In the Supreme Court of the United Kingdom

Notice of appeal

(or application for permission to appeal)

On appeal from

The Court of Appeal (Civil Division)

(1) The Joint Administrators of LB Holdings Intermediate 2 Limited (in administration)
(2) [Lehman Brothers Holdings Inc.]
(3) [The Joint Administrators of Lehman Brothers Limited (in administration)]

— V —

(1) Anthony Victor Lomas, (2) Steven Anthony Person, (3) Paul David Copley, (4) Russell Downs, (5) Julian Guy Parr (in their capacity as Joint Administrators of Lehman Brothers International (Europe) (in administration))
(6) CVI GVI (Lux) Master Sarl

Appeal number

Date of filing

D D / M M M / Y Y Y Y

Appellant's solicitors

(1) DLA Piper UK LLP

Respondent's solicitors

(1) to (5) Linklaters LLP
(6) Freshfields Bruckhaus Deringer LLP

1. Appellant

Appellant's full name: Lehman Brothers Limited (in administration)

Original status:
- ☐ Claimant
- ☐ Defendant
- ☐ Petitioner
- ☐ Respondent
- ☐ Pursuer
- ☐ Defender

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How would you prefer us to communicate with you?
- ☐ DX
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Is the appellant in receipt of public funding/legal aid?
- ☐ Yes
- ☑ No

If Yes, please give the certificate number

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2. Respondent

Respondent's full name: Lehman Brothers International (Europe)(in administration) and see attached

Original status

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

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Is the respondent in receipt of public funding/legal aid?

- ☐ Yes
- ☑ No

If Yes, please give the certificate number

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3. Decision being appealed

Name of Court: Court of Appeal (Civil Division)

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

Date of order/ interlocutor/decision: 1 4 / M A Y / 2 0 1 5
(D D / M M M / Y Y Y Y)

4. Permission to appeal

If you have permission to appeal complete **Part A** or complete **Part B** if you require permission to appeal.

PART A

Name of Court granting permission

Date permission granted

D D / M M M / Y Y Y Y

Conditions on which permission granted

PART B

☑ The appellant applies to the Supreme Court for permission to appeal.

5. Information about the decision being appealed

Please set out

- Narrative of the facts
- Statutory framework
- Chronology of proceedings
- Orders made in the Courts below
- Issues before the Court appealed from
- Treatment of issues by the Court appealed from
- Issues in the appeal

Please see pages 2 to 5 of the attached marked - SECTION 5 OF FORM 1: INFORMATION ABOUT THE DECISION BEING APPEALED

6. Grounds of appeal

Please see pages 6 to 15 of the attached marked - SECTION 6 OF FORM 1: GROUNDS OF APPEAL

Counsel's name or signature:

David Wolfson QC and Nehali Shah

7. Other information about the appeal

Are you applying for an extension of time?

☐ Yes ☑ No

If Yes, please explain why

What order are you asking the Supreme Court to make?

Order being appealed ☐ set aside ☑ vary

Original order ☐ set aside ☐ restore ☑ vary

Does the appeal raise issues under the:

Human Rights Act 1998? ☐ Yes ☑ No

Are you seeking a declaration of incompatibility?

☐ Yes ☑ No

Are you challenging an act of a public authority?

☐ Yes ☑ No

If you have answered Yes to any of the questions above please give details below:

Court's devolution jurisdiction? ☐ Yes ☑ No

If Yes, please give details below:

Are you asking the Supreme Court to:

depart from one of its own decisions or from one made by the House of Lords?

☐ Yes ☑ No

If Yes, please give details below:

make a reference to the European Court of Justice of the European Communities?

☐ Yes ☑ No

If Yes, please give details below:

Will you or the respondent request an expedited hearing?

☐ Yes ☑ No

If Yes, please give details below:

8. Certificate of Service

Either complete this section or attach a separate certificate

The date on which this form was served on the

1st Respondent 0 9 / J U N / 2 0 1 5
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2nd Respondent / /
D D M M M Y Y Y Y

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(See attached page 16)

by

DLA Piper UK LLP

by the following method

Personal Service and Email

Signature

9. Other relevant information

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

2014/EWHC/704
2015/EWCA CIV/485
/ /
/ /

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

First Instance - [2015] Ch. 1; [2014] 3 W.L.R. 466; [2015] 2 All E.R. 111; [2014] B.C.C. 193; [2015] 1 B.C.L.C. 151

Subject matter catchwords for indexing.

