

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
Mr Justice Hildyard
Friday 4 November 2016



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

B E T W E E N :

**THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS
INTERNATIONAL (EUROPE) (IN ADMINISTRATION)**

Applicants

-and-

- (1) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS
LIMITED (IN ADMINISTRATION)**
- (2) THE JOINT ADMINISTRATORS OF LB HOLDINGS
INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)**
- (3) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS
EUROPE LIMITED (IN ADMINISTRATION)**
- (4) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS HOLDINGS PLC
(IN ADMINISTRATION)**

Respondents

ORDER

UPON THE APPLICATION of the Applicants (the “**LBIE Administrators**”) by Application Notice dated 22 April 2016 (the “**Waterfall III Application**”)

AND UPON THE APPLICATION of the First Respondents (the “**LBL Administrators**”) by Application Notice dated 17 October 2016 to join the Joint Administrators of Lehman Brothers Holdings plc (the “**LBH Plc Administrators**”) as respondents to the Waterfall III Application (the “**Joinder Application**”)

AND UPON THE CROSS APPLICATION of the LBL Administrators by Application Notice dated 17 October 2016 (the “**Cross Application**”)

AND UPON READING the evidence

AND UPON HEARING William Trower QC, Daniel Bayfield QC and Stephen Robins for the LBIE Administrators, Philip Marshall QC and Ruth den Besten for the LBL Administrators, Peter Arden QC and Louise Hutton for the Second Respondents (the “**LBHI2 Administrators**”), Felicity Toubé QC and Georgina Peters for the Third Respondents (the “**LBEL Administrators**”) and Stephen Atherton QC and Tony Beswetherick for the LBH Plc Administrators

IT IS ORDERED that:

Joinder Application

1. The LBH Plc Administrators shall be joined as fourth respondents to the Waterfall III Application.

Disclosure

2. The obligations on the parties to provide each other with copies of documents pursuant to paragraphs 4 to 9 of the order of the Court dated 24 June 2016 in the Waterfall III Application (the “**June Order**”) shall be extended, in the case of the LBIE Administrators, the LBL Administrators, the LBHI2 Administrators and the LBEL Administrators, to the provision of such documents to the LBH Plc Administrators. The documents provided by the LBL Administrators to the LBH Plc Administrators prior to the date of this Order shall be treated as having been disclosed pursuant to, and in satisfaction of the obligations of the parties under paragraphs 6 and 7 of, the June Order as extended by this Order.
3. Paragraphs 4 to 9 of the June Order shall apply to the LBH Plc Administrators, save that the LBH Plc Administrators shall not be required to provide documents to the other parties pursuant to those paragraphs prior to 10 January 2017.

June Order

4. Paragraphs 2, 3, 10, 11 and 13 to 16 of the June Order shall cease to have effect. The directions contained in paragraphs 10 and 11 of the June Order shall be considered at the PTR / CMC as provided for in paragraph [0] of this order.

Part A trial

5. The following further issue (the “**Issue 9 Preliminary Issue**”) shall be added to the Waterfall III Application in connection with Issue 9: “*Whether, as a matter of law, it is possible for a member of a company to enter into with that company an enforceable agreement which has the effect of enabling that member to avoid what would otherwise be its obligation to contribute to the assets of the company under section 74 Insolvency Act 1986 in the event of the company's winding up or otherwise to reverse the effect of that section (whether by claiming to be contractually entitled to reimbursement from that company in respect of such contributions or otherwise)*”.
6. Issues 1 to 8, 10 and 12 of the Waterfall III Application and the Issue 9 Preliminary Issue (together, the “**Part A Issues**”) shall be tried upon the basis of the assumptions set out in paragraph [7] of this order (without any concession being made by any party as to the correctness of those assumptions as a matter of fact) by Mr Justice Hildyard commencing on 30 January 2017 with a time estimate of 10 days including 2 days pre-reading.
7. The Part A Issues shall (save for the Issue 9 Preliminary Issue) be argued and decided on the basis of each of the following alternative assumptions (utilising the terms defined in the Waterfall III Application and below), namely that:
 - a) LBL is the legal and beneficial owner of a single share in LBIE and is not entitled to rectification of the share register;
 - b) LBL is entitled to rectification of the share register with the effect that the single share in LBIE currently registered in LBL’s name is:
 - (i) cancelled;

- (ii) registered in the name of Lehman Brothers Holdings Plc (“**LBH Plc**”); or
- (iii) registered in the name of LBHI2;
- c) LBL holds the single share in LBIE as nominee for LBH Plc and/or LBHI2 and is entitled to an indemnity from LBH Plc and/or LBHI2 (as appropriate) in respect of its liability under section 74 of the Insolvency Act 1986; or
- d) LBL is otherwise entitled to recharge its liabilities to LBH Plc (and/or LBIE, LBHI2 and/or LBEL), including its liability to make contribution to LBIE’s estate under section 74 of the Insolvency Act 1986.

