

IN THE COURT OF APPEAL
ON APPEAL FROM

Case No.: A2/2016/4109
No.: 7942 of 2008

THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
Before the Honourable Mr Justice Hildyard

IN THE MATTER OF **LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN
ADMINISTRATION) (“LBIE”)**
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

HER MAJESTY’S REVENUE AND CUSTOMS (“HMRC”)

Appellants

and

(1) ANTHONY VICTOR LOMAS
(2) STEVEN ANTHONY PEARSON
(3) RUSSELL DOWNS
(4) JULIAN GUY PARR

(in their capacity as Joint Administrators of Lehman Brothers
International (Europe)(in administration)) (“**the Administrators**”)

Respondents

APPELLANTS’ SUPPLEMENTAL SKELETON ARGUMENT

Cross-references: An updated version of this supplemental skeleton argument containing cross-references to the finalised Appeal Bundle (including the Authorities) will be filed in due course.

Appendices: For the Court’s ease of reference, pages 17 to 25 of this document comprise Appendices setting out relevant provisions of the Insolvency Rules in various forms in which they have been in force since LBIE entered administration.

A. Introduction:

1. The purpose of this supplemental skeleton argument filed on behalf of the Appellant Commissioners for Her Majesty’s Revenue and Customs (“**HMRC**” or “**the Appellants**”), is to assist the Court by detailing various provisions of the Insolvency Rules which they intend to make reference to during the course of the hearing in relation to 2 matters: (1) the recent commencement of the Insolvency Rules 2016; and (2) an issue which arises from the Respondent

Administrators' Skeleton Argument concerning alleged practical difficulties with HMRC's averred application of the relevant tax legislation. It is hoped that by filing and serving this additional document, the time for making corresponding oral submissions will be considerably reduced.

B. The commencement of the Insolvency Rules 2016:

2. As the Court will be aware, the issue before the Judge was whether interest payable pursuant to Rule 2.88(7) of the Insolvency Rules 1986 (as it then applied to LBIE¹) ("**1986 Rule 2.88(7)**") out of the surplus in the administration could be "*yearly*" for the purposes of section 874 of the Income Tax Act 2007 ("**ITA 2007**") and thus subject to a withholding tax obligation on the part of the Respondent Administrators ("**the Administrators**").
3. As set out below, 1986 Rule 2.88 no longer applies and the corresponding provisions in Rule 14.23 of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024) ("**Insolvency Rules 2016**") apply to the administration of LBIE instead. HMRC do not contend that the current application of the Insolvency Rules 2016 and in particular IR 14.23 make any material difference to the analysis and determination of whether such statutory interest from the surplus can be "*yearly*" for the purposes of section 874 of ITA 2007. However, it is obviously appropriate to apprise the Court of such legislative change and the relevant provisions are recited in full below in an attempt to minimise cross-referencing.
4. At the time the Judge gave his Judgment, 1986 Rule 2.88 (in the form in which it applied to LBIE) provided as follows (the material parts being those underlined):

¹ Rule 2.88 of the Insolvency Rules 1986 (SI 1986/1925) had been amended by the provisions of SI 2010/686 subject to transitional provisions which provided that such amendments only applied where the relevant company entered administration on or after 6 April 2010. As LBIE entered administration on 15 September 2008, the previous incarnation of IR 2.88 then applied.

“2.88.— Interest

- (1) *Where a debt proved in the administration bears interest, that interest is provable as part of the debt except in so far as it is payable in respect of any period after the company entered administration [or, if the administration was immediately preceded by a winding up, any period after the date that the company went into liquidation] ² .*
- (2) *In the following circumstances the creditor's claim may include interest on the debt for periods before the company entered administration, although not previously reserved or agreed.*
- (3) *If the debt is due by virtue of a written instrument, and payable at a certain time, interest may be claimed for the period from that time to the date when the company entered administration.*
- (4) *If the debt is due otherwise, interest may only be claimed if, before that date, a demand for payment of the debt was made in writing by or on behalf of the creditor, and notice given that interest would be payable from the date of the demand to the date of payment.*
- (5) *Interest under paragraph (4) may only be claimed for the period from the date of the demand to that of the company's entering administration and for all the purposes of the Act and the Rules shall be chargeable at a rate not exceeding that mentioned in paragraph (6).*
- (6) *The rate of interest to be claimed under paragraphs (3) and (4) is the rate specified in section 17 of the Judgments Act 1838 on the date when the company entered administration.*
- (7) *Any surplus remaining after payment of the debts proved shall, before being applied for any purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the company entered administration.*
- (8) *All interest payable under paragraph (7) ranks equally whether or not the debts on which it is payable rank equally.*
- (9) *The rate of interest payable under paragraph (7) is whichever is the greater of the rate specified under paragraph (6) or the rate applicable to the debt apart from the administration.”*

5. On 6 April 2017, the Insolvency Rules 2016 came into force and the 1986 Insolvency Rules were revoked.² Accordingly, the Insolvency Rules 2016 now apply to LBIE in respect of the payment of interest out of the surplus in the administration. The relevant provision is to be found in Rule 14.23 (“**IR 14.23**”) which states as follows (the material parts being those underlined):

² Subject only to the transitional and saving provisions in Schedule 2 to the Insolvency Rules 2016; see Introductory Rules 1, 2 and 4 of the Insolvency Rules 2016. There are no material transitional or saving provisions in relation to 1986 Rule 2.88 (whether in the form in which it applied to LBIE or as amended by SI 2010/686).

