Party: Applicants
Witness: Russell Downs
Statement No: 15
Exhibit: "RD15"
Date: 28 November 2017

IN THE HIGH COURT OF JUSTICE **CR-2008-000012**
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

CR-2008-000012

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

ANTHONY VICTOR LOMAS
STEVEN ANTHONY PEARSON
RUSSELL DOWNS
JULIAN GUY PARR
(acting in their capacity as the Joint Administrators of Lehman Brothers International (Europe) (in Administration))

Applicants

- and -

WENTWORTH SONS SUB-DEBT S.À.R.L

Respondent

FIFTEENTH WITNESS STATEMENT OF

RUSSELL DOWNS

I, **Russell Downs** of PricewaterhouseCoopers LLP ("**PwC**") of 7 More London, Riverside, London, SE1 2RT say as follows:

1 I am a Partner in the firm of PwC of the above address and am one of the joint administrators (the "**Administrators**") of Lehman Brothers International (Europe) (in administration) ("**LBIE**").

2 I make this statement in relation to the application for directions to be issued on behalf of the Administrators pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 (the "**Act**"), as described below (the "**Application**").

3 There is one Respondent to the Application, being Wentworth Sons Sub-Debt S.à.r.l., ("**Wentworth Sub-Debt**" or the "**Respondent**") which is part of the "**Wentworth**" joint venture which also includes Lehman Brothers Holdings Inc. ("**LBHI**") and LB Holdings Intermediate 2 Limited (in administration) ("**LBHI2**").

4 LBHI2 is the holder of the following shares in LBIE:

4.1 2 million 5% redeemable Class A preference shares of $1000 each;

4.2 5.1 million 5% redeemable Class B preference shares of $1000 each; and

4.3 6,273,114,000 ordinary shares of $1 each,

representing 100% of the total issued share capital of LBIE.

5 LBHI was the ultimate parent company of the global Lehman Brothers group immediately prior to its bankruptcy in 2008. It remains (directly or indirectly) a shareholder in, and holds creditor interests in respect of, various of the Lehman Brothers group companies. I understand that it is (directly or indirectly) the principal creditor of LBHI2.

6 It is the Administrators' understanding that the Wentworth joint venture, through various special purpose vehicles, including Wentworth Sons Senior Claims S.à.r.l., Wentworth Sub-Debt and Wentworth Sons Equity Claims S.à.r.l., and those associated with it, holds (i) an interest in ordinary unsecured claims, (ii) the subordinated debt in the amount of £1.254 billion originally loaned by LBHI2 to LBIE (the "**Sub-Debt**") pursuant to three subordinated debt agreements dated 1 November 2006 giving rise to the Sub-Debt (the "**Sub-Debt Agreements**") and (iii) the preference shares in LBIE. The Wentworth joint venture is commercially focused on enhancing the amount of the Surplus (as described below) and reducing the claims of ordinary creditors, thereby seeking to maximise the funds available to repay the Sub-Debt and be paid in respect of the shares in LBIE. Wentworth Sub-Debt is the holder of the Sub-Debt.

7 The directions sought in the Application (which we refer to as the "**Waterfall IV**" Application) have been the subject of correspondence with the Respondent. The issues arising on the Application are described in further detail below. In short, however, the Application arises from the decision of the Supreme Court in relation to the payment of Statutory Interest (as defined below at paragraph 17.1(a)) in the event that LBIE were to enter liquidation. As noted below, one of the Supreme Court's decisions on the Waterfall I Application (described in Section B below) was that Statutory Interest to which LBIE's creditors have become entitled during the course of LBIE's administration cannot be claimed in a subsequent liquidation of LBIE (the so-called "**Statutory Interest Lacuna**"). The Supreme Court's decision in relation to the priority of the Sub-Debt also informs the Administrators' approach to the Application. The Supreme Court decided in that regard that the Sub-Debt ranks for payment behind not just provable claims, but also Statutory Interest and non-provable claims, and the holder of the Sub-Debt is not entitled to prove in LBIE's administration until those ranking ahead of it have been paid in full (or it is clear they will be so paid).

8 The Administrators seek the Court's directions on the Application as a result of steps being taken and/or sought to be taken by Wentworth Sub-Debt in an attempt to bring about a liquidation of LBIE with a view to triggering the Statutory Interest Lacuna. As explained further below, Wentworth is seeking to eliminate the Statutory Interest payable to the creditors ranking ahead of it.

9 I make this statement in order to provide the relevant factual background to the Court for the purpose of determining the Application.

10 There is now produced and shown to me a paginated bundle of documents and correspondence marked "**RD15**", to which I shall refer. Save where otherwise stated, page references in this statement are to the contents of RD15 which appears as an exhibit to this statement. Unless otherwise stated, references to a "Rule" are to a rule in the Insolvency Rules 2016. References to a "Section" are to a section of the Insolvency Act 1986 (the "**Act**"). Terms capitalised but not otherwise defined have the meaning given to them in the Application.

11 Save where otherwise stated this witness statement is made from facts and matters that are within my own knowledge. Nothing that I say in this witness statement is

intended to be a waiver of any privilege to which LBIE and/or the Administrators are entitled and no such privilege is waived.

A. BACKGROUND

12 LBIE was the principal trading company within the European group of Lehman Brothers companies and is an English unlimited company. LBIE is authorised and regulated by the Financial Conduct Authority (previously the Financial Services Authority).