Insolvency; Banking and Finance; Administration; Calls; Contingent liabilities; Contributories; Foreign currency transactions; Liquidation; Set-off.

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JOINT ADMINISTRATORS OF LEHMAN BROTHERS LIMITED (IN ADMINISTRATION)

SECTION 2 OF FORM 1: RESPONDENTS

Respondent's Name	CVI GVI (Lux) Master Sarl
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JOINT ADMINISTRATORS OF LEHMAN BROTHERS LIMITED (IN ADMINISTRATION)

SECTION 5 OF FORM 1: INFORMATION ABOUT THE DECISION BEING APPEALED

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1. These proceedings are applications by the administrators of three Lehman group entities for directions in their large and complex insolvencies, raising a series of novel and important questions of insolvency law.

2. Lehman Brothers International Europe ("**LBIE**") was the principal trading company within the European Lehman Brothers group of companies. It is an unlimited company. Lehman Brothers Limited ("**LBL**") is the registered shareholder of a single ordinary share in LBIE. It was the service company for the Lehman Group's operations in the UK, Europe and Middle East. Total claims in LBL's estate exceed £11 billion and include, *inter alia*, the claims of over 800 employees, as well as almost 200 trade suppliers. In addition, LB Holdings Intermediate 2 Limited ("**LBHI2**"), holds 6,273,113,999 ordinary shares of $1 each, two million redeemable preference shares of $1000 each and 5.1 million redeemable Class B preference shares of $1000 each in LBIE.

3. LBIE and LBL have been in administration since September 2008. LBHI2 has been in administration since January 2009. The Insolvency Act 1986 (the "**Act**") and the Insolvency Rules 1986 (the "**Rules**") apply to the administrations, as they stood at the time of entry into administration. The statutory code is further described in the judgment of Lewison LJ in these proceedings in particular at [6], [15]-[27] and [103]-[104]. The members of LBIE are potentially liable to contribute to a deficiency in LBIE's estate to meet its debts and liabilities under s.74 of the Insolvency Act 1986.

4. LBL has lodged an unsecured claim in the LBIE administration in the sum of £363 million. LBHI2 has unsecured subordinated and unsubordinated claims in LBIE's estate. LBIE has filed a proof in LBL's estate in respect of LBL's potential liability under s.74 in the sum of £10,000,000,000.00.

5. The circumstances of the Lehman administrations are unusual and unexpected, because there is a very substantial surplus in LBIE's estate (according to the latest estimate between £6.01 billion and £7.59 billion). LBIE's joint administrators have paid dividends of 100p in the £ to unsecured creditors. Unsecured claims in LBIE have been trading at a substantial premium to par, not least because of the statutory interest rate of 8%.

6. In February 2013, the joint administrators of LBIE, LBL and LBHI2 brought a joint application for directions, raising a "*number of novel and important questions*" of law (David Richards J's judgment at [4]). These included questions as to the relationship between the members' liability, if any, as members, and their claims as creditors, and as to the distribution of the surplus in LBIE's estate and the claims that might be made against that surplus (and their ranking), in particular following the insolvency waterfall described by Lord Neuberger in **In re Nortel GmbH** [2013] USKC 52, [2013] 3 WLR 504, at [39].

7. The application was heard at first instance by David Richards J, who delivered a "*formidable judgment*" (per Lewison LJ at [8]) on 14 March 2014, and made an order dated 19 May 2014 making ten declarations.