“14.23.— Interest

[Note: provision for the payment of interest out of a surplus remaining after payment of the debts is made by section 189(2) in respect of winding up and section 328(4) in respect of bankruptcy.][³]

- (1) Where a debt proved in insolvency proceedings bears interest, that interest is provable as part of the debt except in so far as it is payable in respect of any period after the relevant date.*
- (2) In the circumstances set out below the creditor's claim may include interest on the debt for periods before the relevant date although not previously reserved or agreed.*
- (3) If the debt is due by virtue of a written instrument and payable at a certain time, interest may be claimed for the period from that time to the relevant date.*
- (4) If the debt is due otherwise, interest may only be claimed if demand for payment of the debt was made in writing by or on behalf of the creditor, and notice was delivered that interest would be payable from the date of the demand to the date of the payment, before—*
 - (a) the relevant date, in respect of administration or winding up; or*
 - (b) the presentation of the bankruptcy petition or the bankruptcy application.*
- (5) Interest under paragraph (4) may only be claimed for the period from the date of the demand to the relevant date and, for the purposes of the Act and these Rules, must be charged at a rate not exceeding that mentioned in paragraph (6).*
- (6) The rate of interest to be claimed under paragraphs (3) and (4) is the rate specified in section 17 of the Judgments Act 1838 on the relevant date.*
- (7) In an administration—*
 - (a) any surplus remaining after payment of the debts proved must, before being applied for any other purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the relevant date;*
 - (b) all interest payable under sub-paragraph (a) ranks equally whether or not the debts on which it is payable rank equally; and*
 - (c) the rate of interest payable under sub-paragraph (a) is whichever is the greater of the rate specified under paragraph*

³ The preceding Note is contained within SI 2016/1024. As identified in the accompanying Explanatory Memorandum, the Rules contain a number of “non-legislative notes” which are “contained in square brackets and are labelled as notes”. They have a number of purposes, including drawing the user’s attention to corresponding provisions in the Insolvency Act 1986 which they either complement or to which they correspond in circumstances where similar or equivalent provision is made in the Act for different insolvency proceedings; the lack of consistency in what is contained in the Act and what needs to be in the Rules supplementing the Act as between differing insolvency proceedings means that provisions in the common parts are not always of universal application, such as is the case for IR 14.23(7) and as is highlighted in the particular note.

(6) and the rate applicable to the debt apart from the administration.”

The meaning of “*relevant date*” is materially defined in IR 14.1(3) in the following terms:

“(a) in the case of an administration which was not immediately preceded by a winding up, the date on which the company entered administration,

*(b) in the case of an administration which was immediately preceded by a winding up, the date on which the company went into liquidation,
...”*

6. As indicated above, HMRC do not contend that the application of IR 14.23(7) in place of the former 1986 Rule 2.88(7) (as it applied to LBIE) has any material impact upon the appeal. Nevertheless, the Court should determine the issue in the context of the current legislative landscape.

C. Further submissions in response to the Respondents’ Skeleton Argument averring potential practical difficulties with the Appellants’ position:

7. In paragraph 10 of the Grounds of Appeal and paragraph 30 of their Skeleton Argument, HMRC noted that in coming to his conclusion on the issue of whether interest payable pursuant to 1986 Rule 2.88(7) (as it then applied to LBIE) could be “*yearly*” for the purposes of section 874 of ITA 2007, the Judge appears to have been overly influenced by practical difficulties which the Administrators submitted could arise and which the Judge identified in paragraphs 74 to 77 of his Judgment. In paragraphs 55 to 57 of their Skeleton Argument, the Administrators repeat their submission that HMRC’s primary argument is “*fraught with practical difficulties and concerns*” and essentially aver the same allegations as are recited in paragraphs 74 and 75(1) of the Judgment.
8. Notwithstanding the particular submissions which follow about the likelihood of such matters, HMRC maintain that the existence of any such potential

practical difficulties as are identified in the Judgment and propounded by the Administrators are irrelevant. Nevertheless, even if some consideration of the ‘practicalities’ is relevant to the issue, HMRC submit that the Judge was wrong to conclude that such potential practical difficulties as were averred by the Administrators “*also further lean against HMRC’s arguments*” because, in reality, such potential difficulties as the Judge and the Administrators refer to either will not arise or, alternatively, their likelihood and/or relevance has been significantly overstated.

9. In particular, in paragraph 74 the Judge appears to have accepted the Administrators’ submissions that (if HMRC’s primary argument is correct):

(1) Administrators might come under enormous pressure to admit proofs and pay dividends prior to the first anniversary of an administration (paragraph 74(1));

(2) Creditors’ proofs are not dealt with all at the same time and so it is possible (in a distributing administration) that some creditors will receive payment of 100p in the £ prior to the first anniversary whereas others will not (paragraph 74(2)) – which the Judge considered begged the question whether they were to be treated differently (paragraph 74(3)) and which he considered would be “*wholly unprincipled and without merit*” and/or “*odd and unsatisfactory*” (paragraph 74(4) and 75(1)); and

(3) Creditors might scramble to have their proofs adjudicated upon by administrators and potentially by the court within the first 12 months, which the Judge appeared to fear could result in increased numbers of creditors’ applications to lift the moratorium with a view to establishing their claims through Part 7 proceedings so as to obtain an advantage in receiving dividends prior to the first anniversary of the administration (paragraph 74(5)).