13 LBIE entered into administration (the "**Administration**") on 15 September 2008. The current Administrators are Anthony Victor Lomas, Steven Anthony Pearson, Julian Guy Parr and myself.

14 On 2 December 2009, the High Court of Justice made an order granting permission for the Administrators to make a distribution to creditors and on 4 December 2009 the Administrators gave notice to creditors pursuant to what was then Rule 2.95 of the Insolvency Rules 1986 (the "**1986 Rules**") of their intention to distribute. On 30 April 2014, the Administrators paid a final, fourth interim dividend in respect of the proved claims (as at that date) of unsecured creditors, which took the aggregate dividends paid to LBIE's general unsecured creditors with proved claims to 100 pence in the pound in respect of such claims.

15 There is a surplus in LBIE's estate after payment in full of (or, in a small number of cases, provision for) the proved claims of all general unsecured creditors (the "**Surplus**"). The Progress Report of the Administrators dated 9 October 2017 (for the period 15 March 2017 to 14 September 2017) (the "**LBIE Progress Report**") estimates that, subject to a number of important assumptions, the Surplus will ultimately be c.£7.07bn in a low case scenario and c.£8.10bn in a high case scenario. The LBIE Progress Report is exhibited at **pages 1 to 39.**

16 The Administrators have, as yet, been unable to make any distributions from the Surplus. Accordingly, over three years have now passed since the final distribution to admitted creditors without any distribution having been made from the Surplus. The principal reason for the Administrators' inability, to date, to make distributions from the Surplus has been the need to resolve a range of (often complex and

interlocking) legal issues arising from the existence of the Surplus and the claims in respect of it. The Administrators currently have funds that, but for the ongoing Waterfall proceedings, would allow over £5 billion to be paid in respect of Statutory Interest. The potential impact of the courts (on appeal) coming to a different conclusion, in particular on the *Bower v Marris* and cost of funding issues, is such that no distributions of Statutory Interest have yet been possible. Although the Court will be familiar with the various proceedings that have been undertaken, those that are pertinent to this Application are summarised below.

B. THE WATERFALL I APPLICATION

17 On 14 February 2013, in anticipation of a possible Surplus, the Administrators, together with the administrators of LBHI2 (the "**LBHI2 Administrators**") and the administrators of Lehman Brothers Limited ("**LBL**", the "**LBL Administrators**"), issued an application for directions (the "**Waterfall I Application**") (a copy of which is exhibited at **pages 40 to 46**). That application raised issues as to:

17.1 the relative priority for payment, in the event of a Surplus, of:

(a) interest on proved debts payable pursuant to Rule 2.88(7) of the 1986 Rules ("**Statutory Interest**"); and

(b) the Sub-Debt;

17.2 whether or not, in the event of a Surplus, creditors of LBIE whose provable contractual or other claims are denominated in a foreign currency, the amount of which was converted into sterling as at 15 September 2008 (the "**Administration Date**") for the purpose of proving a debt under Rule 2.86(1) of the 1986 Rules, are entitled to claim against LBIE for any currency losses suffered by them as a result of a decline in the value of sterling as against the original currency of the claim between the Administration Date and the date or dates of payment or payments of distributions to them in respect of their claims (a "**Currency Conversion Claim**") and where Currency Conversion Claims, if they exist, rank for payment in the event of a Surplus;

17.3 whether Statutory Interest accrued but unpaid in LBIE's administration would be payable in a subsequent liquidation of LBIE;

17.4 whether the obligations of LBL and LBHI2 under Section 74 extend not only to provable debts but also to Statutory Interest and Currency Conversion Claims;

17.5 whether LBIE can prove in the administrations or liquidations of its members under Section 74 of the Act ("**Section 74**") (a "**Contribution Claim**") while it is in administration;

17.6 whether, while LBIE remains in administration, the "Contributory Rule" or the rule in *Cherry v Boultbee* apply so as to allow LBIE to refuse to admit to proof or pay dividends on the provable debts of LBHI2 and LBL on the ground that LBHI2 and LBL would or might become liable to calls under Section 74 if LBIE subsequently entered into liquidation; and

17.7 whether the obligations of LBL and LBHI2 under Section 74 are joint and several, and whether LBL and/or LBHI2 may have a right of indemnity or contribution from the other in respect of sums paid to LBIE in satisfaction of a Contribution Claim.

18 The respondents to the Waterfall I Application (the LBHI2 Administrators and LBL Administrators were joint applicants with the Administrators) were:

18.1 LBHI; and

18.2 Lydian Overseas Partners Master Fund Limited, being a substantial unsecured creditor of LBIE, joined to the Waterfall I Application to make submissions in relation to Currency Conversion Claims.

19 Following a hearing before Mr Justice David Richards in November 2013, on 14 March 2014 the Judge handed down his judgment on the Waterfall I Application (the "**Waterfall I Judgment**").

