

Applicants
Edward John Macnamara
1st Witness Statement
"EJM1"
30 March 2020

IN THE HIGH COURT OF JUSTICE

No. 8243 of 2008

**THE BUSINESS AND PROPERTY
COURTS OF ENGLAND & WALES**

**INSOLVENCY AND COMPANIES
LIST (ChD)**

**IN THE MATTER OF LEHMAN BROTHERS EUROPE LIMITED (IN
ADMINISTRATION)**

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

**FIRST WITNESS STATEMENT
OF
EDWARD JOHN MACNAMARA**

I, **Edward John Macnamara**, of PricewaterhouseCoopers LLP, 7 More London Riverside, London SE1 2RT, state as follows:

A. INTRODUCTION

- 1 I am a licensed insolvency practitioner in the position of Partner at PricewaterhouseCoopers LLP ("**PwC**"), a professional services firm of the above address.
- 2 Dan Yoram Schwarzmann, a partner of PwC, Russell Downs, a partner of PwC, Gillian Eleanor Bruce, a director of PwC, and I are the joint former administrators of Lehman Brothers Europe Limited ("**LBEL**"). LBEL is a UK member of the Lehman group of companies ("**Lehman Group**"). As described in further detail below, the administration of LBEL came to an end on 30 November 2019 and LBEL entered into Members' Voluntary

Liquidation immediately thereafter. Since 1 December 2019, Russell Downs, Gillian Eleanor Bruce and I have been appointed as joint liquidators of LBEL.

- 3 In this witness statement, I refer to:
 - 3.1 the joint former administrators, and/or (as the context requires) the joint administrators that had previously been appointed from time to time in respect of LBEL, as the “**Administrators**”; and
 - 3.2 the joint liquidators of LBEL as the “**Liquidators**”.
- 4 I am duly authorised to make this witness statement on behalf of LBEL and the other joint former administrators.
- 5 There is now shown to me a paginated bundle of copy documents, marked “**EJM1**”, to which I refer in this witness statement. Where no cross reference to the paginated bundle is provided and where there is no other indication of the source of my information or belief, the contents of this witness statement are derived from facts and matters which are within my own knowledge and belief. These facts and matters have been learned either as a result of the work undertaken by me as one of the Liquidators, one of the Administrators of the members of the Lehman Group that are or have been in administration (the “**Lehman Administration Companies**”), or they have been provided to me either by my colleagues at PwC involved with the administrations of the Lehman Administration Companies, or by the employees of the Lehman Administration Companies who are still available to the administrators of those companies, or by the Administrators’ legal advisers.
- 6 I make this witness statement in support of the former Administrators’ application (the “**Application**”) to be filed on or after 14 April 2020 for an Order that, in accordance with paragraph 98(2)(c) of Schedule B1 to the Insolvency Act 1986 (the “**Act**”), Gillian Eleanor Bruce, Russell Downs, Derek Anthony Howell and I be discharged from liability pursuant to paragraph 98(1) of Schedule B1 of the Act in respect of any act or omission in their individual capacity as administrators of LBEL, which shall take effect on the date 28 days after a copy of the Order is uploaded on to the LBEL

administration website¹ (or on such other date as the Court thinks fit), save in respect of claims notified to the Liquidators and/or the former Administrators of LBEL before that effective date.

- 7 In light of the exceptional circumstances described below, the Court is respectfully requested to determine the present Application on the papers. If the Court considers that a hearing is nonetheless necessary then the Administrators shall give notice of the same on the LBEL administration website as soon as they are made aware of the Court's decision in this regard. The Administrators shall of course be glad to assist the Court at an oral hearing if the Court considers one to be necessary.
- 8 The remainder of this witness statement describes the status of LBEL's administration and sets out the evidence in support of the Application. This remainder of this witness statement is structured as follows:
 - 8.1 Section B sets out the background to LBEL's entry into administration;
 - 8.2 Section C describes LBEL's administration;
 - 8.3 Section D sets out the recoveries made on behalf of LBEL and distributions to its creditors;
 - 8.4 Section E describes LBEL's liquidation;
 - 8.5 Section F sets out the Administrators' remuneration during the administration; and
 - 8.6 Section G sets out the basis for the Application.