The Administrators repeat such assertions at paragraph 55 of their Skeleton Argument, although they candidly admit – at paragraph 57 – that such concerns do not arise in the context of LBIE.

10. However, HMRC submit that when the statutory framework for the conduct of administrations and in particular for the making of any distributions to creditors within an administration is properly considered, it is apparent that (i) the likely prospect of such averred practical difficulties and adverse consequences has been significantly overstated by the Administrators and therefore the Judge and/or (ii) that the Judge cannot have had such context properly in mind. In particular –

- a. In carrying out their statutory functions, professionally qualified and duly appointed administrators can be expected to act not only with all due expedition but also with all due resilience. The fact that they *might* come under vocal pressure from certain creditors to act more speedily than the proper and efficient conduct of the administration allows is therefore irrelevant; they can and should be expected to stand up to the same.
- b. As detailed in Section D below, the Judge’s statement that “*creditors’ proofs are not dealt with all at the same time*” does not take proper account of the ordinary and orderly statutory procedure for the submission of proofs and for the corresponding payment of dividends within an administration: as a general rule under the statutory scheme creditors’ proofs will all be dealt with at the same time.
- c. Even if there are individual disputed debts that are only resolved at a later date and for which necessary financial provision would have to be made by the administrators, there is no basis for the Judge’s consideration that the differential treatment of any such creditors would be “*wholly unprincipled and without merit*” and/or “*odd and*

unsatisfactory” in circumstances where that would simply be the result, if HMRC’s primary argument of construction is correct, of the proper application of the tax legislation.

- d. The proposition that creditors would scramble to have their claims adjudicated upon, particularly by means of litigation, in order to obtain payment of a dividend within the first year of the administration is also unrealistic in circumstances where (a) the Insolvency Rules prescribe a mandatory and orderly process for the determination of all relevant claims and the corresponding payment of dividends which must be followed by administrators – notably with the court’s prior sanction being required for payment of the relevant dividend in any event⁴ and (b) the prospect of any such litigation being resolved within a year seems extremely fanciful.

D. The statutory procedure for the submission of proofs and the distribution of dividends within an administration:

11. As detailed below, the Insolvency Rules (both in their post 2003⁵ and current form) prescribe a detailed and orderly process for proofs of debt and the declaration and distribution of dividends to unsecured creditors, with the court’s prior sanction being required for payment of the relevant dividend in any event.
12. In particular, in considering the substance of the averred “*practical difficulties*” sought to be relied upon by the Administrators, HMRC specifically invite the Court to bear in mind the following relevant aspects of the statutory scheme:

⁴ See paragraphs 12(1)-(2), 12(4)(d)(iv)-(vi) and 12(5)(d)(iv)-(vi) below.

⁵ Until relevant recently (2003), distributions were not permitted within administrations at all; the concept of a distributing administration having been newly introduced by the provisions of the Enterprise Act 2002 with effect from 15/09/2003, when corresponding amendments were made to Part 2 of the 1986 Rules.

- (1) Administrators do not have any freestanding discretion to decide to make distributions to unsecured creditors. Although paragraph 65(1) of Schedule B1 to the Insolvency Act 1986 (“**the Act**”) provides that an administrator may make a distribution to a creditor of the relevant company⁶, paragraph 65(3) further prescribes that –

“A payment may not be made by way of distribution under this paragraph to a creditor of a company who is neither secured nor preferential unless the court gives permission.”

- (2) Paragraph 65(3) of Schedule B1 to the Act and the circumstances in which the Court will grant such permission to administrators have been considered successively in (i) Re GHE Realisations Ltd [2005] EWHC 2400 (Ch) @ paras [5]-[11], [2006] 1 WLR 287 (Rimer J), (ii) Re MG Rover Belux SA/NV (in admin) [2007] BCC 446 (HHJ Norris QC) @ paras [6] – [9], (iii) Re MF Global Overseas Ltd (unreported, 5 June 2013) (David Richards J) @ paras [6] – [17], and (iv) Re Nortel Networks UK Limited & Ors [2015] EWHC 2506 (Ch) (Snowden J) @ paras [16] – [28]. As those authorities identified, the court’s discretion pursuant to paragraph 65(3) is at large and it is not clear from the terms of Schedule B1 what is required to be taken into account. Nevertheless, in determining those cases it was held that the following are (in summary) amongst the relevant considerations for the purposes of exercising the court’s jurisdiction:

- a. The creditors’ interests as a whole and whether the payment of a dividend to unsecured creditors is consistent with the functions and duties of the administrator and any proposals made by him;
- b. Whether the proposed distribution is conducive to the achievement of the current objectives of the administration;
- c. Whether proper provision has been made for secured and preferential creditors;
- d. Whether full provision is to be made for all disputed claims; and

⁶ See footnote 5 above. Schedule B1 to the Act was introduced by the provisions of the Enterprise Act 2002 with effect from 15/09/2003.