20 In relation to the issues outlined above at paragraph 17, Mr Justice David Richards concluded (see paragraph 250 of the Waterfall I Judgment):

20.1 that the Sub-Debt ranks for payment behind provable debts, Statutory Interest and non-provable liabilities in the event of a Surplus;

20.2 that Currency Conversion Claims exist as a non-provable liability and therefore rank for payment ahead of the Sub-Debt in the event of a Surplus;

20.3 that, if LBIE moved from administration into liquidation without having paid Statutory Interest accrued in the administration, creditors would only be entitled to post-administration interest in the liquidation from the date of liquidation. The Statutory Interest in respect of the period of LBIE's administration would not be provable by the creditor in the subsequent liquidation nor would it be payable to the creditor as Statutory Interest under Rule 2.88 of the 1986 Rules or under Section 189 of the Act, but creditors whose debts carried interest apart from the administration (whether by contract, judgment interest or otherwise) would have a non-provable claim against LBIE in liquidation for any such interest in respect of the period of administration;

20.4 that the obligations of LBL and LBHI2 under Section 74 extend not only to provable debts but also to Statutory Interest and Currency Conversion Claims;

20.5 that, whilst LBIE remains in administration, LBIE (acting by the Administrators) could prove on a contingent basis in the distributing administrations or subsequent liquidations of LBHI2 and LBL for their Section 74 liabilities (the relevant contingencies including LBIE's entry into liquidation and a call being made under Section 74 by LBIE's liquidators) and those provable claims would be the subject of mandatory insolvency set-off against any provable claims of LBHI2 and LBL against LBIE; and

20.6 that whilst LBIE remains in administration, neither the "Contributory Rule" nor the rule in *Cherry v Boultbee* applies.

21 All of the issues decided in the Waterfall I Judgment were appealed to the Court of Appeal. Commencing on 23 March 2015, the Court of Appeal heard that appeal. On 14 May 2015, the Court of Appeal handed down its judgment (the "**Waterfall I Court of Appeal Judgment**"). The Court of Appeal's directions in respect of the issues were as follows:

21.1 The Court of Appeal held (upholding the Waterfall I Judgment) that the Sub-Debt is a provable debt in LBIE's insolvency and that it ranks for payment by

LBIE after payment of all proved debts, Statutory Interest thereon and non-provable liabilities. The Court of Appeal also expressed the view that LBHI2's contingent claim in respect of the Sub-Debt should be valued at zero for the purposes of proof under Rule 2.86 of the 1986 Rules until such contingencies are satisfied (paragraph 41 of the Waterfall I Court of Appeal Judgment).

21.2 The Court of Appeal by a majority (Moore-Bick and Briggs LJJ) agreed with the Judge that Currency Conversion Claims exist as the balance of a creditor's original contractual claim which has not been discharged by the process of conversion, proof and dividend under the relevant part of the insolvency scheme, and rank as non-provable liabilities of LBIE to be paid after all proved debts and Statutory Interest thereon. Lewison LJ dissented.

21.3 In relation to Statutory Interest arising in respect of proved debts in LBIE's administration, the Court of Appeal departed from the Judge's reasoning and found that, once a Surplus has arisen in the Administration after payment of all proved debts, Rule 2.88(7) of the 1986 Rules has the effect of requiring the surplus funds in the Administration to be used in discharging Statutory Interest on the debts proved in the Administration before being used for any other purpose such that it continues to burden so much of the Surplus arising in the Administration as passes into the hands of the liquidator.

21.4 The Court of Appeal agreed with the Judge that the liability of members under Section 74 extends not only to provable debts but also to Statutory Interest and liabilities not provable as part of the statutory scheme (such as Currency Conversion Claims).

21.5 The Court of Appeal agreed with the Judge that LBIE could (whilst in administration and acting through the Administrators) prove for the contingent Section 74 liabilities of its members in their distributing administrations or subsequent liquidations.

21.6 The Court of Appeal agreed with the Judge that the Contributory Rule does not apply in a distributing administration.

22 Various of the parties to the Waterfall I Application were given permission to appeal the Waterfall I Court of Appeal Judgment to the Supreme Court. Commencing on 17 October 2016, the Supreme Court heard an appeal of all issues in the Waterfall I

Application. On 17 May 2017, the Supreme Court handed down its judgment (the "**Waterfall I Supreme Court Judgment**"). The Supreme Court's decisions in respect of the issues were as follows:

22.1 The Supreme Court held (upholding the Waterfall I Court of Appeal Judgment) that the Sub-Debt ranks for payment behind provable debts, Statutory Interest and non-provable liabilities in the event of a Surplus.

22.2 The Supreme Court did differ from the Court of Appeal on one point, upholding the first instance decision of Mr Justice David Richards that, given the drafting of the subordination provisions, LBHI2 could not submit a proof in respect of its Sub-Debt claim until all amounts ranking ahead of it had been paid in full (or at least until it was clear that they could be met in full).

22.3 The Supreme Court (Lord Clarke dissenting) held that there was no room in the legislative provisions for Currency Conversion Claims to exist, overturning both judgments below.

22.4 In relation to Statutory Interest that arises in respect of proved debts during the period of LBIE's Administration, the Supreme Court overturned the Waterfall I Court of Appeal Judgment and agreed with Mr Justice David Richards' reasoning at first instance that such interest cannot be claimed in any subsequent liquidation to the extent unpaid. This has become known as the "**Statutory Interest Lacuna Issue**", which forms part of the subject of this Application.

22.5 The Supreme Court agreed with the Court of Appeal that the liability of members under Section 74 extends not only to provable debts but also to liabilities not provable as part of the statutory scheme, but disagreed, overturning both judgments below, that Section 74 extends to cover Statutory Interest.

