

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**COMPANIES COURT**

No. 7942 of 2008

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

**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**BETWEEN**

**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**

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**SKELETON ARGUMENT ON BEHALF OF THE ADMINISTRATORS OF THE THIRD RESPONDENT (“LBEL”) FOR THE HEARING LISTED TO COMMENCE ON 30 JANUARY 2017**

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**References to the Trial Bundle are in the form: [Vol. No./Tab. No./Page No.].**

**Reading list if time permits:**

*Skeleton arguments*

(1) Skeleton arguments of the Applicants and First to Fourth Respondents;

*Waterfall III Application and Orders to date*

(2) Waterfall III Application Notice dated 22 April 2016 of Lehman Brothers International (Europe) (in administration) (“LBIE”) (the “**Waterfall III Application**”) [1/1];

(3) Ninth witness statement of Russell Downs dated 22 April 2016 [1/21];

(4) Order of Mr Justice Hildyard dated 24 June 2016 (the “**First CMC Order**”) [1/3];

(5) Order of Mr Justice Hildyard dated 4 November 2016 (sealed on 21 December 2016) (the “**Second CMC Order**”) [1/4];

(6) Order of Mr Justice Hildyard dated 16 January 2017 (the “**PTR Order**”) [1/5];

## *Position Papers*

- (7) Position Paper on behalf of the Administrators of the First Respondent, Lehman Brothers Limited (in administration) (“**LBL**”) dated 30 September 2016 (“**LBL 1**”) [1/14];
- (8) Supplemental Position Paper on behalf of the Administrators of LBL dated 11 November 2016 (“**LBL 2**”) [1/15];
- (9) Position Paper on behalf of the Administrators of LBIE dated 18 November 2016 (“**LBIE 1**”) [1/16];
- (10) Position Paper on behalf of the Administrators of the Second Respondent, LB Holdings Intermediate 2 Limited (in administration) (“**LBHI2**”) dated 18 November 2016 (“**LBHI2 1**”) [1/17];
- (11) Position Paper on behalf of the Administrators of LBEL dated 18 November 2016 (“**LBEL 1**”) [1/18];
- (12) Position Paper on behalf of the Administrators of Lehman Brothers Holdings Plc (“**LBH**”) dated 16 December 2016 (“**LBH 1**”) [1/19];
- (13) Reply Position Paper on behalf of the Administrators of LBL dated 30 December 2016 (“**LBL 3**”) [1/20].

### **A. Introduction**

1. This skeleton argument is lodged on behalf of the Joint Administrators of the Third Respondent, LBEL (the “**LBEL Administrators**”) for the trial of the Part A issues in the Waterfall III Application.
2. The Waterfall III Application is concerned with fourteen issues, in respect of which the Joint Administrators of LBIE (the “**LBIE Administrators**”) seek directions from the Court pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 (the “**IA 1986**”).
3. The issues relate, in summary, to:
  - 3.1. **Issues 1 to 4:** claims of LBIE against LBL and/or LBHI2, the registered shareholders of LBIE, under section 74 of the IA 1986 (a “**Contribution Claim**”) to contribute to the assets of LBIE to the extent necessary to enable LBIE to pay sums owed to LBHI2 pursuant to three subordinated loan agreements entered into on 1 November 2006 between LBHI2 and LBIE (the “**Sub-Debt**”);
  - 3.2. **Issues 5 and 6:** the operation of insolvency set-off in a distributing administration or liquidation of LBL and/or LBHI2 in respect of any cross-claims between those companies and LBIE and/or LBEL, in circumstances where insolvency set-off in the administrations of LBIE and LBEL took effect, respectively, on 4 December 2009 and 11 July 2012;
  - 3.3. **Issues 7, 8 and 13:** issues relating purely to the contribution and indemnity liabilities of LBL and LBHI2 in their capacity as registered shareholders of LBIE (including an issue as to the rectification of the share register of LBIE);