- e. Whether there are any realistic or more appropriate alternative methods of effecting the proposed distribution to creditors (such as moving to creditors' voluntary liquidation or returning the company to the control of the directors) and the impact that the proposed distribution would have upon any proposed exit route from administration.
- (3) Moreover, as set out below, any such distribution (even with the Court's permission) can only be made in accordance with the statutory regime for the submission and determination of proofs and the declaration and payment of dividends prescribed for by the applicable insolvency rules.
- (4) Prior to 6 April 2017, the relevant rules were contained in Part 2 of the Insolvency Rules 1986 (as amended in 2003 and subsequently). That regime materially provided as follows:
- a. Where an administrator proposed to make a distribution to any class of creditors other than secured creditors, he was required (by 1986 IR 2.68) to give notice to the creditors of his intention to declare and distribute a dividend in accordance with 1986 IR 2.95.
 - b. 1986 IR 2.69 provided that,
"[d]ebts other than preferential debts rank equally between themselves in the administration and, after the preferential debts, shall be paid in full unless the assets are insufficient for meeting them, in which case they abate in equal proportions between themselves"
- and 1986 IR 2.70(1) provided that in calculating and distributing a dividend the administrator was required to make provision for the following –
- "(a) any debts which appear to him to be due to persons who, by reason of the distance of their place of residence, may not have had sufficient time to tender and establish their proofs;*
 - (b) any debts which are the subject of claims which have not yet been determined; and*
 - (c) disputed proofs and claims." "*

- c. Detailed machinery for the proving and quantification of debts, as well as for the determination of disputed proofs, was set out in 1986 IR 2.72 to IR 2.94.
- d. Moreover, the 1986 Rules contained specific requirements in relation to the notification and distribution of any dividends (which would be required to be followed upon the grant of any permission pursuant to para 65(3) of Schedule B1 to the Act). For the purposes of minimising the need to refer to multiple documents, the material provisions of 1986 IR 2.95 to 2.99 as they applied immediately before 6 April 2017⁷, are recited in Appendix A to this supplemental skeleton argument. (In circumstances where the Administrators submissions about practical concerns have been made on a generic basis rather than by reference to the specific regime that applied to LBIE prior to 6 April 2017, for the purposes of chronological clarity and for ease of comparison with the current regime, the 1986 Rules have been recited in Appendix A and are referred to below in their most recent form. Nevertheless, for the purposes of transparency, Appendix B to this supplemental skeleton argument recites the corresponding provisions of the 1986 Rules as they applied to LBIE.) It will be seen from those legislative provisions that:

- i. Prior to declaring and making any relevant distribution, the administrator had to first give notice of such intention to all relevant creditors and had to invite them to prove their

⁷ In the form in which they are set out in Appendix A to this Skeleton Argument, the provisions of the 1986 Rules incorporate some amendments which were made by the Insolvency (Amendment) Rules 2010/686 and by the Insolvency (Amendment) Rules 2009/642 that did not apply to LBIE by virtue of the various particular transitional provisions; see e.g. footnotes 9 and 10 below. In particular, Rule 3 of 2009/642 provided that the relevant amendments made by that instrument did not apply to companies which entered administration before 6 April 2009 and Schedule 4, para 1 of 2010/686 provided that the relevant amendments made by paragraphs 85 to 89 of that instrument only applied where the company entered administration on or after 6 April 2010; the amendments therefore did not apply to LBIE as it entered administration on 15 September 2008. However, none of the amendments effected by those statutory instruments undermine the substance of HMRC's submissions concerning the overall structure and machinery of the Rules and it is notable that such transitional provisions have not been preserved in the introduction of the replacement Insolvency Rules 2016 – such that those new rules now apply to LBIE without modification; see paragraph 5 above and paragraph 12(5) below.

debts. In particular, the notice was required to state that it was the administrator's intention to make such a distribution within a period of 2 months from the last date for proving and it had to specify a universal date (not less than 21 days from the date of such notice) up to which such proofs of debt might be lodged. [1986 IR 2.95]

- ii. Within 5 business days⁸ of that last date for proving, the administrator was required to admit or reject all proofs submitted to him or to make such provision in respect of them as he thought fit. [1986 IR 2.96]
- iii. If within the 2 month period referred to, the administrator rejected any proof and an application was made to the court to challenge that decision (pursuant to 1986 IR 2.78), the administrator could postpone or cancel the dividend. [1986 IR 2.96A]⁹
- iv. Moreover, although the administrator would ordinarily be required by 1986 IR 2.97(1) to proceed to declare a dividend within the relevant 2 month period, 1986 IR 2.97(2) expressly provided that where there was any extant application to the court to challenge his decision on a proof, the administrator could not declare any dividend without the permission of the court. [IR 2.97]
- v. As Snowden J noted in Re Nortel Networks UK Limited & Ors [2015] EWHC 2506 (Ch) @ paragraph 28 –

“It is implicit in Rule 2.97(2) (and was subsequently made explicit by an amendment to the Rules in 2010¹⁰) that the permission of the court should only be given on terms that provision is made for any disputed proofs so that a pari

⁸ In the case of LBIE, IR 2.96 as unamended prescribed a period of 7 days.