22.6 The Supreme Court disagreed with the Court of Appeal and the Judge, and held that LBIE could not (whilst in administration and acting through the Administrators) prove for the contingent Section 74 liabilities of its members in their distributing administrations or subsequent liquidations.

22.7 The Supreme Court, overturning the Court of Appeal and the Judge, extended the Contributory Rule to apply in a distributing administration.

23 The result of the Waterfall I Supreme Court Judgment, in particular the decision that Currency Conversion Claims do not exist and the decision that Section 74 does not extend to cover Statutory Interest, means that the Surplus, subject to further outstanding litigation (i.e. the appeals in the Waterfall II proceedings), is likely (but not certain) to be sufficient to cover all outstanding liabilities in the LBIE estate, including Statutory Interest and the Sub-Debt, with any remaining sums going to LBIE's remaining member, LBHI2.

24 As described above at paragraph 6, the Respondent has a financial incentive to limit payments of Statutory Interest to creditors in order to maximise the likelihood and extent of payments in respect of the Sub-Debt. In addition, it and its associates forming the Wentworth joint venture have an interest in ensuring that there is sufficient of the Surplus left over after payment in full of the Sub-Debt in order to facilitate a distribution to LBIE's shareholder. The Respondent's conduct is therefore calculated to benefit itself and LBIE's shareholder (in each case who are part of the Wentworth joint venture) at the expense of LBIE's ordinary unsecured creditors who rank ahead of them.

C. THE WATERFALL II APPLICATION

25 On 12 June 2014, the LBIE Administrators issued an application for directions in relation to further issues relating to the Surplus (the "**Waterfall II Application**") (a copy of which is at **pages 47 to 63**). Those issues broadly fell, and were ultimately divided for the purposes of case management, into three categories:

25.1 how entitlements to Statutory Interest and Currency Conversion Claims are to be calculated ("**Waterfall IIA**");

25.2 whether terms contained in certain post-administration contracts entered into between LBIE and creditors had the effect of releasing creditors' entitlements to Statutory Interest and Currency Conversion Claims and, if so, whether the LBIE Administrators should be directed not to enforce them ("**Waterfall IIB**"); and

25.3 how default interest is to be calculated under ISDA Master Agreements and certain other trading agreements ("**Waterfall IIC**").

26 The respondents to the Waterfall II Application were:

26.1 Burlington Loan Management Limited, CVI GVF (Lux) Master S.a.r.l and Hutchinson Investors, LLC (together, the "**Senior Creditor Group**"). The Senior Creditor Group is primarily focused on enhancing the value of its claims to Statutory Interest and, before the Waterfall I Supreme Court Judgment, Currency Conversion Claims;

26.2 Wentworth Sub-Debt which, as described above at paragraph 3, is part of the Wentworth joint venture and is primarily focused on enhancing the amount of the Surplus available to repay the Sub-Debt and be paid to the remaining member of LBIE;

26.3 York Global Finance BDH, LLC ("**York**"), which is primarily focused on enhancing the amount of the Surplus available to pay Statutory Interest and, before the Waterfall I Supreme Court Judgment, Currency Conversion Claims, in respect of claims arising under prime brokerage agreements; and

26.4 Goldman Sachs International, which was joined to the Application on 23 June 2015, for the purposes of Waterfall IIC only, to make arguments relating to equity-based costs of funding.

27 The trials of the Waterfall IIA and Waterfall IIB issues took place before Mr Justice David Richards between 18 and 26 February 2015 and 18 and 21 May 2015 respectively. Mr Justice David Richards handed down his judgments (the "**Waterfall IIA Judgment**" and "**Waterfall IIB Judgment**") on 31 July 2015.

28 Further to the Waterfall IIA Judgment and Waterfall IIB Judgment, the parties identified certain further issues which are closely related to, and/or arise directly from, issues covered in those judgments. The Court agreed to give supplemental judgments in relation to those issues, and Mr Justice David Richards handed down judgment (the "**Waterfall II Supplemental Issues Judgment**") in respect of those issues on 24 August 2016.

29 The trial of Waterfall IIC took place before Mr Justice Hildyard between 9 and 25 November 2015. Mr Justice Hildyard handed down his judgment (the "**Waterfall IIC Judgment**") on 5 October 2016. Some of the issues decided in the Waterfall IIC Judgment have been appealed to the Court of Appeal with a hearing listed for 3 July 2018.

30 Many of the issues decided in the Waterfall IIA Judgment, the Waterfall IIB Judgment and the Waterfall II Supplemental Issues Judgment (and one further supplemental issue, decided in the Waterfall IIC Judgment) were appealed to the Court of Appeal. The Court of Appeal heard the appeal commencing on 3 April 2017 (with a supplemental hearing on 25 July 2017 following the handing down of the Waterfall I Supreme Court Judgment). On 24 October 2017, the Court of Appeal handed down its judgment (the "**Waterfall IIA Court of Appeal Judgment**").

31 Wentworth Sub-Debt was the only party to appeal to the Court of Appeal in respect of issues arising out of the Waterfall IIB Judgment and also (in common with other parties, in respect of other issues, including the Senior Creditor Group) appealed several issues decided in the Waterfall IIA Judgment and Waterfall II Supplemental Issues Judgment. Wentworth Sub-Debt, the Senior Creditor Group and York have all sought permission to appeal to the Supreme Court aspects of the Waterfall IIA Court of Appeal Judgment.