B. BACKGROUND TO LBEL'S ENTRY INTO ADMINISTRATION

- 9 LBEL was incorporated as an English limited company on 14 March 2000. LBEL's principal activity was the provision of investment banking and corporate finance services, but it also arranged derivatives transactions as agent for other Lehman Group companies. LBEL was authorised and

¹ <https://www.pwc.co.uk/services/business-restructuring/administrations/non-lbie-companies/lehman-brothers-europe-limited-in-administration.html>

regulated by the Financial Services Authority and used employees seconded from Lehman Brothers Limited (now in administration) ("**LBL**").

- 10 Pursuant to paragraph 22 of Schedule B1 to the Act, LBEL was placed into administration by its directors on 23 September 2008. The background to LBEL's insolvency and its consequent entry into administration are set out in the Administrators' proposals dated 14 November 2008 (the "**Proposals**") (a copy of which can be found at pages 1 to 14 of Exhibit EJM1).
- 11 The Proposals, which were approved by creditors on 1 December 2008, also set out the purpose of the administration. The purpose of LBEL's administration was to achieve a better result for LBEL's creditors than would be likely if LBEL were wound up without first being in administration (i.e. it is the second of the three statutory objectives set out in paragraph 3 of Schedule B1 to the Act).

C. LBEL'S ADMINISTRATION

- 12 A creditors' committee was formed on 5 May 2009 (the "**Creditors' Committee**"). The Administrators liaised with the Creditors' Committee throughout the administration (until its disbandment as described below) in order to discuss significant issues and to outline key decisions. Creditors have been informed on the progress of LBEL's administration via the Administrators' six-monthly progress reports and the Administrators have kept creditors informed of their strategy in relation to key issues.
- 13 The Administrators sought to achieve the purpose of the administration by protecting and managing LBEL's assets, realising these assets and by making distributions to creditors as funds permit. The various progress reports that the Administrators provided to LBEL's creditors during the course of the administration outline the progress of the administration since its inception to its conclusion. Those progress reports are exhibited to this witness statement at pages 15 to 318 of Exhibit EJM1. As demonstrated by LBEL's final progress report dated 7 February 2020, covering the period from 23 September 2019 to 30 November 2019 (appearing at pages 298 to 318 of Exhibit EJM1), the Administrators successfully achieved a better result for

creditors than would have been likely had LBEL been wound up without first being in administration, by paying them in full together with statutory interest.

- 14 The Administrators' term of office was extended from time to time by various orders of the Court. The most recent extension was pursuant to an Order of Mr Justice Hildyard dated 5 November 2015 (a copy of which can be found at page 319 of Exhibit EJM1), which extended the Administrators' term of office until 30 November 2019.
- 15 Given that LBEL's creditors were paid in full, no further extensions of the Administrators' appointment were required, and the Administrators' appointment concluded on 30 November 2019. The Administrators made arrangements for LBEL to be placed into liquidation immediately following the conclusion on 30 November 2019 of the administration, and the Liquidators were appointed on 1 December 2019, as further outlined below.

D. RECOVERIES MADE ON BEHALF OF LBEL AND DISTRIBUTIONS TO ITS CREDITORS

- 16 LBEL's total net receipts during the course of the administration totalled the equivalent of approximately £854 million.
- 17 By Orders dated 25 June 2012 and 10 June 2013 (copies of which can be found at pages 320 to 322 of Exhibit EJM1 and pages 323 to 325 of Exhibit EJM1, respectively), the Court granted the Administrators "*permission to make a distribution to unsecured creditors pursuant to paragraph 65(3) of Schedule B1 of the Insolvency Act 1986*" and "*to make such further distributions to ... LBEL's unsecured, non-preferential creditors as they consider appropriate*".
- 18 Following the declaration of three interim dividends paid on 9 November 2012, 13 November 2013 and 24 September 2014, respectively, LBEL's admitted unsecured creditors received dividends totalling 100 pence in the pound. In addition, a distribution of statutory interest at 8% per annum was

paid on these claims, less the applicable withholding tax in the amount of £7.5 million which has been paid to HMRC.