- 3.4. **Issue 9 (including the Issue 9 Preliminary Issue)<sup>1</sup> and Issue 11:** LBL’s alleged entitlement to recover three categories of sums from LBIE and/or LBEL (together, the “**Recharges**”);
  - 3.5. **Issue 12:** to the extent that LBL does have an entitlement to be paid the Recharges, the impact of any set-off occurring in LBIE’s administration as between (i) the Contribution Claim, and (ii) provable claims of LBL against LBIE, on LBL’s alleged entitlement to recover the amount of the Contribution Claim from LBEL;
  - 3.6. **Issue 10:** to the extent that LBL does have an entitlement to be paid the Recharges in respect of a Contribution Claim, the priority ranking as between LBL’s Recharge claim against LBIE in respect of the Sub-Debt Contribution Claim and LBHI2’s claim in respect of the Sub-Debt; and
  - 3.7. **Issue 14:**<sup>2</sup> LBL’s alleged entitlement to recover the Contribution Claim recharge from LBH.
4. The Court will recall that at the second CMC held on 4 November 2016:
    - 4.1. Issues 1 to 8, 10 and 12 of the Waterfall III Application and the Issue 9 Preliminary Issue (the “**Part A Issues**”) were directed to be heard during the “Part A Trial”, to be argued and decided on the basis of the alternative assumptions identified in the Second CMC Order, paragraph 7 [1/4].
    - 4.2. Issues 9, 11, 13 and 14 of the Waterfall III Application (the “**Part B Issues**”) were directed to be heard during a second, “Part B Trial” [1/4].
  5. In relation to the Part A Issues, LBEL has adopted a position on Issue 6 and Issue 12, in which it has a direct interest.
    - 5.1. There is one other Respondent which is directly interested in Issue 6 and Issue 12, namely the joint administrators of LBL (the “**LBL Administrators**”).
    - 5.2. However, in addition, the LBIE Administrators are directly interested in Issue 5, which is the “mirror issue” to Issue 6 (relating to the successive occurrence of insolvency set-off in the estates of LBIE and LBL). The joint administrators of LBHI2 are also directly interested in Issue 5.
  6. LBEL is also indirectly impacted by the outcomes of a number of the other issues arising in the Waterfall III Application. To avoid unnecessary duplication, no arguments are advanced in this skeleton argument in relation to such issues, and it is not currently

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<sup>1</sup> In the terms set out in paragraph 4 of the Second CMC Order.

<sup>2</sup> In the terms set out in paragraph 7 of the Second CMC Order.

expected that LBEL will make submissions on those issues at the hearing. However, LBEL reserves the right to make submissions in relation to other issues at the Part A Trial, but only if and insofar as LBEL is affected by those issues and the parties to which such issues directly relate fail comprehensively to do so.

## **B. Factual context**

7. On 14 March 2000, LBEL was incorporated as an English limited company. On 23 September 2008, LBEL entered into administration. The current LBEL Administrators are Dan Yoram Schwarzmann, Anthony Victor Lomas, Steven Anthony Pearson and Julian Guy Parr of PricewaterhouseCoopers LLP (“**PwC**”). For brevity, references to the LBEL Administrators’ position in this skeleton argument will be to LBEL’s position.
8. LBEL carried on the principal activity of the provision of investment banking and corporate finance services. It was authorised and regulated by the Financial Services Authority, and it also arranged derivatives transactions as agent for other members of the Lehman Group of companies.
9. LBEL remains in administration. On 11 July 2012 the LBEL Administrators gave notice to creditors pursuant to rule 2.95 of the Insolvency Rules 1986 (the “**IR 1986**”) of their intention to make a distribution to creditors.<sup>3</sup>
10. On 15 September 2008 LBL entered into administration. The current LBL Administrators are Michael John Andrew Jervis and Zelf Hussain of PwC. On 8 July 2014 the LBL Administrators gave notice of a proposed distribution to creditors pursuant to rule 2.95 of the IR 1986.<sup>4</sup>
11. LBIE was an unlimited company and was authorised and regulated by the Financial Services Authority. On 15 September 2008 LBIE entered into administration. The current LBIE Administrators are Anthony Victor Lomas, Steven Anthony Pearson, Julian Guy Parr and Russell Downs of PwC.<sup>5</sup>