⁹ IR 2.96A did not apply to LBIE, having been inserted by 2010/686 para 87.

¹⁰ 1986 IR 2.97(3) was inserted by the Insolvency (Amendment) Rules 2010 (SI 2010/686), Schedule 1, para.88(2) with effect from 6 April 2010. However, it was subject to savings and transitional provisions specified in SI 2010/686 Schedule 4, para 1 which meant that it did not apply where the company entered administration prior to 6 April 2010.

passu distribution can ultimately be made and creditors are not prejudiced.”

Accordingly, permission was only granted pursuant to paragraph 65(3) of Schedule B1 in that case “*provided that the Administrators make full provision in respect of all such disputed claims*”.

vi. Only once the dividend was declared, would any such payments be made to creditors. [IR 2.99]

e. Accordingly, although an individual creditor whose proof was disputed might receive a dividend at a later date (if and when his proof was later accepted or otherwise determined in his favour), under the 1986 Insolvency Rules the creditors’ claims would essentially all be dealt with at the same time and pursuant to a structured timetable, the commencement of which was directed by the administrators - following the grant of relevant permission from the court.

(5) As noted in paragraph 5 above, on 6 April 2017 the Insolvency Rules 2016 came into force. There are no relevant transitional or saving provisions in relation to the material provisions in chapter 10 of Part 2 of the Insolvency Rules 1986, whether in the form in which they applied immediately prior to 6 April 2017 or the preceding form in which they applied to LBIE.¹¹ Accordingly, all future distributions within administrations will be made in accordance with Part 14 of the Insolvency Rules 2016 – being the now common part headed “*Claims by and distributions to creditors in administration, winding up and bankruptcy*”¹². Notably, they similarly prescribe the following –

¹¹ See Schedules 1 and 2 to the Insolvency Rules 2016.

¹² See also IR 14.1(1): “*This Part applies to administration, winding up and bankruptcy proceedings.*”

- a. IR 14.29 provides that where an administrator proposes to make a distribution, he must deliver notice of such intention to the creditors (the required contents of which are specified by IR 14.30) and if the administrator has not previously placed a notice in the Gazette inviting creditors to prove their debts, IR 14.28 requires that he must additionally place a notice of his intention to make such a distribution in the Gazette – stating a date by which proofs must be delivered.
- b. IR 14.12(2) provides that:

“[d]ebts other than preferential debts rank equally between themselves and, after the preferential debts, must be paid in full unless the assets are insufficient for meeting them, in which case they abate in equal proportions between themselves”

and IR 14.39 provides that in the calculation and distribution of a dividend the administrator must make provision for –

“(a) any debts which are the subject of claims which have not yet been determined; and
(b) disputed proofs and claims.”
- c. Detailed machinery for the proving and quantification of debts, as well as for the determination of disputed proofs, is similarly set out in IR 14.4 to 14.11 and 14.14 to 14.24.
- d. Moreover, the 2016 Rules likewise contain specific requirements in relation to the notification and distribution of any dividends (which will be required to be followed upon the grant of any permission pursuant to para 65(3) of Schedule B1 to the Act). Again for the purposes of minimising the need to cross-refer to other materials, the provisions of IR 14.30 to 14.35 are recited in Appendix C to this supplemental skeleton argument. It will be seen from those legislative provisions that:
 - i. Prior to declaring and making any relevant distribution, the administrator must first give notice of such intention to all relevant creditors, inviting them to prove their debts by a specified date that is not less than 21 days from the date of the notice and stating that it is the administrator’s intention

to make such a distribution within the period of 2 months from that last date for proving. [IR 14.30]

- ii. Within 14 days of that last date for proving, the administrator must (if he has not already dealt with them) admit or reject all proofs delivered to him or make such provision in respect of them as he thinks fit. [IR 14.32]
- iii. If within the 2 month period from the last date for proving, an application is made to the court to challenge a decision of the administrator in relation to any proof (pursuant to IR 14.8), the administrator may postpone or cancel the dividend. [IR 14.33(1)] The administrator may also postpone a dividend if he considers that *“due to the nature and affairs of the person to whom the proceedings relate there is real complexity in admitting or rejecting proofs of claim submitted”*. [IR 14.33(2)]
- iv. Moreover, although the administrator will ordinarily be required by IR 14.34(1) to proceed to declare a dividend in accordance with the notice within the relevant 2 month period (unless he has cause to postpone or cancel it pursuant to IR 14.33), IR 14.34(2) likewise expressly provides that the administrator *“must not declare a dividend so long as there is pending an application to the court to reverse or vary a decision of the office-holder on a proof, or to exclude a proof or to reduce the amount claimed unless the court gives permission”*.
- v. IR 14.34(3) further mirrors 1986 Rule 2.97(3) such that, following the ruling of Snowden J in Re Nortel Networks, the Court should only give permission to declare the dividend if full provision is made for any disputed claims.
- vi. Only once the dividend is declared, will any such payments be made to creditors. [IR 14.35]

- e. It therefore remains the case that although an individual creditor whose proof is disputed might receive a dividend at a later date (if and when his proof is later accepted or otherwise determined in his favour), essentially the creditors' claims will all be dealt with at the same time, pursuant to a structured timetable the commencement of which is directed by the administrators – but only subsequent to the grant of relevant permission from the court.
13. Accordingly, in so far as the Judge took into account and/or was influenced by the potential difficulties averred by the Administrators as identified above, he was wrong to do so. Further or alternatively, if and so far as any such arguments are maintained by the Administrators during the appeal, in view of the clear and orderly procedures prescribed for by the legislation detailed above, the Court should not attribute such assertions with any weight.
14. In the premises, for all the reasons highlighted in the Appellants' Skeleton Argument and in this supplemental skeleton argument the appeal should be allowed.