D. WATERFALL III APPLICATION

32 On 25 April 2016, the LBIE Administrators issued an application for directions in relation to further issues relating to the Surplus (the "**Waterfall III Application**") (a copy of which is at **pages 64 to 70**). Those issues principally concerned the proper treatment of various claims filed between the parties to the Waterfall III Application, namely LBIE, LBHI2, LBL and Lehman Brothers Europe Limited, including the claims submitted by the Administrators in the estates of LBHI2 and LBL in respect of their contingent liability to make a contribution as shareholders of LBIE pursuant to Section 74.

33 The Waterfall III Application was divided into two parts, the first comprising primarily legal issues to be determined based on assumed facts agreed by the parties ("**Part A**"), and the latter comprising factual issues ("**Part B**"). A hearing in respect of Part A took place before Mr Justice Hildyard commencing on 30 January 2017 with judgment reserved.

34 In light of the Waterfall I Supreme Court Judgment (in particular, there now existing a realistic prospect of the Surplus being sufficient to pay the Sub-Debt, potentially

with a remainder going to the shareholders of LBIE and the scope of any Contribution Claim being greatly reduced so as not to include Statutory Interest), the parties to the Waterfall III Application reached a settlement in respect of the Waterfall III Application and other matters (effective from 6 September 2017). The administrators of the various estates involved (including the Administrators) sought the Court's directions in relation to their entry into that settlement, which directions were given at a hearing on 24 July 2017 before Mr Justice Hildyard. The hearing in respect of Part B was vacated following that settlement.

E. BACKGROUND TO THE CURRENT APPLICATION

35 The issues in the Application principally arise out of the Supreme Court's ruling in respect of the Statutory Interest Lacuna. As described in paragraph 22.4 above, the Supreme Court ruled that entitlements to Statutory Interest pursuant to Rule 2.88 of the 1986 Rules that arise in an administration but are unpaid at the end of that administration cannot be claimed in a subsequent liquidation. In other words, while a distribution of the Surplus (if it were possible) today would result in substantial sums (in excess of £5 billion) being paid to LBIE's admitted unsecured creditors by way of Statutory Interest (and only thereafter to those ranking lower in the priority waterfall), a distribution of the Surplus after LBIE was wound up would result in no payment in respect of Statutory Interest for the period of the Administration, with such sums instead being paid to the holder of the Sub-Debt and those sitting lower still in that waterfall.

36 The LBIE Progress Report shows (subject to the caveats and qualifications set out therein) that, should the Waterfall IIA Court of Appeal Judgment and Waterfall IIC Judgment be upheld on appeal (or, in relation to the former, there is no further appeal), the Administrators estimate that Statutory Interest claims on proved debts will total approximately £5.29 billion (see **page 11** of the exhibit). The Administrators expect, in that event, the remaining Surplus to be sufficient to potentially cover all liabilities falling to be paid lower in the distribution waterfall than Statutory Interest, including the Sub-Debt and interest on the Sub-Debt, such that a distribution may also be made to LBIE's Shareholders. Based on this estimate, should LBIE be put into liquidation, and the Statutory Interest Lacuna were to apply, the effect would be that LBIE's ordinary unsecured creditors could stand to lose their entitlements to

£5.29 billion, which will instead flow down the waterfall to the holder of the Sub-Debt and, thereafter subject to the quantum of interest on the Sub-Debt, the holder of LBIE's shares, i.e., in both cases, members of the Wentworth joint venture structure.

37 The Administrators consider that putting LBIE into liquidation at this stage would in the circumstances not be in the interests of LBIE's creditors as a whole. Having considered the Supreme Court's decision on the Statutory Interest Lacuna Issue, and following queries from a number of LBIE's creditors who were concerned about that point, the Administrators posted an update to creditors on the LBIE website on 23 June 2017 stating that they would object to any attempt to force the premature liquidation of LBIE. A copy of that update is at **pages 71 to 74**. The Administrators' reasons for taking this position are set out in that update and are briefly as follows:

37.1 in 2016, the Court extended the term of LBIE's administration to 2022 and in doing so noted that, unless some specific advantage of a liquidation is shown over distribution in an administration, the implication of the Court having granted permission to distribute is that an administration should be maintained for as long as is reasonably necessary to complete the process of distribution;

37.2 the Court, in acceding to the Administrators' extension application, was clear that the Administrators should be allowed to "complete their mandate" in administration, in a context that clearly envisaged the distribution of Statutory Interest;

37.3 there is currently Statutory Interest of around £5.2bn payable in the administration with a large enough realised Surplus to pay this, subject to the conclusion of the ongoing Waterfall proceedings;

37.4 the Supreme Court has confirmed that the Sub-Debt is subordinated to Statutory Interest;

37.5 the Supreme Court has noted that "*forcing an administrator to move the company into liquidation would potentially wreak real unfairness on all the other creditors of the company*"; and

37.6 leaving aside the Statutory Interest Lacuna, there are other adverse consequences of going into liquidation (including tax consequences) on the basis of which the Administrators consider it would not be in the interests of

LBIE and its creditors, for LBIE to go into liquidation (some of those reasons are also referred to in the Administrators' post on their website of 29 March 2017. That post is exhibited at **pages 75 to 78**).