- 19 When the Administrators applied for permission to make distributions to LBEL's unsecured creditors in June 2012, it was envisaged that in due course there might be a surplus available for distribution to LBEL's shareholder, Lehman Brothers Holding plc ("**LBH**"), once LBEL's unsecured creditors' admitted claims and entitlements to statutory interest had been paid in full.
- 20 In May 2017, after reserving for further amounts then potentially due to creditors in respect of statutory interest (depending on the outcome of the then-pending Waterfall II proceedings) the Administrators were in possession of a surplus (the "**LBEL Surplus**"). Accordingly, in connection with the settlement of the Waterfall III proceedings, the Administrators sought directions from the Court regarding the distribution of the LBEL Surplus. In particular, in circumstances where the Administrators had no power to effect such a distribution themselves, they sought directions approving their proposal to appoint a director of LBEL and permit him to declare an interim dividend to LBH.
- 21 The Court concluded that the Administrators' proposed course of action would materially benefit LBEL's creditors by enabling the proposed settlement of Waterfall III and thereby furthering the statutory purpose of the administration. It accordingly gave the directions sought by the Administrators.
- 22 Pursuant to that Order, Derek Anthony Howell was appointed as a director of LBEL in September 2017. In his capacity as such, Mr Howell:
 - 22.1 declared a shareholder cash dividend of £374.7 million to LBH, which was paid in September 2017;
 - 22.2 declared a further cash dividend to LBH in the amount of £97.8 million, which was paid in September 2018;

22.3 declared a further cash dividend to LBH in the amount of £20 million, which was paid in September 2019. He did so in connection with a transaction entered into between LBEL and certain other Lehman Group companies (with interconnected liabilities and/or shareholding) that facilitated the release of various previously held cash reserves (the “**2019 Transaction**”).

E. LBEL’S LIQUIDATION

- 23 The Administrators had hoped that they might have been able to conclude all outstanding matters in respect of LBEL by the time their appointment came to an end on 30 November 2019. In the event, however, it was not possible by that date to (i) finalise the corporation tax position of LBEL, (ii) make any final required payments in relation to group relief and (iii) obtain HMRC’s clearance to dissolve the company.
- 24 Following the 2019 Transaction, the Administrators engaged with HMRC to seek final tax clearance to dissolve LBEL. That process was still underway in November 2019 and hence it was not possible to move LBEL straight to dissolution at that time. However, the Administrators considered that the purpose of the administration was achieved by 30 November 2019 notwithstanding that the corporation tax position had not been finalised. The Administrators did not consider it appropriate to apply for a further extension of their appointments given there were no remaining creditors. For that reason, LBEL’s administration ceased on 30 November 2019 and LBEL was placed into liquidation immediately thereafter and the Liquidators were appointed on 1 December 2019
- 25 During LBEL’s liquidation, the Administrators sought to secure HMRC’s final tax clearance. This clearance was provided by Nicola Rass of HMRC in an email to Jacqueline Dolby of LBEL dated 18 February 2020, which stated “*[HMRC is] content for [LBEL] to be dissolved*”. A copy of this email can be found at pages 326 to 330 of Exhibit EJM1. By this, the Administrators understand that HMRC does not lay any claim to the assets of LBEL.
- 26 HMRC’s confirmation was subject to LBEL providing certain requested documents to HMRC. These documents were provided by email from

Jacqueline Dolby to David Saunders of HMRC dated 5 March 2020. (a copy of which, together with an email from David Saunders dated 24 March confirming receipt of the documents, can be found at pages 331 to 332 of Exhibit EJM1).

- 27 Now that the corporation tax position of LBEL has been finalised and there are no remaining claims of HMRC for LBEL to discharge, the Liquidators are in the process of arranging:

27.1 payment to Lehman Brothers International (Europe) (in administration) (“**LBIE**”) in the amount of £5,955,208 in respect of tax losses transferred from LBIE to LBEL by way of group relief; and

27.2 a final cash dividend to LBH in the amount of approximately £61.86 million.

