitimately make a payment to the lender under such Sub-Debt loan agreements, LBIE, as borrower, was able to rely upon and treat as an asset its contingent entitlement to make a call under section 74 were it to enter liquidation. This is especially the case where doing so would involve an estimation of: (a) the contingency; and (b) the ability or otherwise of its members (who will themselves have fluctuating assets) to meet such a call.

 - 3) If clause 5(2) were intended to include such a possibility (*i.e.* as outlined in sub-paragraph (2) above), it would mean that the protection intended to be afforded by the subordinated loan agreements would be significantly eroded. It would require treating the possible future ability

to make a recovery from a member pursuant to section 74 as part of LBIE's "capital".

- 5) Moreover, Lewison LJ was correct in Waterfall I CA (at paragraph [113]) in observing that the right to make a call is not in fact the property of a company.
- 6) Even if that is not correct, LBIE's right to make a call under section 74 is at most a contingent asset, and such assets do not ordinarily form part of the assessment of whether or not a company is solvent (*Re Rococo Developments Ltd (in liquidation)* [2016] EWCA Civ 660 and *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc* [2013] UKSC 28).
- 7) Further still, a member's liability under section 74 is to contribute a sum which is "sufficient" to pay the company's debts and liabilities and the expenses of the winding up. Thus, a member's liability under section 74 presupposes that the company is unable to pay its debts and liabilities on its own account.

- f) It follows that a proper interpretation of clause 5(2) does not include treating the possibility of a call being made, in the event that LBIE were to enter liquidation in the future, as one of LBIE's assets for the purposes of deciding whether LBIE is able to pay its relevant liabilities.

13. The reasoning in support of the LBH Administrators' secondary position is set out in relation to Issues 3 and 4 below.

Issue 2

14. **Whether any claim of LBIE against LBHI2 and/or LBL under section 74 (a "Contribution Claim") in respect of the Sub-Debt (a "Sub-Debt Contribution Claim") is to be included in the insolvency set-off account in LBIE's administration against the provable claims of (i) LBHI2 and/or (ii) LBL.**
15. As the law presently stands⁴, it is the position of the LBH Administrators that the answer is "Yes": a Sub-Debt Contribution Claim is to be included in the insolvency set-off account in LBIE's

⁴ Pending the decision of the Supreme Court in relation to Waterfall I.

administration as against the provable claims of LBHI2 and/or LBL⁵. (The LBH Administrators' position in relation to the effect of set-off in LBIE's administration upon LBHI2's cross-claim for the Sub-Debt is dealt with in relation to Issue 3 below.)

16. The same position is also adopted by the LBL Administrators, the LBIE Administrators and the LBHI2 Administrators (as set out in paragraphs 118, 14 and 2.1 of their respective position papers). Accordingly, excluding the LBEL Administrators (who take no position in relation to this issue), there is unanimity in relation to Issue 2.
17. The LBH Administrators adopt the reasoning and analysis contained in the LBIE Administrators' position paper (in paragraphs 15 and 16).

Issue 3

18. **Whether the value of the Sub-Debt Contribution Claim, for the purposes of proof and set-off, is:**
 - (i) **for the full amount of the Sub-Debt;**
 - (ii) **limited to the estimated value that is applied to LBHI2's claim for the Sub-Debt for the purposes of proof; or**
 - (iii) **some other value.**
19. In summary, the LBH Administrators' position is as follows:
 - i) The value of LBIE's Sub-Debt Contribution Claim against LBHI2 for the purposes of proof in LBHI2's administration (or subsequent liquidation) and set-off (in LBIE's administration) cannot exceed the estimated value that is applied to LBHI2's claim for the Sub-Debt in LBIE's administration.
 - ii) The value of LBIE's Sub-Debt Contribution Claim against LBL or LBH (if it is a registered shareholder of LBIE) for the purposes of proof in LBL's or LBH's respective administrations (or subsequent liquidations) and set-off (in LBIE's administration) is nil.
20. The LBH Administrators' position is explained below:
 - i) If LBIE has no liability to pay the Sub-Debt (or the value of LBHI2's claim into LBIE for the Sub-Debt is nil) then a liquidator of LBIE would have no need (nor right) to make a

⁵ If LBH were a member of LBIE and if LBH was in possession of a provable debt against LBIE then a Sub-Debt Contribution Claim by LBIE would fall to be included in the insolvency set-off account.

call under section 74 in order to enable LBIE to pay the Sub-Debt. It follows that LBIE's Sub-Debt Contribution Claim depends upon the existence of a liability on the part of LBIE in respect of the Sub-Debt. What follows assumes the existence of such a liability.