38 On 30 June 2017, Wentworth Sub-Debt's legal representatives ("**Kirkland & Ellis**") wrote to the Administrators' legal representatives ("**Linklaters**") stating that Wentworth would be amenable to discussing a settlement of the Waterfall II proceedings involving accelerated payments of Statutory Interest subject to a discount for that acceleration and for the risk that LBIE may enter liquidation (i.e. in respect of the potential adverse effect of the Statutory Interest Lacuna). Kirkland & Ellis noted in that letter that paragraph 79(2)(c) of Schedule B1 to the Act requires the Administrators to make an application to Court for their appointment to cease if a creditors' decision requires them to do so, and that the holder of 10% of the total debts of LBIE could require the Administrators to seek such a decision (by reason of paragraph 56(1) of Schedule B1 to the Act). Kirkland & Ellis went on to state Wentworth Sub-Debt's apparent belief that it would be able to cause the Administrators to make an application under paragraph 79(2)(c) of Schedule B1 to the Act.

39 Kirkland & Ellis also identified in that letter Wentworth Sub-Debt's preferred resolution of the remaining issues in the LBIE estate, seemingly on the basis of giving no value for the arguments the subject of pending appeals in the Waterfall II proceedings, and indicated that, should the Administrators not proceed as Wentworth Sub-Debt advocated in that letter (or if LBIE's creditors opposed such an approach) Wentworth Sub-Debt "*would have to look to alternative approaches to finalising the LBIE estate, including compelling an application to court to be made for the termination of the administrators' appointment*". That letter is exhibited at **pages 79 to 81**.

40 Linklaters responded on behalf of the Administrators to that letter on 23 August 2017, setting out reasons why moving into liquidation at this stage would be inappropriate. Linklaters' letter is exhibited at **pages 82 to 84**. That response noted that the Wentworth Sub-Debt proposal assumed that all pending appeals would fail, in proceedings in which Wentworth assisted in formulating the issues and in which it remains an active participant. The letter directed Wentworth Sub-Debt to the 23 June 2017 update to creditors, and the Administrators' views that a liquidation of LBIE would not be in the best interests of LBIE's creditors and that the statutory objective

of LBIE's administration (achieving a better result for LBIE's creditors as a whole than in a liquidation) continues to be achievable. In addition to the points made in the 23 June update, the letter also set out various reasons why the action proposed by Wentworth Sub-Debt would be contrary to LBIE's creditors' interests.

41 No response was received to Linklaters' 23 August 2017 letter. Instead, on 24 October 2017, Wentworth Sub-Debt sent a letter to the Administrators, purporting to be a request pursuant to paragraph 56(1) of Schedule B1 to the Act, to call a creditors' meeting, or otherwise invite LBIE's creditors, to vote upon a resolution designed to bring about the termination of the LBIE Administration and the commencement of a liquidation (the "**paragraph 56(1) request**"). That letter is exhibited at **pages 85 to 86**.

42 On 30 October 2017, the Administrators responded to the paragraph 56(1) request through Linklaters, noting that Wentworth Sub-Debt had failed to engage on any of the substantive points raised in the earlier correspondence, including the legal and factual obstacles to Wentworth Sub-Debt's assertion that they had the means to place LBIE into liquidation by way of the paragraph 56(1) request. That letter is exhibited at **pages 87 to 91**. In that letter, Linklaters reiterated the Administrators' position, inviting Wentworth Sub-Debt to withdraw the paragraph 56(1) request or to respond substantively to the issues raised. The letter made it clear that, absent such a withdrawal, the Administrators would apply to court for directions in respect of the paragraph 56(1) request, including seeking a direction that the Administrators should not be obliged to seek a creditors' decision.

43 On 6 November 2017, Kirkland & Ellis responded to Linklaters' letter of 30 October 2017. The letter (exhibited at **pages 92 to 97**) reiterated Wentworth Sub-Debt's belief that the LBIE administration should be brought to a conclusion because, it was said, its continuation does not help achieve a better result for creditors as a whole compared with a winding-up commencing at this stage. The letter attempted (albeit, in the Administrators' view, unsatisfactorily) to respond to the substantive legal and factual obstacles identified in Linklaters' letter dated 30 October 2017.

44 In light of the refusal to withdraw the paragraph 56(1) request, on 10 November 2017 Linklaters responded to Kirkland & Ellis' 6 November 2017 letter noting that it failed adequately to deal with any of the legal and factual obstacles identified and stating that the Administrators remained of the view expressed throughout the

correspondence and publicly on the matter. Linklaters also set out responses to certain points raised in the Kirkland & Ellis letter, noting that they would post all correspondence on the LBIE website and prepare this Application. That letter appears at **pages 98 to 102**.

45 Later that same day, the Administrators posted an update on the LBIE website, setting out a summary of the matter and the correspondence to date, their continued intention not to accede to the paragraph 56(1) request without first seeking directions from the Court and noting their intention to issue this Application. The post is exhibited at **pages 103 to 107**.

46 On 14 November 2017, Kirkland & Ellis responded to Linklaters' letter of 10 November 2017, expressing the view that the letter contained no new points and confirming their instructions on behalf of Wentworth Sub-Debt to accept service of the Application. That letter is exhibited at **page 108**.