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<sup>3</sup> See further the most recent progress report of the LBEL Administrators for the period 23 March 2015 to 22 September 2015 at [2/1/121 to 131]. The distributions made to date out of the LBEL estate, and the accrual of the LBEL surplus, are addressed at Sections 1 and 2 of the LBEL progress report: [2/1/124 to 127].

<sup>4</sup> See further the most recent progress report of the LBL Administrators for the period 15 September 2015 to 14 March 2016 at [2/1/90 to 109]. The distributions made to date out of the LBL estate are addressed at Section 2.3 of the LBL progress report: [2/1/99].

<sup>5</sup> See further the most recent progress report of the LBIE Administrators for the period 15 September 2015 to 14 March 2016 at [2/1/35 to 71].

12. LBIE also remains in administration. On 4 December 2009 the LBIE Administrators also gave notice of a proposed distribution to creditors pursuant to rule 2.95 of the IR 1986: see Downs 1, paragraph 10 [1/21/3].<sup>6</sup>
13. A number of cross-claims have been asserted between the parties, giving rise to issues of insolvency set-off as between LBEL and LBL and as between LBIE and LBL. Issues 6 and 12 principally concern the proper treatment of the claims asserted as between LBIE, LBEL, and LBL, in circumstances in which those claims have been, or would have been, subject to insolvency set-off.
14. Each of LBIE, LBEL and LBL has lodged a proof of debt in the estate of each other entity (albeit the cross-claims between LBEL and LBIE have since been resolved):
- 14.1. On 21 December 2011 LBL submitted a proof of debt in LBIE's estate in the sum of around £363 million. A copy of that proof is at [2/1/151 to 166].
- 14.2. On 31 August 2012, LBL submitted a proof of debt in LBEL's estate in the sum of around £243 million, in respect of the intercompany balance between LBL and LBEL as at 15 September 2008 and the recharge of certain matters not included in the intercompany balance (the "**Original Proof of Debt**"). A copy of the Original Proof of Debt is at [2/1/192 to 193].
- 14.3. On 9 September 2014, LBEL also submitted a proof of debt in LBL's estate in the sum of around £447 million, reflecting LBEL's assessment of the net balance owed to it by LBL following the reversal of certain inter-company debts (the "**LBEL Proof of Debt**"). The LBEL Proof of Debt has not yet been adjudicated upon by the LBL Administrators. A copy of the LBEL Proof of Debt is at [2/1/196 to 197].
- 14.4. On 31 October 2014, LBIE submitted a claim for £10.4 billion in LBL's administration. This claim includes the LBIE Administrators' estimation of LBL's contingent liability under the Contribution Claim (being the LBIE Administrators' prudent assessment of LBL's contingent liability to LBIE as a contributory under section 74 of the IA 1986: see Downs 1, paragraphs 23 and 25 [1/21/7]). A copy of that claim is at [2/1/137 to 146].
- 14.5. On 23 September 2015 LBL requested leave of the LBEL Administrators to amend its proof of debt to around £4.9 billion (the "**Revised Proof of Debt**") to claim a recharge of, amongst other things:

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<sup>6</sup> The distributions made to date out of the LBIE estate, and the accrual of the LBIE surplus, are addressed in Downs 1, paragraph 10 [1/21/3].

- 14.5.1. LBIE's estimated Contribution Claim against LBL in the sum of £10 billion, the alleged recharge to LBEL being valued at £4.5 billion;
- 14.5.2. bad debt claims valued at £399 million, in respect of the unrecovered balance of claims made by LBL in the insolvent estates of other entities within the Lehman Group, where a dividend of less than 100 pence in the pound is anticipated to be received by LBL (the "**Bad Debt Claims**"); and
- 14.5.3. administration expenses incurred by LBL, in the amount of £22 million (the "**Administration Expenses**").