8. With the permission of the Judge, the parties appealed to the Court of Appeal against a number of the declarations made by David Richards J. The issues in the Court of Appeal included:

   (1) An appeal by LBL (and others) against the Judge's conclusion that creditors of LBIE whose provable contractual or other claims are denominated in a foreign currency are entitled to claim against LBIE for any currency losses suffered by them as a result of a decline in the value of sterling against the currency of the claim between the date of the commencement of the administration of LBIE and the date or dates of payment or payments of distributions to them in respect of their claims ("**Currency Conversion Claims**"), such claims ranking as non-provable liabilities, payable only after the payment in full of all proved debts and statutory interest on those debts (the "**Currency Conversion Claims Issue**").

(2) An appeal by LBL (and others) against the Judge's conclusion that the members of LBIE are liable to contribute under s.74 of the Act not only to provable debts but also to statutory interest on those debts and non-provable liabilities (the "**s.74 Issue**").

(3) An appeal by LBIE against the Judge's conclusion that, if the administration of LBIE is immediately followed by a liquidation, any interest in respect of the period of the administration which has not been paid before the commencement of the liquidation will not be provable as a debt in the liquidation, nor will it be payable as statutory interest under either Rule 2.88 of the Rules or section 189 of the Act (the "**Statutory Interest Issue**").

9. Following a 5-day hearing, the Court of Appeal (whose order was made on 15 May 2015, following a judgment running to 260 paragraphs dated 14 May 2015) rejected LBL's appeal on the Currency Conversion Claims Issue (Lewison LJ dissenting) and the s.74 Issue, and allowed LBIE's appeal on the Statutory Interest Issue (albeit with different reasoning to that advanced by LBIE).

10. LBL seeks permission to appeal in respect of each of these three issues (para 1 of the Court of Appeal's order insofar as it applies to declarations (ii)-(iii) and (vi), and para 4 of the Court of Appeal's order). LBL's case is that:

(1) Currency Conversion Claims do not exist, in light of the express conversion in the Rules of foreign currency denominated debts into sterling, and for the reasons identified below in LBL's grounds of appeal.

(2) The liability of contributories under s.74 of the Act does not extend to statutory interest or non-provable claims.

(3) If the administration of LBIE is immediately followed by a liquidation, any interest in respect of the period of the administration which has not been paid before the commencement of the liquidation will not be payable as statutory interest under Rule 2.88, in view of the fact that Rule 2.88 only applies to administrations.

11. LBL respectfully submits that these issues raise plainly arguable points of law of general public importance which ought to be considered by the Supreme Court, including because:

(1) They will affect the very significant sums payable (or potentially payable) to the numerous creditors of each of the Lehman estates (including the former Lehman employees with claims against LBL). These proceedings are being closely followed by the global financial industry, not least because various classes of LBIE debt have been widely speculated in and traded, and because of the size of the claims against the Lehman estates. For example, LBIE's administrators have estimated that interest accruing on debts since the commencement of its administration is around £10 billion (having accrued at 8% since September 2008), and Currency Conversion Claims in LBIE's estate are estimated by LBIE's administrators to be worth around £1.3 billion (if they exist).

(2) These issues raise important questions of insolvency law (following on from the identification of the insolvency waterfall by Lord Neuberger in **In re Nortel GmbH** [2013] UKSC 52, [2013] 3 WLR 504 at [39]) on which there is remarkably little authority, and on which further clarity at the highest judicial level is needed, including the nature and effect of currency conversion under the Rules, the nature and treatment of non-provable liabilities and statutory interest in insolvency proceedings, and the nature and extent of the liability of contributories under s.74 of the Act.

JOINT ADMINISTRATORS OF LEHMAN BROTHERS LIMITED (IN ADMINISTRATION)

SECTION 6 OF FORM 1: GROUNDS OF APPEAL

The Currency Conversion Claims Issue

1. The majority of the Court of Appeal erred in law in recognising the existence of Currency Conversion Claims, ranking as non-provable liabilities. Lewison LJ correctly concluded in his cogent dissent that Currency Conversion Claims do not exist, for a number of reasons.

2. The statutory insolvency scheme provides for the collective enforcement of debts by way of *pari passu* distribution to those who have proved for their debts. Since 1986, it has expressly provided for the mandatory conversion of foreign currency claims into sterling, and the relevant provisions apply whether the winding up is solvent or insolvent.