- ii) In an administration, insolvency set-off applies both where the creditor's claim and where the company's cross-claim are contingent obligations (Rule 2.85(4) IR 1986). For the purposes of the set-off account, such obligations are to be estimated in accordance with Rule 2.81 IR 1986 (*per* Rule 2.85(5) IR 1986).
- iii) LBHI2's claim in LBIE's administration for the Sub-Debt is a contingent liability because (as explained in Waterfall I CA) the liability to pay the Sub-Debt arises only if all prior ranking claims in LBIE can be paid.
- iv) LBIE's Sub-Debt Contribution Claim against LBHI2 is also contingent, being contingent upon at least: (a) LBHI2 having a claim for the Sub-Debt; (b) LBIE entering liquidation; and (c) LBIE's liquidator making a call under section 74 against LBHI2.
- v) Since insolvency set-off under Rule 2.85 IR 1986 took effect in LBIE's administration on 4 December 2009, there has already been a netting-off in respect of LBIE's Sub-Debt Contribution Claim against LBHI2 and LBHI2's cross-claim for the Sub-Debt.
- vi) As a consequence, LBHI2's claim for the Sub-Debt has been extinguished (and in effect paid) by the operation of insolvency set-off in LBIE's administration. From the point of view of LBIE, therefore, LBIE's liability for the Sub-Debt has been satisfied.
- vii) The foregoing is unaffected by the application of the hindsight principle to the re-valuing of the set-off account. If, in view of changed circumstances, LBHI2's contingent claim for the Sub-Debt in LBIE's administration is re-valued upwards as at the set-off date, the value of LBIE's Sub-Debt Contribution Claim against LBHI2 is also increased to a like extent.
- viii) LBH had no claim against LBIE so it would have been impossible for insolvency set-off to have taken place in LBIE's administration as between LBIE and LBH (even assuming that LBH was the registered holder of a single share in LBIE).
- ix) Since any liability on the part of LBIE for the Sub-Debt has been satisfied (and that will be the case irrespective of any revaluation of LBIE and LBHI2's Sub-Debt-based cross-claims in accordance with the hindsight principle) there is no basis upon which a

liquidator of LBIE could make a call upon LBH (on the assumption that it is the registered holder of a single share in LBIE) for the purposes of enabling LBIE to pay LBIE's liability for the Sub-Debt. The Sub-Debt has been discharged. (The LBH Administrators' position in relation to the question whether a liquidator of LBIE might make a call under section 74 for the purposes of adjusting the rights of the members between themselves is addressed in the context of Issue 7 below.)

- x) The same outcome arises if LBL is the registered holder of a single share in LBIE. In this regard, the LBH Administrators further rely upon the analysis and reasoning in the LBHI2 Administrators' position paper (at paragraphs 3.1 to 3.8).
21. The principal authorities upon which the LBH Administrators presently intend to rely are: *Stein v Blake* [1996] 1 AC 243; *Wight v Eckhart Marine GmbH* [2004] 1 AC 147; *Re Bank of Credit and Commerce International SA (No 8)* [1996] 2 All ER 121; *Swissport (UK) Ltd v Aer Lingus Ltd* [2007] EWHC 1089 (Ch); and *Lomas v Burlington Loan Management* [2015] EWHC 2269 (Ch).

Issue 4

22. **To the extent that insolvency set-off has already taken effect, in the administration of LBIE, between LBHI2's claim in respect of the Sub-Debt and LBIE's Sub-Debt Contribution Claim (if any) against LBHI2, what effect (if any) such set-off has on LBIE's ability to make a Sub-Debt Contribution Claim against LBL.**
23. In summary, and for the reasons set out in relation to Issue 3 above, it is the position of the LBH Administrators that:
- i) Insolvency set-off took effect in LBIE's administration as between LBIE's Sub-Debt Contribution Claim against LBHI2 and LBHI2's cross-claim for the Sub-Debt on 4 December 2009.
 - ii) The effect of such set-off was to extinguish LBHI2's claim for the Sub-Debt.
 - iii) As a consequence, LBIE cannot make a Sub-Debt Contribution Claim against LBL or LBH (assuming that it is the registered holder of a single share in LBIE) in respect of LBIE's liability to pay the Sub-Debt.
24. The LBH Administrators' position in relation to the question of whether LBL or LBH might have a contingent liability for a call by a liquidator of LBIE under section 74 for the purposes of adjusting the rights of the members between themselves is addressed in the context of Issue 7 below.

25. It appears to the LBH Administrators that there is unanimity as to the 'end result' on Issue 4 as between those parties that take a position on the issue (*i.e.* all apart from the LBEL Administrators), albeit the reasoning may differ.