- 28 Following HMRC’s confirmations and the distributions above, all that remains is for the Liquidators to close the company down.

F. REMUNERATION

- 29 On 22 October 2008, a Court order authorised the Administrators, subject to ratification by the Creditors’ Committee, to draw remuneration of 75% of the time costs incurred at the time of the application, being £2.8 million including VAT. The order dated 22 October 2008 can be found at pages 333 to 335 of Exhibit EJM1.

- 30 The Creditors’ Committee subsequently resolved that the Administrators’ remuneration be fixed at 5% of the property with which the Administrators had to deal with. On 19 May 2017, the Administrators agreed to restrict their remuneration such that they were entitled to receive remuneration of 5% of cash received up to £280 million from the date of that agreement and 2.5% of cash received above £280 million from the date of that agreement, up to a maximum amount of £3.5 million of fees received (rather than being fixed on a time cost basis).

- 31 In total, the Administrators have drawn remuneration of £40.8 million (excluding VAT) in accordance with the above approval. The Administrators

do not propose to draw any further remuneration and nor do the Liquidators propose to draw any additional remuneration in connection with that appointment.

G. DISCHARGE FROM LIABILITY

- 32 As the Court will be aware, paragraph 98(1) of Schedule B1 to the Act provides that where a person ceases to be an administrator, he or she is discharged from liability in respect of any action taken as an administrator. Further, paragraph 98(2) relevantly provides that such a discharge takes effect: “... (b) *in the case of an administrator appointed under paragraph 14 or 22, at a time appointed by resolution of the creditors’ committee or, if there is no committee, by resolution of the creditors, or (c) in any case, at a time specified by the court.*”
- 33 Of the joint former administrators, Dan Yoram Schwarzmann was appointed under paragraph 22 of Schedule B1 to the Act, such that the date of his release from liability may be set by the creditors pursuant to paragraph 98(2)(b) of Schedule B1 to the Act. The issue of such release was addressed in the Proposals that were approved by creditors on 1 December 2008.
- 34 In particular, in relation to discharge, the Proposals provide (at section 5, paragraph viii) that: “*The Administrators shall be discharged from liability pursuant to Paragraph 98(1) Sch.B1 IA86 in respect of any action of theirs as Administrators at a time determined by the creditors committee (sic) or, if no creditors committee (sic) [has been] appointed, by the general body of creditors.*”
- 35 Pursuant to an Order made by the Court on 2 July 2018 (the “**Replacement Order**”), Anthony Victor Lomas, Steven Anthony Pearson and Julian Guy Parr were removed from office as Administrators and were replaced by Russell Downs, Gillian Eleanor Bruce and me. Since Mr Downs, Ms Bruce and I were all appointed by the Court, I understand that the date for our

release from liability must be set by the Court, pursuant to paragraph 98(2)(c) of Schedule B1 to the Act.

- 36 The Replacement Order provided that Julian Guy Parr, Anthony Victor Lomas and Steven Anthony Pearson be discharged from all liability in respect of their acts and omissions and otherwise in respect of their conduct as administrators of LBEL. The Replacement Order went on to provide that Mr Downs, Ms Bruce and I *“shall obtain [our] discharge from liability pursuant to paragraph 98(1) of Schedule B1 of the Act on the same basis as those administrators originally appointed in respect of [LBEL]. Accordingly, the discharge provided by paragraph 98(1) of Schedule B1 of the Act will take place... at a time appointed by the resolution of the creditors’ committee or, if there is no committee, by resolution of the creditors or in any case at a time specified by the court...”*
- 37 It follows that the position in respect of each of the joint former administrators is that set out in the approved Proposals, i.e. that their release is to take effect on a date to be specified by the Creditors’ Committee or, insofar as no such committee exists, by the general body of creditors.
- 38 In the event, the matter of when the Administrators’ release should take effect was never put to the Creditors’ Committee for a decision. As set out above, the Creditors’ Committee has now been disbanded. Further, there is no longer a general body of creditors from whom a decision on that question could now be sought.
- 39 In these circumstances, the Administrators now respectfully request that the Court determine the date for their release, pursuant to paragraph 98(2)(c) of Schedule B1 of the Act. In particular, they seek an Order that Dan Yoram Schwarzmann, Russell Downs and Gillian Eleanor Bruce and I be discharged from liability under paragraph 98(1) of Schedule B1 of the Act in respect of any act or omission in their individual capacity as administrators of LBEL, which shall take effect on the date 28 days after a copy of the Order is

uploaded on to the LBEL administration website² (or on such other date as the Court thinks fit), save in respect of claims notified to the Liquidators and/or the former Administrators of LBEL before that effective date.