MALCOLM GAMMIE CBE QC
One Essex Court

CATHERINE ADDY QC
Maitland Chambers
7 Stone Buildings
Lincoln's Inn

Email: cjaddy@maitlandchambers.com
Tel: 020 7406 1200

5th September 2017

APPENDIX A:

Rules 2.95 to 2.99 of the Insolvency Rules 1986, concerning notification, declaration and distribution of dividends in administration.

2.95. — Notice of proposed distribution

- (1) *Where an administrator is proposing to make a distribution to creditors he shall give notice of that fact.*
- (2) *The notice given pursuant to paragraph (1) shall—*
 - (a) *be sent to—*
 - (i) *all creditors whose addresses are known to the administrator; and*
 - (ii) *where a member State liquidator has been appointed in relation to the company, to the member State liquidator;*
 - (b) *state whether the distribution is to preferential creditors or preferential creditors and unsecured creditors; and*
 - (c) *where the administrator proposes to make a distribution to unsecured creditors, state the value of the prescribed part, except where the court has made an order under section 176A(5).*
- (3) *Subject to paragraph (5)(b), before declaring a dividend the administrator shall by notice invite the creditors to prove their debts. Such notice—*
 - (a) *shall be gazetted; and*
 - (b) *may be advertised in such other manner as the administrator thinks fit.*
- (4) *A notice pursuant to paragraph (1) or (3) must, in addition to the standard contents –*
 - (a) *state that it is the intention of the administrator to make a distribution to creditors within the period of 2 months from the last date for proving;*
 - (b) *specify whether the proposed dividend is interim or final;*
 - (c) *specify a date up to which proofs may be lodged being a date which—*
 - (i) *is the same date for all creditors; and*
 - (ii) *is not less than 21 days from that of the notice.*
- (5) *Where a dividend is to be declared for preferential creditors—*
 - (a) *the notice pursuant to paragraph (1) need only to be given to those creditors in whose case the administrator has reason to believe that their debts are preferential; and*
 - (b) *the notice pursuant to paragraph (3) need only be given if the administrator thinks fit.*

2.96.— Admission or rejection of proofs

- (1) *Unless he has already dealt with them, within 5 business days of the last date for proving, the administrator shall—
 - (a) admit or reject (in whole or in part) proofs submitted to him; or
 - (b) make such provision in respect of them as he thinks fit.*
- (2) *The administrator is not obliged to deal with proofs lodged after the last date for proving, but he may do so, if he thinks fit.*
- (3) *In the declaration of a dividend no payment shall be made more than once by virtue of the same debt.*
- (4) *Subject to Rule 2.104, where—
 - (a) a creditor has proved; and
 - (b) a member State liquidator has proved in relation to the same debt,payment shall only be made to the creditor.*

2.96A Postponement or cancellation of dividend

If in the period of 2 months referred to in Rule 2.95(4)(a)—

- (a) *the administrator has rejected a proof in whole or in part and application is made to the court for that decision to be reversed or varied, or*
- (b) *application is made to the court for the administrator's decision on a proof to be reversed or varied, or for a proof to be expunged, or for a reduction of the amount claimed,*

the administrator may postpone or cancel the dividend

2.97.— Declaration of dividend

- (1) *Subject to paragraph (2), within the 2 month period referred to in Rule 2.95(4)(a) the administrator shall proceed to declare the dividend to one or more classes of creditor of which he gave notice.*
- (2) *Except with the permission of the court, the administrator shall not declare a dividend so long as there is pending any application to the court to reverse or vary a decision of his on a proof, or to expunge a proof or to reduce the amount claimed.*
- (3) *If the court gives permission under paragraph (2), the administrator must make such provision in respect of the proof in question as the court directs.*

2.98.— Notice of declaration of a dividend

- (1) *Where the administrator declares a dividend he shall give notice of that fact to all creditors who have proved their debts and, where a member State liquidator has been appointed in relation to the company, to the member State liquidator.*
- (2) *The notice shall include the following particulars relating to the administration—*
 - (a) *amounts raised from the sale of assets, indicating (so far as practicable) amounts raised by the sale of particular assets;*
 - (b) *payments made by the administrator when acting as such;*
 - (c) *where the administrator proposed to make a distribution to unsecured creditors, the value of the prescribed part, except where the court has made an order under section 176A(5);*
 - (d) *provision (if any) made for unsettled claims, and funds (if any) retained for particular purposes;*
 - (e) *the total amount of dividend and the rate of dividend; and*
 - (g) *whether, and if so when, any further dividend is expected to be declared.*

2.99.— Payments of dividends and related matters

- (1) *The dividend may be distributed simultaneously with the notice declaring it.*
- (2) *Payment of dividend may be made by post, or arrangements may be made with any creditor for it to be paid to him in another way, or held for his collection.*
- (3) *Where a dividend is paid on a bill of exchange or other negotiable instrument, the amount of the dividend shall be endorsed on the instrument, or on a certified copy of it, if required to be produced by the holder for that purpose.*

APPENDIX B:

Rules 2.95 to 2.99 of the Insolvency Rules 1986 – as they applied to LBIE by virtue of the date it entered administration.