Issue 5

26. **In circumstances where insolvency set-off in LBIE's administration took effect on 4 December 2009, whether insolvency set-off in a subsequent distributing administration or liquidation of LBHI2 and/or LBL is of any application in respect of those companies' claims against, and liabilities to, LBIE.**
27. It is the position of the LBH Administrators that since insolvency set-off took effect in LBIE's administration on 4 December 2009, insolvency set-off in a subsequent distributing administration or liquidation of LBHI2, LBL or LBH (if it is a registered shareholder) would have no application save insofar as there were mutual debts that did not fall within the set-off account in LBIE's administration.
28. The LBH Administrators adopt the analysis and reasoning set out in the LBIE Administrators' position paper (paragraphs 33 to 34) and the LBHI2 Administrators' position paper (paragraphs 5.1 to 5.2).

Issue 6

29. **In circumstances where insolvency set-off in the administration of LBEL took effect on 11 July 2012, whether insolvency set-off in a subsequent distributing administration or liquidation of LBL is of any application in respect of LBL's claims against, and liabilities to, LBEL.**
30. The position of the LBH Administrators in relation to Issue 6 is the same as it is for Issue 5 save that it relates to the position as between LBEL and LBL in circumstances where automatic insolvency set-off took effect in the administration of LBEL before it could have taken effect in the administration of LBL.

Issue 7

31. **In light of the fact that LBL owns one ordinary share of \$1 in LBIE, and LBHI2 owns 2 million 5% redeemable Class A preference shares of £1,000 each, 5.1 million 5% redeemable Class B shares of \$1,000 each and 6,237,113,999 ordinary shares of \$1 each in LBIE:**

- (i) whether their obligations to contribute to the assets of LBIE pursuant to section 74 are joint and several, joint, several or otherwise as against LBIE;
- (ii) whether they are entitled to a contribution or indemnity from one another in respect of (a) any payments made pursuant to any such obligation; and/or (b) any set-off pursuant to any such obligation and, if so, the nature and extent of such right of contribution or indemnity;
- (iii) whether, in addition to or instead of any right of contribution or indemnity (as referred to in sub-paragraph (ii) above), LBL or LBHI2 are liable to contribute to LBIE's assets to any amount sufficient for the adjustment of the rights of the contributories among themselves and what the effect of such adjustment is;
- (iv) to what extent any right to contribution or indemnity (as referred to in sub-paragraph (ii) above) and/or adjustment (as referred to in sub-paragraph (iii) above) is affected by any other claims which LBHI2 and LBL have against one another or any other party;
- (v) whether the LBIE Administrators should be directed to assert less than 100% of the Contribution Claim against LBL and/or LBHI2 and, if so, by how much the Contribution Claim should be reduced as against LBL and/or LBHI2 and what factors should the Court take into account in reaching its decision.

32. In summary, the LBH Administrators' position is as follows:

- i) **As to sub-paragraph (i):** The liability of LBHI2, LBL and LBH (assuming that it is the registered holder of a single share in LBIE) to contribute to the assets of LBIE pursuant to section 74 is statutory-based and is a several liability.
- ii) **As to sub-paragraph (ii):** It follows that there is no entitlement as between LBHI2, LBL and LBH (assuming that it is the registered holder of a single share in LBIE) to a contribution or indemnity from one another.
- iii) **As to sub-paragraph (iii):** Instead of any entitlement to a contribution or indemnity from one another, LBHI2, LBL and LBH (assuming it is a registered shareholder of LBIE) have a liability under section 74 for calls that may be made by LBIE's liquidator in order to adjust the rights of the members as between themselves. The effect of such a call being made by a liquidator of LBIE is that the relevant member would be required to make a payment to the liquidator. The liquidator would be obliged to pass on the payment to the other member so as to bring about an adjustment of the members'

respective net contributions as between each other (in accordance with section 74 and sections 107, 150 and 154 IA 1986).