3. This mandatory statutory conversion (like other features of the statutory scheme such as Rule 2.105 regarding future debts, s.189 of the Act in relation to disclaimer, and insolvency set-off, as interpreted by the House of Lords in *Stein v Blake* [1996] AC 243) has substantive effect. This is demonstrated by the fact that a foreign currency creditor is not required to refund any excess he receives in the event that sterling appreciates against the foreign currency between the date of conversion and the date(s) of payment. If no such refund is required, it can only be because of the substantive effect of currency conversion under the Rules, such that Currency Conversion Claims cannot exist.

4. Were it otherwise, foreign currency creditors would have a one-way bet, or upside only option: they would be able to keep the windfall that would arise if sterling appreciates against the foreign currency between the date of conversion and the date

of payment, but they would have a claim against the company in the event that sterling depreciates against the relevant foreign currency between those dates.

5. This one-way bet would operate against the members (and their creditors), as it would diminish their right to the surplus in the company. But worse still, it would also operate as a one-way bet against creditors with other non-provable claims against the company.

6. Non-provable claims are now very rare, as there has been a general trend towards increasing the class of provable debts so that the statutory insolvency scheme deals as comprehensively as possible with all the sums payable by a company. However, non-provable claims remain a class of claims against the company towards the bottom of the insolvency waterfall, and they include, by way of example, the injured pedestrian referred to in Briggs LJ's judgment at [26].

7. The majority did not decide that Currency Conversion Claims rank behind other non-provable claims. On the contrary, it was assumed they would rank *pari passu* with other non-provable claims (see e.g. Briggs LJ at [140] and [165]).

8. If there is not a sufficient surplus in the company's estate to pay the claims of all non-provable creditors, then, if Currency Conversion Claims exist and if they rank equally with other non-provable claims, the sterling non-provable creditors will, in effect, be underwriting exchange rate risk for the benefit of the foreign currency creditors. That sterling creditors should not bear exchange rate risk for the benefit of foreign currency creditors is the premise of the decision of the Court of Appeal in *Re Lines Bros* [1983] Ch 1 (and Lewison LJ's analysis of the reasoning of the judgments in *Re Lines Bros* (at [70]-[81]) was entirely correct).

9. The position of foreign currency creditors was expressly considered prior to the introduction of the 1986 scheme. As set out in the reports referred to in the judgments of the Court of Appeal, the Law Commission and Cork Committee considered how to deal with foreign currency claims, and whether foreign currency creditors should be compensated for adverse exchange rate fluctuations after the process of proving, by way of a second conversion date. They specifically decided against allowing for such

compensation, even if the company turned out to be solvent, concluding that there should be a once-for-all conversion date. The existence of Currency Conversion Claims would entail the rejection of the advice of the Cork Committee and the conclusion of the Law Commission (as the majority appears to acknowledge at [156]). It would also contradict the Government's stated aim of simplifying insolvency procedures.

10. The treatment of foreign currency claims was thus expressly considered and provided for in the legislation, and there is no room in the scheme for a second conversion giving rise to a non-provable claim against the company. There is no other example of a unitary obligation which gives rise to both a provable and a non-provable claim; if they exist, Currency Conversion Claims would have this surprising and unique effect.

11. Where non-provable claims have been recognised, it has been in situations where the factual situation which has arisen was unforeseen by the legislature, e.g. the tort claims in *Re T&N Ltd* [2006] 1 WLR 1728. Following the decision in *Re T&N,* Parliament swiftly enacted legislation to make these tort claims provable (Insolvency (Amendment) Rules 2006, SI2006/1272, amending Rule 13.12).

12. In contrast to the unforeseen tort claims, foreign currency claims were considered prior to the introduction of the 1986 scheme, and they are provable (in sterling). The words "*for the purpose of proving a debt*" in Rule 2.86 are consistent with currency conversion having substantive effect, because proving is the only way in which a creditor becomes entitled to participate in distributions in a winding up/administration.

13. A further reason against Currency Conversion Claims is that it is impossible to fathom how they will work in practice, and the majority failed to address this important consideration.