F. ISSUES FOR DETERMINATION

47 As set out in the correspondence, and as summarised above, the Administrators have identified several significant issues that arise in relation to Wentworth Sub-Debt's purported paragraph 56(1) request on which the Administrators seek a determination from the Court.

48 The first and most fundamental of these is whether the Administrators are obliged to comply with Wentworth Sub-Debt's purported paragraph 56(1) request in circumstances where the Administrators consider that the request would frustrate the achievement of the purpose of LBIE's Administration and/or not further the proper operation of the LBIE Administration (or the LBIE estate more generally) and that the request would therefore not be conducive to the aim of doing justice as amongst all parties interested in the LBIE estate.

49 The Administrators have been seeking to achieve the purpose of the Administration with the objective of achieving a better result for LBIE's creditors as a whole than would be likely if LBIE were wound up without it first being in administration. The Administrators believe that the distribution of the Surplus in payment of entitlements to Statutory Interest on proved debts would further achieve this objective, and that

the paragraph 56(1) request, which is designed to trigger the Statutory Interest Lacuna, would not further the proper operation of the Administration; on the contrary, it would run counter to it (not least where a liquidation at this stage would achieve a worse outcome for LBIE's creditors as a whole than concluding the distribution of the Surplus in the Administration). The potential loss to senior creditors of £5.29 billion of Statutory Interest entitlements, in the Administrators' opinion, would amount to an injustice which far outweighs any benefit to creditors which might arise from any supposedly swifter resolution that a liquidation might be said to offer. There are other disadvantages to putting LBIE into liquidation and, in the Administrators' view, no genuine advantage, and certainly none that justifies accepting the risks and disadvantages of such a step.

50 It seems to the Administrators (and Wentworth Sub-Debt have not suggested otherwise in their correspondence) that the only parties that might benefit from the proposed steps are the members of the Wentworth joint venture in their capacities as holders of the Sub-Debt and/or LBIE's shares[1]. Indeed, triggering the Statutory Interest Lacuna, in order to bring about those advantages that would benefit only Wentworth Sub-Debt and its associated entities, appears to be the sole motivation for the steps now being taken.

51 Given the importance of this first issue, the Court may wish to deal with it first, on an expedited basis. If the Court agrees with the Administrators' position, it will be unnecessary for the Court to decide any of the further issues, as set out below. If the Court wishes to deal with every issue raised by this Application at the same time, or in the event that the Court does not agree with the Administrators' position on the first issue, the further issues falling for determination are as follows.

52 The next issue for determination is whether the intended steps by Wentworth Sub-Debt to put LBIE into liquidation, thereby triggering the Statutory Interest Lacuna and increasing its recovery at the expense of those to whose claims the Sub-Debt is subordinated, breaches the terms of the Sub-Debt Agreements. Copies of the Sub-Debt Agreements are exhibited at **pages 109 to 159**.

53 Clauses 7(d) and (e) of the Sub-Debt Agreements provide that steps shall not be taken without the consent of the FSA to "*attempt to obtain repayment of the*

[1] The only other party that might benefit from a liquidation of LBIE is HMRC as a result of the adverse tax consequences of such a winding up.

Subordinated Liabilities otherwise than in accordance with the terms of this Agreement" or to "*take or omit to take any action whereby the subordination of the Subordinated Liabilities or any part of them to the Senior Liabilities might be terminated, impaired or adversely affected*". As outlined above at paragraph 22.2, the Supreme Court held in Waterfall I that the lodging of a proof in respect of the Sub-Debt prior to the payment in full of the Senior Liabilities (including statutory interest) is precluded by those two clauses.

54 The Administrators seek directions as to whether the steps currently sought by Wentworth Sub-Debt, the purpose of which is to cause the Sub-Debt and, thereafter, LBIE's shareholder (now, practically, the Wentworth joint venture) to be paid funds out of the Surplus which would otherwise be paid to unsecured creditors in the form of Statutory Interest, are prohibited by the subordination provisions in the Sub-Debt Agreements.

55 A further issue the Administrators have identified is whether a claim for which a creditor cannot prove until all prior ranking liabilities are paid (including Statutory Interest), in this case the Sub-Debt (see paragraph 22.2 above), can constitute a debt for which a proof can be delivered for the purposes of Rule 15.28(1)(a), whether such a liability can be claimed as "due" as required by Rule 15.28(3)(a) and whether such a claim entitles Wentworth Sub-Debt to vote in respect of any creditors' decision. In light of the Waterfall I Supreme Court Judgment, in particular the ruling as to the subordination of the Sub-Debt and the decision that the holder of the Sub-Debt cannot presently prove (see paragraph 22.2 above), the Administrators consider this to be an issue that, in light of the paragraph 56(1) request and Wentworth Sub-Debt's approach in the correspondence described above, requires determination by the Court.

56 The penultimate issue involves Wentworth Sub-Debt's standing to make the paragraph 56(1) request. I understand that the creditor or creditors who wish to make a paragraph 56(1) request must hold at least 10% of the total debts in the estate. The total admitted debts of LBIE (excluding the Sub-Debt) total some £12.31 billion; including the Sub-Debt, LBIE's total debts are therefore £13.55 billion. This excludes claims which have not yet been admitted, which may result in a higher level of total debts. The Sub-Debt, upon which Wentworth Sub-Debt bases its purported entitlement to request the seeking of a Creditors' decision, has a value of some £1.24 billion, i.e. less than 10% of LBIE's total debts. Wentworth Sub-Debt seeks to argue

that the creditors whose proved debts have received a dividend should be excluded from the total debts calculation to the extent of such dividends. The Administrators are not persuaded that there is any such requirement in the relevant provisions of the Act or the Rules and seek directions from the Court in respect of this issue.