- iv) **As to sub-paragraph (iv):** As there is no entitlement as between LBHI2, LBL and LBH (if it is a registered shareholder) to a direct right of contribution or indemnity from one another, any claims that they may have against one another, or against other parties, are irrelevant to the process of adjustment for the purposes of section 74 and sections 107, 150 and 154 IA 1986.
 - v) **As to sub-paragraph (v):** The LBIE Administrators can be directed not to assert a claim against LBL or LBH (assuming it is the registered holder of a single share in LBIE) under section 74. Further and in any event, the only claim that might be asserted is a claim for a sum pro-rated by reference to LBL / LBH's minimal shareholding.
33. In relation to Issues 7(i) to (iv), the LBH Administrators adopt the analysis and reasoning contained in the LBIE Administrators' position paper (paragraphs 42(1) to (4)) and in the LBHI2 Administrators' position paper (paragraphs 7.1(i) to 7.1(iv)).
34. In relation to Issue 7(v), the LBH Administrators adopt the analysis and reasoning contained in the LBHI2 Administrators' position paper (paragraph 7.1(v)). Further (and assuming that LBH is the holder of a single registered share in LBIE):
- i) No claim can or should be asserted by LBIE against LBH for a contribution to enable LBIE to pay the Sub-Debt for the reasons set out in relation to Issues 3 and 4 above, the principal obligation in respect of making a Sub-Debt Contribution Claim having already been discharged by set-off as between the claims of LBIE and LBHI2 in the administration of LBIE.
 - ii) Whilst LBIE might, in principle, assert a claim against LBH in respect of the (contingent) liability of LBH to a call by a liquidator of LBIE under section 74 to adjust the rights of LBHI2 and LBH between themselves, any such claim would take as a starting point the principle that the members should make contributions under section 74 in proportion to their shareholding. The relevant proportion in the present case would be based upon the number of \$1 ordinary shares held by each (LBHI2 holding 6,237,113,999 shares and LBH being assumed to hold only 1 such share).
 - iii) However, and for the reasons given in sub-paragraphs (iv) to (vi) below, in both a compulsory and voluntary liquidation a member might be required to pay less than 100%

of the sum necessary to pay the debts and liabilities of the company and the expenses of the winding up and so the Court can give directions to the LBIE Administrators requiring them to assert a claim for less than 100% of the said sum.

- iv) As to the position in a compulsory liquidation:
 - a) The Court “*may*”, at any time after making a winding up order, make calls for the payment of any money “*which the court considers necessary*” to satisfy the debts and liabilities of the company and the expenses of the winding up (section 150(1) IA 1986). This is, plainly, a discretionary power.
 - b) Further, in making a call the Court, “*may take into consideration the probability that some of the contributories may partly or wholly fail to pay it*” (section 150(2) IA 1986).
 - c) The Court’s power to make a call under section 150 IA 1986 has been delegated to the liquidator (in accordance with section 160(1)(d) IA 1986). In making a call, the liquidator acts “*as an officer of the court subject to the court’s control*” (Rule 4.202 IR 1986). That being so, the liquidator when making a call is exercising the Court’s discretionary power and is doing so under the Court’s supervision.
 - d) Further, in the event that a liquidator made such a call but it was unpaid, the Court in deciding whether to make an order to enforce the payment of such a call pursuant to Rule 4.205(2) IR 1986 would have a further discretion.
 - e) It follows that the Court can, in appropriate circumstances, direct the liquidator in a compulsory liquidation not to make a call or to make a call for a specific amount. Further, since enforcement of a call requires the exercise by the Court of its powers to order payment by a member, the efficacy of a call is dependent upon the Court’s discretion.
 - f) Accordingly, a member might be required to pay less than the sum that would be necessary to pay 100% of the debts and liabilities of the company and the expenses of the winding up.
- v) The same is true in the case of a voluntary liquidation:

- a) In order to give effect to a member's liability to make a contribution under section 74, the liquidator may apply to the Court, "*to exercise as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court*" (section 112(1) IA 1986). Accordingly, in a voluntary liquidation, the Court can make such orders for calls or for their enforcement as it could make in relation to a compulsory liquidation.
 - b) The Court's power to make a call in a voluntary liquidation has again been delegated to the liquidator (Waterfall I CA, paragraph [177]). Although a voluntary liquidator is not an officer of the Court, he may be taken to be one in circumstances where he is exercising a power of the Court that has been delegated to him. In any event, the delegated power to make a call is subject to the Court's supervision.
 - c) The Court, if satisfied that, "*the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just*" (section 112(2) IA 1986). Accordingly, the Court in deciding the extent to which to order a member to contribute to the assets of the company would be exercising a discretion and could decide to order a contribution of such sum as it thought fit.
 - d) Accordingly, a member might be required to pay less than the sum that would be necessary to pay 100% of the debts and liabilities of the company and the expenses of the winding up.
- vi) Since LBIE is in administration and the LBIE Administrators are officers of the Court, the Court supervising the administration can give directions to the LBIE Administrators as to whether and to what extent they should assert a Contribution Claim against LBHI2, LBL or LBH (assuming that it is the registered holder of a single share in LBIE). In giving such a direction, the Court should take into account all of the circumstances, including those identified by the LBHI2 Administrators in paragraph 7.1(v) of their position paper. In particular, the Court should have regard to the course that is necessary in order to ensure that the relevant liabilities of LBIE are discharged as well as the ultimate objective (whether a liquidator makes a call for the purposes of meeting the debts and liabilities of the company and the costs of the winding up or for the purposes of

adjusting the rights of the members between themselves) of ensuring that members contribute to the assets of the company in proportion to their respective shareholdings.