40 The Administrators are conscious that an application for discharge pursuant to paragraph 98(2)(c) of Schedule B1 to the Act would ordinarily be dealt with by the Court at a hearing, even where there is no creditor or other stakeholder who objects to the Administrators being granted their release. The Administrators nonetheless respectfully consider that this case is an unusual case in that, not only are there no creditors that have expressed any interest in the question of the Administrators' discharge from liability, but as outlined above: (i) the creditors have now been paid in full and received statutory interest on their claims; and (ii) LBEL's sole shareholder has received significant distributions in respect of the LBEL Surplus. In these circumstances, whilst the Administrators would be very glad to attend a hearing represented by counsel to respond to any queries the Court may have, nonetheless were the Court minded to determine the present Application without a hearing, doing so would have the advantage of saving costs. Anticipating the possibility that the Court might be minded to determine the present Application on the papers, the notices of this Application given by the Administrators (as described below) have indicated that the Administrators will propose to the Court that the Application be determined without a hearing.

41 I confirm that the Administrators have given notice of this Application to:

41.1 HMRC, email from Jennifer Ellis of PwC to Nicola Rass of HMRC dated 17 March 2020 (a copy of which can be found at pages 336 to 341 of Exhibit EJM1); and

41.2 LBEL's former creditors, by posting a notice dated 23 March 2020 on the administration website, which is accessible by all former creditors (a copy of which can be found at pages 342 to 349 of Exhibit EJM1).

² ie <https://www.pwc.co.uk/services/business-restructuring/administrations/non-lbie-companies/lehman-brothers-europe-limited-in-administration.html>

- 42 As already noted, the notices referred to above notified HMRC and the former creditors of the Administrators' intention to ask the Court to determine the Application without the need for a hearing. Moreover, the notice to LBEL's former creditors:
- 42.1 also requested that, in the event any former creditor wished to raise any objection to the proposed Application or otherwise to participate, they should let the Administrators know by sending an email to Nigel Rackham as soon as possible and in any event by 14 April 2020 (a period of 3 weeks from the date the notice was posted to the administration website);
 - 42.2 informed the former creditors that the Application would not be issued before 14 April 2020; and
 - 42.3 informed the former creditors that in the event that the Application is listed for a hearing, details of the time and place of the hearing would be made available on the administration website as soon as they were known.
- 43 The Administrators will upload this witness statement, with the exhibits available on request, to the LBEL administration website as soon as possible.
- 44 I confirm that as at the date of this witness statement, no objection to (or intention to otherwise participate in) the present Application has been notified by HMRC or any former creditor. The Administrators shall write to the Court in their cover letter to the Application on or after 14 April 2020, i.e. a date upon or after the expiry of the 3-week period referred to in the notices referred to above, to confirm whether or not they have received objections by that date.
- 45 In the event that there is to be a hearing, the Administrators will confirm at the hearing that no objections have been received in the interim (and, as

noted above, notice of that hearing shall be given on the LBEL administration website as soon as the Administrators learn that a hearing will be required).

46 I can confirm that neither I nor the other Administrators are aware of any claims made against us arising out of our conduct as administrators of LBEL nor are we aware of any facts or matters which we consider could give rise to such claims.

47 Accordingly, the Administrators respectfully suggest that the Court can be satisfied that no prejudice to LBEL's creditors will result from granting the Order on the terms sought.

H. CONCLUSION

48 Accordingly, the Administrators respectfully ask the Court to make the Order sought.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true.


Signed:

Edward John Macnamara

30 March 2020

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