(1) Briggs LJ referred to *"a further process of pari passu distribution"* of non-provable claims ([165]). But there is no mechanism for any collective process dealing with non-provable claims in the Rules or the Act, and the Court of Appeal offered no

adequate guidance on this issue (other than noting *"the judges will have to cope"*, Briggs LJ at [165]).

(2) In *Re T&N Limited* [2006] 1 WLR 1728, David Richards J (speaking of asbestosis claims which were – at that time – non-provable) said at [106]-[107] that in the event of a surplus otherwise available to shareholders, the court would not restrain the asbestosis claimant from obtaining and then executing a judgment. In this case, Briggs LJ said at [188] that it would not be necessary for a non-provable claimant to obtain a judgment against the company. But if that is correct, it is even more difficult to see how the administrator or liquidator could ensure equality between the holders of non-provable claims, who may not assert their claims at the same time (not least because the claims might arise at different times). Given the absence of a process of collective enforcement of non-provable claims, there is a real risk of an *"unholy rush to judgment"* (Briggs LJ at [188]) and a race between currency conversion claimants (and other non-provable claimants).

(3) As David Richards J noted in *Re T&N* at [107], *"in a case where there was a surplus but it was insufficient to pay all tort claims [such tort claims being at that time non-provable claims] in full, the court would face a major issue as to how best to deal with this situation in a fair and sensible manner"*. This "major issue" is not answered by the majority, and thus a critical lack of certainty arises as to how non-provable claims are to be dealt with by judges and insolvency practitioners.

(4) In addition, there is no obvious date for the conversion of any foreign currency losses (and none was suggested by the majority), and no machinery for choosing an appropriate date. In order to achieve equality between different kinds of non-provable creditors (which may include creditors with multiple claims in different foreign currencies) it would be necessary to value their claims in a common currency on a single date, and thus a second conversion of foreign currency claims would be required in order to calculate the value of Currency Conversion Claims. No such date is provided for in the Rules (as Lewison LJ pointed out at [96]). Moreover, if there were a second conversion date, it could be said that that could give rise to further currency conversion losses, giving rise to the potential for Currency Conversion Claims *ad infinitum*.

(5) Thus Currency Conversion Claims are unworkable, and the principle of once-for-all conversion espoused by the Cork Committee and the Law Commission is the only way to ensure equality, certainty and finality.

14. Currency Conversion Claims were considered by the majority to be a solution to an injustice arising from foreign currency creditors apparently not receiving their full contractual entitlements. However, it is important to bear in mind that such creditors may well have received other benefits as a result of the insolvency regime exceeding their contractual entitlements (such as statutory interest at 8%, the discounting of future debts at 5%, and the windfall which they receive if they hold claims in a foreign currency against which sterling appreciates between the relevant dates). The purpose of an administration or liquidation is to achieve a broad justice, and it would be unprincipled and unfair for a creditor to take all the benefits of the insolvency process with none of the disadvantages.

15. The Court of Appeal erred in considering that *Re Humber Ironworks and Shipbuilding Company* (1869) LR 4 Ch App 643 supports the existence of Currency Conversion Claims. When *Humber Ironworks* was decided (almost 150 years ago), there was no statutory entitlement to interest following the commencement of the winding up, and the Court of Appeal in that case held that only in the event of there being a surplus could creditors whose debts carried interest assert claims for interest accruing after the date of the winding up. The Act and Rules now provide expressly and exhaustively for the payment of interest in respect of the period after the commencement of liquidation (or administration). Lewison LJ was correct to say, at [95], that the "*reversion to contract*" theory of *Humber Ironworks* does not apply to provable debts.

16. In the context of enforcement of a judgment debt against a solvent company pursuant to the principle in *Miliangos v George Frank (Textiles) Ltd*_[1976] AC 443, the judgment is converted into sterling at the beginning of the process of execution. Likewise, foreign currency debts in a winding up or administration are also converted

once-for-all into sterling at the beginning of that process, being the beginning of the process of collective execution.

17. Thus the Court of Appeal should have held that Rule 2.86 (which applies to both solvent and insolvent administrations) operates with substantive effect and causes the mandatory conversion of a (foreign currency) debt into sterling and renders the sterling equivalent of the debt provable in the administration of the debtor, such that payment of the proved (sterling) sum satisfies the creditor's claim in full, and that there are no such things as Currency Conversion Claims.