Issue 8

35. **How, if at all, any claim for a contribution or indemnity as referred to in paragraph 7(ii) above and/or any adjustment as referred to in paragraph 7(iii) above would be affected by the rule against double-proof in circumstances where LBIE had not yet been paid in full in respect of a Contribution Claim.**
36. It is the position of the LBH Administrators that this issue does not arise as a matter of law because:
- i) Consistent with the position taken by the LBH Administrators above, there is no entitlement as between LBHI2, LBL and LBH (assuming that LBH were found to be the registered holder of a single share in LBIE) to a contribution or indemnity from one another. Hence there would be no competing claims that might engage the rule against double-proof.
 - ii) Although an adjustment may be effected via section 74, that adjustment if sought would be carried out by call(s) made by the liquidator against the members at the point when all of the debts and liabilities of the company and the expenses of the winding up had been paid. Payments made in respect of a call made for the purposes of adjustment are received by the liquidator in his capacity as an officer of the Court. They will be subject to the Court's direction and will be payable onwards to the relevant member(s) so as to bring about an adjustment of the members' respective net contributions. As a consequence, the process of adjustment under section 74 does not give rise to competing claims that might engage the rule against double-proof.
 - iii) If, contrary to the LBH Administrators' position, there is an entitlement as between LBHI2, LBL and LBH (if LBH were a registered shareholder of LBIE) to a contribution or indemnity from one another, then the rule against double-proof would arise.
37. The LBH Administrators adopt the analysis and reasoning in the LBIE Administrators' position paper (at paragraphs 47 to 49) and the LBHI2 Administrators' position paper (at paragraphs 8.1 to 8.4).

Issue 9A⁶

38. **Whether, as a matter of law, it is possible for a member of a company to enter into with that company an enforceable agreement which has the effect of enabling that member to avoid what would otherwise be its obligation to contribute to the assets of the company under section 74 in the event of the company's winding up or otherwise to reverse the effect of that section (whether by claiming to be contractually entitled to reimbursement from that company in respect of such contributions or otherwise).**
39. The LBH Administrators take no position upon this issue. This is because:
- i) The LBL Administrators' Supplementary Position Paper advances the position (in paragraph 19) that LBL has a right of recharge for distinct or apportioned sums against particular Lehman entities.
 - ii) It follows that any recharge claim made by LBL against LBIE which was reduced or discharged by the operation of insolvency set-off in LBIE's administration would have no impact upon any posited recharge claim against LBH (the latter recharge claim being for a distinct and separate liability).

Issue 10

40. **If the answer to the issue at sub-paragraph 9(i)⁷ is yes, whether LBL's recharge claim against LBIE in respect of the Sub-Debt Contribution Claim and LBHI2's claim in respect of the Sub-Debt are to be paid *pari passu* and, if not, in what order of priority.**
41. The LBH Administrators take no position upon this issue.

Issue 12

42. **If the answer to the question set out at sub-paragraph 11(i), 11(ii) or 11(iii)⁹⁸ above would otherwise be in the affirmative, is it impacted (and if so to what extent) by any set-off occurring in LBIE's administration as between (i) the Contribution Claim; and (ii) provable claims of LBL against LBIE.**

⁶ This issue was added to the Waterfall III application by the order dated 4 November 2016.

⁷ *I.e.* Issue 9(i), which is not itself one of the Part A Issues. Issue 9(i) is as follows: "*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 ... sums paid or payable by it to LBIE in respect of a Contribution Claim*".

⁸ *I.e.* Issues 11(i), (ii) and (iii) which are not themselves included in the Part A Issues. Issue 11 is as follows: "*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*".

43. It is the position of the LBH Administrators that, assuming that LBL has a right of recharge against LBH (which is denied), such a right would not be impacted by any set-off occurring in LBIE's administration as between LBIE and LBL's cross-claims.
44. The LBH Administrators' reasons are as follows:
- i) The LBL Administrators' Supplementary Position Paper advances the position (in paragraph 19) that LBL has a right of recharge for distinct or apportioned sums against particular Lehman entities.
 - ii) It follows that any recharge claim made by LBL against LBIE which was reduced or discharged by the operation of insolvency set-off in LBIE's administration would have no impact upon any posited recharge claim against LBH (the latter recharge claim being for a distinct and separate liability).

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16 December 2016

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