A copy of the Revised Proof of Debt is at [2/1/194 to 195].

15. On 23 September 2015 LBL requested leave of the LBIE Administrators to amend its proof of debt in the LBIE estate to around £10.934 billion to claim a recharge of, amongst other things:
  - 15.1. LBIE's estimated Contribution Claim against LBL in the sum of £10 billion;
  - 15.2. Bad Debt Claims valued at £535 million; and
  - 15.3. Administration Expenses in the amount of £30 million;
  - 15.4. Sums payable in respect of a claim by Canary Wharf Group, the landlord of the Lehman Brothers group's former European headquarters at 25 Bank Street;
  - 15.5. Further alleged recharge claims.

A copy of the amended proof of debt in the LBIE estate is at [2/1/170 to 172].

16. On 12 November 2015, the LBEL Administrators consented to LBL's request to amend the Original Proof of Debt. LBL's Revised Proof of Debt has not, however, been adjudicated upon by the LBEL Administrators, pending a resolution of the issues raised by this application.
17. On 6 April 2016, the LBIE Administrators consented to LBL's request to amend its proof of debt in the LBIE estate (which has also not yet been adjudicated upon by the LBIE Administrators). A copy of the letter confirming this is at [2/1/173].
18. Following three interim dividends paid to the creditors of LBEL on, respectively, 9 November 2012, 13 November 2013 and 24 September 2014, the admitted creditors of LBEL received dividends totalling 100 pence in the pound.
19. The present position is that the LBEL Administrators are in possession of a surplus in the sum of approximately £275 million (the "**LBEL Surplus**"), which would, in the absence of the matters described above, be paid in the first instance, to discharge the statutory

interest entitlements of creditors holding admitted, unsecured claims (currently estimated to amount to approximately £36 million), with the balance being distributed to LBEL's sole shareholder (LBH). As a result, the issues raised in the Waterfall III Application are the only matters that are currently (based on the status of the law as decided thus far in the other Waterfall applications) preventing the LBEL Administrators from concluding distributions to creditors. The LBEL Surplus cannot be distributed to the unsecured creditors or shareholder of LBEL until these issues have been resolved.

20. The LBEL Proof of Debt also remains to be adjudicated upon by the LBL Administrators.

### **C. The Factual Assumptions**

21. By the Second CMC Order, paragraph 7, it was directed that the Part A Issues are to be tried upon the basis of the following, alternative assumptions [1/4]:

21.1.LBL is the legal and beneficial owner of a single share in LBIE and is not entitled to rectification of the share register ("**Assumption 1**");

21.2.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 LBH; or
- (iii) registered in the name of LBHI2;

("Assumption 2");

21.3.LBL holds the single share in LBIE as nominee for LBH and/or LBHI2 and is entitled to an indemnity from LBH and/or LBHI2 (as appropriate) in respect of its liability under section 74 of the IA 1986 ("**Assumption 3**"); or

21.4.LBL is otherwise entitled to recharge its liabilities to LBH (and/or LBIE, LBHI1 and/or LBEL), including its liability to make contribution to LBIE's estate under section 74 of the IA 1986 ("**Assumption 4**").

22. The effect of the above assumptions on Issue 6 is as follows:

22.1.Issue 6 asks whether, in circumstances where insolvency set-off in the administration of LBEL took effect on 11 July 2012, insolvency set-off in a subsequent distributing administration or liquidation of LBL is of any application in respect of LBL's claims against, and liabilities to, LBEL.