The s.74 Issue

18. The Court of Appeal erred in law in holding that the obligation of members to contribute under s.74(1) to the "*debts and liabilities*" of the company extends not only to provide for proved debts but also to statutory interest on those debts and non-provable liabilities.

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

(1) S.74 is only applicable in a winding up, where it is part of the statutory scheme under which creditors receive pari passu distributions in respect of their proved debts.

(2) The word "surplus" is used in s.189(2) to identify the fund from which statutory interest is to be paid. The notion that a contributory must contribute to a "surplus" is nonsensical. A surplus is something that is left over, not something that is brought in. In this regard, the members' liability to contribute under s.74(1) is not an asset of the company, and Lewison LJ's analysis of *Webb v Whiffin* (1872) LR 5 HL 711 and *Re Pyle Works* (1889) 44 Ch 534 is correct.

(3) Statutory interest is not a liability of the company. S.189(2) simply constitutes a direction to a liquidator as to the application of any surplus, as Mervyn Davies J noted in *Re Lines Bros Ltd* [1984] BCLC 215 (albeit in a different context).

(4) Neither the Cork Report nor the White Paper which led to the introduction of statutory interest suggested that introducing statutory interest extended the liability of contributories (which liability has remained substantially unaltered since the mid-nineteenth century).

(5) The Court of Appeal in any event erred in holding that the s.74 obligation extends to the payment of non-provable liabilities. As set out above, the statutory insolvency scheme includes no mechanism for the determination of such liabilities and the obligation to pay such liabilities is not part of the statutory scheme. Consequently, there is no basis for the scope of a contributory's s.74 liability, which forms part of the statutory scheme, to include non-provable liabilities.

(6) The fact that the s.74 liability extends to adjusting the rights of the contributories amongst themselves has no bearing on whether the s.74 liability extends to statutory interest and non-provable debts. There is nothing to stop liquidators making a separate call for the adjustment of the rights of the contributories, and indeed they may need to do so if one contributory has contributed more than its rateable share.

(7) It would be very surprising if the s.74 liability extended to amounts (such as statutory interest and non-provable liabilities) which are not provable in the contributories' own insolvencies, and such a construction of s.74 gives rise to an unprincipled lack of symmetry as between the estates of the company and the estates of its contributories.

The Statutory Interest Issue

20. The Court of Appeal erred in holding that Rule 2.88(7) continues to operate in a liquidation following an administration.

21. The Act and the Rules provide a complete regime for the payment of statutory interest in an administration out of a surplus in the hands of the administrator (Rule 2.88 of the Rules) and a separate and complete regime for the payment of statutory interest in a liquidation out of a surplus in the hands of the liquidator (s.189 of the Act).

22. As the Judge held at first instance, on a "*straightforward reading of the relevant provisions*" (Judgment, [119]), their effect is that, where an administration is followed by a liquidation, interest on interest-bearing debts is provable in respect of the period down to the commencement of the administration, but statutory interest is payable out of a surplus only from the date of the liquidation. Rule 2.88(7) does not continue to apply in a liquidation following an administration.

23. That Rule 2.88(7) only applies in an administration is clear from the fact that Part 2 of the Rules is entitled "Administration Procedure", and Rule 2.68(1) provides that chapter 10 of the Rules (which contains Rule 2.88) "*applies where the administrator makes, or proposes to make, a distribution to any class of creditors ...*". The "surplus" referred to in Rule 2.88(7) can only be a surplus in the hands of the administrator.

24. Rule 2.88(7) does not continue to operate in a liquidation following an administration. Not only would this entail a provision in subordinate legislation riding roughshod over s.189 of the Act, it would also contradict the statutory waterfall applicable in a liquidation, as it would entail the payment of post-insolvency interest in a liquidation in priority to higher-ranking claims in the liquidation (including, but not limited to, liquidation expenses and preferential claims). The Court of Appeal's approach would entail a re-ordering of the waterfall in a liquidation by inserting post-administration interest at the top of the waterfall, in circumstances where post-insolvency interest is clearly only intended to be payable once prior-ranking claims (including insolvency expenses, preferential claims and provable claims) are paid in full.