Part B trial

- 8. The following further issue shall be added to the Waterfall III Application as Issue 14:
“Whether and to what extent LBL is entitled to recover from Lehman Brothers Holdings Plc sums paid or payable by it to LBIE in respect of a Contribution Claim”.
- 9. Issues 9, 11, 13 and 14 of the Waterfall III Application (the “**Part B Issues**”) shall be tried by Mr Justice Hildyard during September 2017 (the “**Part B trial window**”) with a provisional time estimate of three weeks including pre-reading by the Judge.
- 10. The LBIE Administrators shall make an appointment to attend on the Listing Officer (The Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL; Tel. 020 7947 6690; email rcjchancery.judgeslisting@hmcts.gsi.gov.uk) to fix a trial date within the Part B trial window, giving notice of the appointment to all other parties and to Mr Justice Hildyard’s clerk.

Part A PTR/Part B CMC

- 11. A pre-trial review in respect of Part A and a case management conference in respect of Part B (the “**PTR/CMC**”) shall take place before Mr Justice Hildyard on 16 January 2017 with a time estimate of one day.

Position papers

12. The LBL Administrators shall by 4.00pm on 11 November 2016 file and serve on the other parties a supplemental position paper clarifying their position in respect of those questions raised in the letter from Dentons UKMEA LLP dated 6 October 2016, to include the precise terms of the relief which the LBL Administrators seek in connection with the rectification of LBIE's share register to which LBL claims to be entitled and the parties against whom it is sought.
13. The LBIE Administrators, the LBHI2 Administrators and the LBEL Administrators shall, by 4.00pm on 18 November 2016, file and serve on the other parties and on each other position papers setting out in detail (i) their respective positions (insofar as they take any position) in respect of the Part A Issues and the Part B Issues and (ii) the basis upon which they adopt such positions, including references to the principal authorities which they anticipate, at that stage, relying upon at trial.
14. The LBH Administrators shall, by 4.00pm on 16 December 2016, file and serve on the other parties a position paper setting out in detail (i) their position (insofar as they take any position) in respect of each of the Part A Issues and (ii) the basis upon which they adopt such positions, including references to the principal authorities which they anticipate, at that stage, relying upon at trial.
15. The LBL Administrators shall, by 4.00pm on 30 December 2016, file and serve on the other parties a position paper in reply to the position papers filed pursuant to paragraphs [0] and [0] above.

Part A trial preparation

16. The parties' solicitors shall discuss and agree the index for the Part A trial bundle by 4.00pm on 23 December 2016.

17. The LBIE Administrators shall be responsible for preparing the Part A trial bundle and shall provide at least one copy to the other parties by no later than 10 January 2017. The LBIE Administrators shall further file a copy of the Part A trial bundle for the use of the Judge with the Chancery Listing Office by 4.00pm on 12 January 2017. The Part A trial bundle shall be used as the bundle for the PTR/CMC.
18. Skeleton arguments for the Part A trial shall be filed and exchanged by 4.30pm on 20 January 2017, and copies of all authorities mentioned in the skeleton arguments shall be provided to the LBIE Administrators' solicitors at the same time. The LBIE Administrators' solicitors shall then prepare a composite bundle of authorities, which shall be lodged at court and served on the other parties by 4.30pm on 24 January 2017.

Part B trial preparation

19. Further directions shall be given at the PTR/CMC in respect of:
 - a) The deadline for the service of a position paper on the Part B Issues by the LBH Plc Administrators;
 - b) The deadline for the service of a position paper by the LBL Administrators in reply thereto;
 - c) The deadline for the filing and exchange of witness statements in respect of the Part B trial; and
 - d) All other aspects of the pre-trial timetable in respect of the Part B trial.

Costs

20. Costs be costs in the Waterfall III Application.

Service of this Order

The Court has provided a sealed copy of this Order to the serving party:

Linklaters LLP, One Silk Street, London EC2Y 8HQ (ref: Euan Clarke; Jared Oyston)