22.2.Assumptions 1 to 3 impact or may impact on the existence and the quantum of LBL's liability to LBIE under section 74 of the IA 1986, and consequently, on (i) the *existence*

of a recharge claim by LBL against LBEL in respect of the Contribution Claim, and (ii) the *quantum* of LBL's total claims against LBEL. However, on any of the alternative assumptions, it is assumed that LBL will still assert claims against LBEL (under the Original Proof of Debt and/or under the Bad Debt Claim and/or the Administration Expenses). Issue 6 thus requires determination on each of Assumptions 1 to 3, and each of those assumptions does not affect the issue of principle to be resolved under Issue 6.

22.3. Assumption 4 impacts on the existence of LBEL's liability to LBL under each of the Recharge claims. As between LBEL and LBL, the validity of the Recharge claims are a matter of dispute and this dispute is to be determined in the Part B Trial under Issue 11. LBEL's position is that LBL has no entitlement to be paid the Recharges, whether on the bases alleged by LBL or otherwise. The effect of Assumption 4 is that Issue 6 is to be determined on the assumption that LBL is entitled to claim the Recharges from LBEL (such that the cross-claims subject to the insolvency set-off must be assumed to include the Recharge claims).

23. The effect of the above assumptions on Issue 12 is as follows:

23.1. Issue 12 asks whether, if the answer to Issue 11(i), 11(ii) or 11(iii) would otherwise be in the affirmative, it is impacted (and if so, to what extent) by any set-off occurring in LBIE's administration as between (i) the Contribution Claim, and (ii) provable claims of LBL against LBIE.

23.2. Issue 12 is therefore framed in terms such that it is itself dependent on one or more of the Recharge claims being recoverable from LBEL. Accordingly, Assumption 4, which states that LBL is entitled to recover the Recharge claims from (*inter alia*) LBEL, is an assumption which falls to be made in answering Issue 12 in any event (and without prejudice to the dispute between LBEL and LBL as to the validity of the Recharge claims, which as above, will be determined at the Part B Trial under Issue 11).



#### **D. Issue 6**

**“In circumstances where insolvency set-off in the administration of LBEL took effect on 11 July 2012, whether insolvency set-off in a subsequent distributing administration or liquidation of LBL is of any application in respect of LBL’s claims against, and liabilities to, LBEL”.**

24. It is agreed between LBEL and LBL that the Court should make a declaration in relation to this issue. LBEL has suggested the making of a declaration in the following terms (and the response of the parties, including in particular LBL, is awaited as to the proposed wording): “In circumstances where insolvency set-off in LBEL’s administration took effect on 8 July 2014, insolvency set-off in a distributing administration or liquidation of LBL is of no application in respect of LBL’s claim against, and liabilities to, LBEL which went into the set-off account in LBEL’s administration. However, this conclusion is without prejudice to the ability to re-draw the balances in the set-off account on the basis of the hindsight principle.”
25. Nevertheless, it is accepted that the Court must be satisfied that this declaration should be made. It is submitted that the Court can be so satisfied for the reasons below.
26. Issue 6 arises in the following factual circumstance. As addressed in Section B above, each of LBIE, LBEL and LBL is presently in a distributing administration:
- 26.1. In each administration the notice of proposed distribution under rule 2.95 of the IR 1986 occurred on different dates.
- 26.2. As a result, the date on which insolvency set-off under rule 2.85 of the IR 1986 took effect in the estate of each such entity is different, being (in each case) the date of the notice under rule 2.95 (see rule 2.85(3) of the IR 1985).
27. Like Issue 5, this issue raises no issue of fact, but rather a narrow point of legal principle, arising by reason of insolvency set-off having taken effect in the distributing administration of each of LBEL and LBL at different times.
28. Issue 6 concerns the impact of insolvency set-off (if any) in LBL’s administration (which took effect on 8 July 2014), on the cross-claims between LBL and LBEL, in circumstances where insolvency set-off had already taken effect in LBEL’s administration on the earlier date of 11 July 2012.
29. As a result of the insolvency set-off occurring in LBEL’s administration prior to the date on which it occurred in LBL’s administration, the question of what impact the subsequent

insolvency set-off (in LBL's administration) will have on the parties' cross-claims will arise in circumstances in which:

- 29.1. such claims as are to be admitted in LBEL's estate under the Revised Proof of Debt (of LBL, against LBEL) and LBEL's cross-claims against LBL (being those currently identified in the LBEL Proof of Debt in LBL's estate), were the subject of the mandatory insolvency set-off in the LBEL administration under rule 2.85 of the IR 1986 (which took effect on 11 July 2012); and
  - 29.2. in the distributing administration of LBL, the LBL Administrators are required to adjudicate upon any claims of LBEL against LBL (whether under the LBEL Proof of Debt, or otherwise).
30. The prior insolvency set-off in the administration of LBEL is automatic and self-executing, giving rise to a net claim in favour of either entity: see *Stein v Blake* [1996] AC 243, 253B to 254H; 255A to 255G *per* Lord Hoffmann.
31. It is perhaps useful to consider two alternative scenarios:
- 31.1. Scenario A: if the statutory balance (under rule 2.85(8) of the IR 1986) gave rise to a net claim by LBEL against LBL, the LBEL Administrators will continue to prove in respect of the net claim in any subsequent distributing administration or liquidation of LBL (on the assumption that the cross-claims which were the subject of the set-off occurring on 11 July 2012 already encompassed all other claims which each of LBEL and LBL would lodge in the other entity's estate). There will therefore subsist no further claim of LBL against LBEL (as of 11 July 2012), and consequently no cross-claim of LBL against LBEL which could be subject to any insolvency set-off occurring in the LBL administration on 8 July 2014.
  - 31.2. Scenario B: if, however, the statutory balance is such that LBL is a net creditor of LBEL, then any provable claims of LBEL against LBL will have been discharged in the LBEL administration (as of 11 July 2012), such that LBEL will possess no subsisting cross-claim against LBL which could be subject to any insolvency set-off occurring in the LBL administration on 8 July 2014.
32. In each scenario, no issue of set-off will arise in any subsequent distributing administration or liquidation of LBL, a net claim accruing to either LBEL or LBL as of 11 July 2012. If, for example, Scenario A were to occur giving rise to a net claim in favour of LBEL, then the LBL Administrators will be precluded from setting-off LBL's alleged claims against LBEL against LBEL's net claim, as those claims will already have been taken into account

and discharged in full by the operation of insolvency set-off in LBEL's estate on 11 July 2012.

33. Consequently:

33.1. the operation of insolvency set-off in LBEL's administration, to the extent that it gives rise to a statutory balance as between LBEL's claims against, and liabilities to, LBL (the "**LBEL Set-off**"), has the effect that the subsequent operation of insolvency set-off in LBL's administration cannot alter, disturb or affect the impact of the LBEL Set-off on the underlying claims of LBEL against LBL and the underlying claims of LBL against LBEL; and

33.2. insolvency set-off in LBL's administration is of no application in respect of the underlying claims of LBEL against LBL and the underlying claims of LBL against LBEL, to the extent that those claims were mutual claims already falling within the set-off account in LBEL's administration.

34. There is no dispute between LBEL and LBL in relation to this issue: see LBL 1, paragraphs 130 to 132 [1/14/46]; LBEL, paragraphs 16 to 26 [1/18/7]; LBL 3, paragraph 2.5 [1/20/3].

35. It is also understood that there is no dispute between LBIE, LBHI2 and LBL in relation to the "mirror" issue which arises under Issue 5: see LBL 1, paragraphs 130 to 132 [1/14/46]; LBL 3, paragraph 2.5 [1/20/3]; LBIE 1, paragraphs 32 to 35 [1/16/15 to 16]; LBHI2 1, paragraph 5 [1/17/9].