2.95. — Notice of proposed distribution

- (1) *Where an administrator is proposing to make a distribution to creditors he shall give 28 days' notice of that fact.*
- (2) *The notice given pursuant to paragraph (1) shall—*
 - (a) *be sent to—*
 - (i) *all creditors whose addresses are known to the administrator; and*
 - (ii) *where a member State liquidator has been appointed in relation to the company, to the member State liquidator;*
 - (b) *state whether the distribution is to preferential creditors or preferential creditors and unsecured creditors; and*
 - (c) *where the administrator proposes to make a distribution to unsecured creditors, state the value of the prescribed part, except where the court has made an order under section 176A(5).*
- (3) *Subject to paragraph (5), the administrator shall not declare a dividend unless he has by public advertisement invited creditors to prove their debts.*
- (4) *A notice pursuant to paragraphs (1) or (3) shall—*
 - (a) *state that it is the intention of the administrator to make a distribution to creditors within the period of 2 months from the last date for proving;*
 - (b) *specify whether the proposed dividend is interim or final;*
 - (c) *specify a date up to which proofs may be lodged being a date which—*
 - (i) *is the same date for all creditors; and*
 - (ii) *is not less than 21 days from that of the notice.*
- (5) *A notice pursuant to paragraph (1) where a dividend is to be declared for preferential creditors, need only be given to those creditors in whose case he has reason to believe that their debts are preferential and public advertisement of the intended dividend need only be given if the administrator thinks fit.*

2.96. — Admission or rejection of proofs

- (1) *Unless he has already dealt with them, within 7 days of the last date for proving, the administrator shall—*
 - (a) *admit or reject proofs submitted to him; or*
 - (b) *make such provision in respect of them as he thinks fit.*
- (2) *The administrator is not obliged to deal with proofs lodged after the last date*

for proving, but he may do so, if he thinks fit.

- (3) *In the declaration of a dividend no payment shall be made more than once by virtue of the same debt.*
- (4) *Subject to Rule 2.104, where—*
 - (a) *a creditor has proved; and*
 - (b) *a member State liquidator has proved in relation to the same debt, payment shall only be made to the creditor.*

2.97.— Declaration of dividend

- (1) *Subject to paragraph (2), within the 2 month period referred to in Rule 2.95(4)(a) the administrator shall proceed to declare the dividend to one or more classes of creditor of which he gave notice.*
- (2) *Except with the permission of the court, the administrator shall not declare a dividend so long as there is pending any application to the court to reverse or vary a decision of his on a proof, or to expunge a proof or to reduce the amount claimed.*

2.98.— Notice of declaration of a dividend

- (1) *Where the administrator declares a dividend he shall give notice of that fact to all creditors who have proved their debts and, where a member State liquidator has been appointed in relation to the company, to the member State liquidator.*
- (2) *The notice shall include the following particulars relating to the administration—*
 - (a) *amounts raised from the sale of assets, indicating (so far as practicable) amounts raised by the sale of particular assets;*
 - (b) *payments made by the administrator when acting as such;*
 - (c) *where the administrator proposed to make a distribution to unsecured creditors, the value of the prescribed part, except where the court has made an order under section 176A(5);*
 - (d) *provision (if any) made for unsettled claims, and funds (if any) retained for particular purposes;*
 - (e) *the total amount of dividend and the rate of dividend;*
 - (f) *how he proposes to distribute the dividend; and*
 - (g) *whether, and if so when, any further dividend is expected to be declared.*

2.99.— Payments of dividends and related matters

- (1) *The dividend may be distributed simultaneously with the notice declaring it.*
- (2) *Payment of dividend may be made by post, or arrangements may be made with*

- any creditor for it to be paid to him in another way, or held for his collection.*
- (3) *Where a dividend is paid on a bill of exchange or other negotiable instrument, the amount of the dividend shall be endorsed on the instrument, or on a certified copy of it, if required to be produced by the holder for that purpose.*

APPENDIX C:

Rules 14.30 to 14.35 of the Insolvency Rules 2016, concerning notification, declaration and distribution of dividends in administration.

14.30. Contents of notice of intention to declare a dividend or make a distribution

A notice under rule 14.29 must contain the following—

- (a) a statement that the office-holder intends to make a distribution to creditors or declare a dividend (as the case may be) within the period of two months from the last date for proving;*
- (b) a statement whether the proposed distribution or dividend is interim or final;*
- (c) the last date by which proofs may be delivered which must be—
 - (i) the same date for all creditors who prove, and*
 - (ii) not less than 21 days from the date of notice;**
- (d) a statement of the place to which proofs must be delivered;*
- (e) the additional information required by rule 14.31 where the office-holder intends to treat a small debt as proved for the purposes of paying a dividend; and*
- (f) in the case of a members' voluntary winding up, where the distribution is to be a sole or final distribution, a statement that the distribution may be made without regard to the claim of any person in respect of a debt not proved.*

14.31.— Further contents of notice to creditors owed small debts etc.