25. In his analysis, Briggs LJ focused upon a *Quistclose* trust. Lewison LJ considered Rule 2.88(7) imposes a "*statutory burden*" and he did not "*consider that we should become bogged down in selecting a suitable private law label by which to describe this statutory instruction*". Neither approach is consistent with the statutory scheme or workable in practice.

26. Lewison LJ said at [107] that Rule 2.88(7) is a "*statutory instruction that the surplus cannot be applied for any purpose other than paying statutory interest*". But it is necessary to ask to whom that statutory instruction is directed and when it applies. It cannot be a direction to a liquidator in a winding up following an administration,

because the liquidator is subject to different express instructions as to how to apply assets in his hands, which are inconsistent with Rule 2.88(7). Conversely, if an administrator with a surplus in his hands vacates office, by relinquishing control over the surplus, he is not applying that surplus for any purpose so as to contravene Rule 2.88(7).

27. Where the draftsman intended to create a charge or trust on the assets, specific provision was made in the legislation (see e.g. para 99 of Schedule B1 of the Act). By contrast with the express wording in para 99, there is no such wording apt to create a statutory burden or *Quistclose* trust in Rule 2.88(7). The wording in Rule 2.88(7) simply echoes that in s.189 (which contains a direction to the liquidator to pay statutory interest from any surplus remaining after payment of proved debts). David Richards J was correct to say (at [71]) that Rule 2.88(7) "*does not create a proprietary or equitable interest in the surplus in favour of those creditors*".

28. Also, the Court of Appeal's proposed solution to the perceived lacuna could not apply to:

(1) A surplus arising for the first time in the hands of the liquidator (given that Rule 2.88(7) is restricted to the surplus in the hands of the administrator);

(2) Creditors who did not lodge a proof in the administration. Not only would this mean the Court of Appeal's solution would only go a limited way to meeting the problem, it would give rise to unjustifiable discrepancies in the payment of interest as regards creditors, depending upon whether they proved in the administration or only in the winding up. This would run counter to s.189(3) of the Act which makes clear that all debts rank equally for the payment of interest in a winding up; or

(3) An administration which has not become a distributing administration. It may be thought more likely in the case of a non-distributing administration that a company would subsequently go into liquidation, and David Richards J was correct to say (Judgment [125]) that the absence of any provision dealing with interest for the

period of an administration in the case of a non-distributing administration is "*very telling*".

29. For these reasons, the Court of Appeal should not have held that, if the administration of LBIE is immediately followed by a liquidation, any statutory interest in respect of the period of the administration which was payable under Rule 2.88(7) but was not paid before the commencement of the liquidation will be payable in the liquidation under Rule 2.88(7) from any part of the fund which constituted the "*surplus*" in the administration and which subsequently comes into the hands of the liquidator(s). Instead, they should have upheld the decision of David Richards J on this issue.

JOINT ADMINISTRATORS OF LEHMAN BROTHERS LIMITED (IN ADMINISTRATION)

SECTION 8 OF FORM 1: CERTIFICATE OF SERVICE

PARTY		DATE SERVED	METHOD
Respondents			
1.	**The Joint Administrators of Lehman Brothers International (Europe) (in administration)** Linklaters LLP One Silk Street London EC2Y 8HQ	9 June 2015	Personal Service and Email
2.	**CVI GVI (Lux) Master Sarl** Freshfields Bruckhaus Deringer LLP 65 Fleet Street London EC4Y 1HS	9 June 2015	Personal Service and Email
Other Parties			
3.	**The Joint Administrators of LB Holdings Intermediate 2 Limited (in administration)** Dentons UKMEA LLP One Fleet Place London EC4M 7WS	9 June 2015	Personal Service and Email
4.	**Lehman Brothers Holdings Inc.** Weil, Gotshal & Manges LLP 110 Fetter Lane London EC4A 1AY	9 June 2015	Personal Service and Email

Signature

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