57 The Administrators therefore seek directions as to whether the term "total debts", as it is used in paragraph 56(1) of Schedule B1 to the Act, excludes debts which have been repaid in full (or the portions of debts which have been partially repaid). The consequence of such debts being excluded may have a significant impact on the calculation of the "total debts" in the LBIE estate and whether Wentworth Sub-Debt holds the requisite 10%. The Administrators consider that the valuation of the Sub-Debt (and of claims more generally) for the purposes of voting and the ability to request that a creditors' decision be sought, should take place against the backdrop of the Sub-Debt plainly being payable only after the Statutory Interest on the claims already proved and paid.

58 The final issue the Administrators have identified is whether Wentworth Sub-Debt, by virtue of being a part of a joint venture including the 100% shareholder of LBIE, is a connected party such that Rule 15.34(2) is engaged. That rule provides that a creditors' decision "*is not made if those voting against it include more than half in value of the creditors to whom notice of the decision procedure was delivered who are not […] connected with [LBIE]*".

59 As described above at paragraph 3, LBHI2, the holder of 100% of the shares in LBIE, is a member of the Wentworth joint venture. Although a complex and opaque structure, the Administrators' understanding, based upon a publicly available document entitled "Summary of Certain Material Commercial Terms of Economics, Funding and Transfers" (the "**Joint Venture Summary**", available on the LBHI online docket, and exhibited at **pages 160 to 172**), is that LBHI2 initially held a third of the voting rights in the ultimate parent company of Wentworth Sub-Debt (see the structure chart, produced by Linklaters based on information derived from the Joint Venture Summary, exhibited at **page 173**, and item 15 of the Joint Venture Summary entitled "Corporate Governance" at **page 165** which lists the voting rights). This would appear to fall within the definition of "person with control" pursuant to section 435(10)(b) of the Act, in which case Wentworth Sub-Debt would be an "associate" of LBIE pursuant to section 435(6)(a) of the Act, such that it would be "connected" with LBIE pursuant to section 249(b) of the Act. The Administrators invite the Court to

determine whether Wentworth Sub-Debt is a connected party for the purposes of Rule 15.34(2).

G. REASONS FOR MAKING THE APPLICATION

60 In keeping with the approach they have taken throughout the LBIE Administration, the Administrators consider that they have a duty to seek resolution as expeditiously as possible of issues which arise in the estate.

61 The Administrators have considered the different options open to them in order to deal with the Statutory Interest Lacuna Issue. With a view to minimising costs incurred, the Administrators set out their position in detail, including the various factual and legal obstacles that they consider arise in respect of the paragraph 56(1) request, in the correspondence with Wentworth Sub-Debt (see **pages 79 to 102 and 108**). This was done in the hope that it would lead to a withdrawal of the paragraph 56(1) request. Such a withdrawal has not been forthcoming, and the Administrators have concluded that the most appropriate and expeditious approach is for the issue to be dealt with by way of an application for directions pursuant to paragraph 63 of Schedule B1 of the Act.

H. PROPOSED DIRECTIONS

62 The Administrators will give notice of this Application, once issued, to the general body of LBIE's creditors, by posting the Application and this statement on the LBIE website (which, as the Court will be aware, is the way in which the Administrators keep LBIE's creditors updated in relation to developments in the estate). In the event that any other party indicates that they wish to be heard on the Application, the Administrators will take steps to update the Court accordingly.

63 The Administrators do not consider that the Court will require significant (if any) further evidence in order to determine the issues on the Application.

64 Accordingly, and with a view to the swift resolution of the Application, the Administrators propose the listing of the trial of the Application at the earliest sensibly achievable opportunity. The Administrators have established that, as matters currently stand, the Court could accommodate a trial of the Application:

64.1 based on a time estimate of one day (in respect of just the first issue identified above) in February 2018 in the normal course or in January 2018 on an expedited basis; or

64.2 based on a time estimate of two to three days (if determining all the issues above) in late February or March 2018.

65 As mentioned above, the Court may wish to consider dealing with the first issue in the Application first, on an expedited basis, given that it is the most important issue and will, if decided in the Administrators' favour, make it unnecessary for the Court to determine the remainder of the issues in the Application.

66 The Administrators will seek to agree directions for the above procedural steps with the Respondent, instead of having to seek the Court's directions at an initial procedural hearing, with a view to the Application proceeding as efficiently as possible.

I. CONCLUSION

67 For the reasons set out above, the Court is respectfully requested to provide directions for the determination of the issues identified in the Application.

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

Dated 28 November 2017

.....

Russell Downs

Party: Applicant
Witness: Russell Downs
Statement No: 15
Exhibit: "RD15"
Date: 28 November 2017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

FIFTEENTH WITNESS STATEMENT OF

RUSSELL DOWNS

Linklaters LLP
One Silk Street
London EC2Y 8HQ
(Ref: Euan Clarke)

Tel: (+44) 20 7456 2000
Fax: (+44) 20 7456 2222
Solicitors for the Administrators