- (1) The office-holder may treat a debt, which is a small debt according to the accounting records or the statement of affairs of the company or bankrupt, as if it were proved for the purpose of paying a dividend.*
- (2) Where the office-holder intends to treat such a debt as if it were proved the notice delivered under rule 14.29 must—
 - (a) state the amount of the debt which the office-holder believes to be owed to the creditor according to the accounting records or statement of affairs of the company or the bankrupt (as the case may be);*
 - (b) state that the office-holder will treat the debt which is stated in notice, being for £1,000 or less, as proved for the purposes of paying a dividend unless the creditor advises the office-holder that the amount of the debt is incorrect or that no debt is owed;*
 - (c) require the creditor to notify the office-holder by the last date for proving if the amount of the debt is incorrect or if no debt is owed; and*
 - (d) inform the creditor that where the creditor advises the office-holder that the amount of the debt is incorrect the creditor must also submit a proof in order to receive a dividend.**

- (3) *The information required by paragraph (2)(a) may take the form of a list of small debts which the office-holder intends to treat as proved which includes that owed to the particular creditor to whom the notice is being delivered.*

14.32.— Admission or rejection of proofs following last date for proving

- (1) *Unless the office-holder has already dealt with them, the office-holder must within 14 days of the last date for proving set out in the notice under rule 14.29—*
- (a) *admit or reject (in whole or in part) proofs delivered to the office-holder;*
 - or*
 - (b) *make such provision in relation to them as the office-holder thinks fit.*
- (2) *The office-holder is not obliged to deal with a proof delivered after the last date for proving, but the office-holder may do so if the office-holder thinks fit.*
- (3) *In the declaration of a dividend a payment must not be made more than once in respect of the same debt.*
- (4) *Subject to rule 14.43 (assignment of right to dividend), payment must only be made to the creditor in a case where both the creditor and a member State liquidator have proved in relation to the same debt.*

14.33.— Postponement or cancellation of dividend

- (1) *The office-holder may postpone or cancel the dividend in the period of two months from the last date for proving if an application is made to the court for the office-holder's decision on a proof to be reversed or varied, or for a proof to be excluded, or for a reduction of the amount claimed.*
- (2) *The office-holder may postpone a dividend if the office-holder considers that due to the nature of the affairs of the person to whom the proceedings relate there is real complexity in admitting or rejecting proofs of claims submitted.*
- (3) *Where the dividend is postponed or cancelled a new notice under rule 14.29 will be required if the dividend is paid subsequently.*

14.34.— Declaration of dividend

- (1) *The office-holder must declare the dividend in the two month period referred to in rule 14.30(a) in accordance with the notice of intention to declare a dividend unless the officeholder has had cause to postpone or cancel the dividend.*
- (2) *The office-holder must not declare a dividend so long as there is pending an application to the court to reverse or vary a decision of the office-holder on a proof, or to exclude a proof or to reduce the amount claimed unless the court gives permission.*

- (3) *If the court gives such permission, the office-holder must make such provision in relation to the proof as the court directs.*

14.35.— Notice of declaration of a dividend

- (1) *Where the office-holder declares a dividend the office-holder must deliver notice of that fact to all creditors who have proved for their debts (subject to paragraph (5)).*
- (2) *The notice declaring a dividend may be delivered at the same time as the dividend is distributed.*
- (3) *The notice must include the following in relation to the insolvency proceedings—*
- (a) *the amounts raised from the sale of assets, indicating (so far as practicable) amounts raised by the sale of particular assets;*
 - (b) *the payments made by the office-holder in carrying out the office-holder's functions;*
 - (c) *the provision (if any) made for unsettled claims, and funds (if any) retained for particular purposes;*
 - (d) *the total amount to be distributed and the rate of dividend; and*
 - (e) *whether, and if so when, any further dividend is expected to be declared.*
- (4) *In an administration, a creditors' voluntary winding-up or a winding up by the court, where the administrator or liquidator intends to make a distribution to unsecured creditors, the notice must also state the value of the prescribed part unless there is no prescribed part or the court has made an order under section 176A(5).*
- (5) *Where the office-holder declares a dividend for preferential creditors only, the notice under paragraph (1) need only be delivered to those preferential creditors who have proved for their debts.*
-

Case No.: A2/2016/4109

IN THE COURT OF APPEAL

ON APPEAL FROM

No.: 7942 of 2008

THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

COMPANIES COURT

Before the Honourable Mr Justice Hildyard

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

AND IN THE MATTER OF THE INSOLVENCY
ACT 1986

BETWEEN:

HER MAJESTY'S REVENUE AND CUSTOMS
Appellant

and

(1) ANTHONY VICTOR LOMAS

(2) STEVEN ANTHONY PEARSON

(3) RUSSELL DOWNS

(4) JULIAN GUY PARR

(in their capacity as Joint Administrators of
Lehman Brothers
International (Europe)(in administration))

Respondents

**APPELLANTS' SUPPLEMENTAL
SKELETON ARGUMENT**