36. In relation to the points made in paragraph 131 of LBL 1 as to the hindsight principle, these are correct statements of law, but are irrelevant to this issue. The hindsight principle<sup>7</sup> could result in the re-drawing of balances in the set-off account in LBEL's administration, such that the statutory balance might be adjusted as a result, but it would not have any bearing on a *subsequent* insolvency set-off in the distributing administration or liquidation of LBL. To the extent that information becomes available to the LBEL Administrators requiring them to revise the quantum of any estimated debt applied for the purposes of insolvency set-off, this constitutes an action required to be taken by the LBEL Administrators in the LBEL administration, and has no import on the operation of insolvency set-off in LBL's estate.

37. The Court is therefore asked to make the declaration sought.

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<sup>7</sup> As most recently explained by Mr Justice David Richards in *In re MF Global UK Ltd (in special administration) (No 2)* [2013] Bus LR 1030 at paras 48 to 54; see also *Stein v Blake* [1996] AC 243, 252 *per* Lord Hoffmann; *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147 at para 32 *per* Lord Hoffmann.

## E. Issue 12

**“If the answer to the question set out at sub-paragraph 11(i), 11(ii) or 11(iii) above would otherwise be in the affirmative, is it impacted (and if so, to what extent) by any set-off occurring in LBIE’s administration as between (i) the Contribution Claim; and (ii) provable claims of LBL against LBIE”.**

38. It is agreed between LBEL and LBL that the Court should make a declaration in relation to this issue. LBEL has suggested the making of a declaration in the following terms (and the response of the parties, including in particular LBL, is awaited as to the proposed wording): “If and to the extent that LBL is entitled, under the terms of the Service Agreement between LBL and LBEL dated 20 May 2004 or otherwise, to recover from LBEL (i) sums paid or payable by it to LBIE in respect of a Contribution Claim, (ii) Bad Debt Claims claimed by LBL, and/or (iii) certain expenses of LBL’s administration, any such entitlement to recover such sums from LBEL is not impacted by any set-off occurring in LBIE’s administration as between (i) the Contribution Claim; and (ii) provable claims of LBL against LBIE.”
39. Again, the Court needs to be satisfied that the declaration should properly be made. It is submitted that the Court can be so satisfied.
40. This issue raises a point of legal principle as to whether LBL’s alleged Recharge claims against LBEL (including its alleged recharge claim in respect of the Contribution Claim) is affected by the operation of insolvency set-off in LBIE’s administration as between the Contribution Claim and any provable cross-claims of LBL.
41. It is premised on the existence (contrary to LBEL’s case) of LBL’s entitlement to be paid the alleged Recharge in respect of the Contribution Claim (i) from both LBIE and LBEL, and (ii) in identified proportions as between, *inter alia*, LBIE and LBEL (whether on the 55 per cent./41 per cent. allocation applied by LBL in its revised proofs, or otherwise).
42. This issue arises in circumstances where (i) on the one hand, the Contribution Claim (amongst other claims by LBIE against LBL),<sup>8</sup> and (ii) on the other hand, provable claims of LBL against LBIE, including its alleged recharge in respect of the Contribution Claim, were subject to the operation of insolvency set-off on 4 December 2009 in LBIE’s estate.
43. It gives rise to the question of whether, to the extent that LBL’s gross claim to recharge the Contribution Claim is discharged by set-off in LBIE’s estate, and where LBIE’s own cross-claims comprise and/or include its Contribution Claim against LBL, a corresponding

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<sup>8</sup> As mentioned above, on 31 October 2014 LBIE submitted a claim for £10.4 billion in LBL’s administration, of which the Contribution Claim represents £10 billion.

reduction ought to apply in the amount of the Contribution Claim recharge which LBL alleges is payable by LBEL.

44. It is LBEL's case that no such reduction ought to apply, such that this issue should be answered in the negative. The incidence of set-off in LBIE's administration in respect of LBL's claim to recharge the Contribution Claim, is irrelevant to the question of whether LBEL is contractually required to reimburse LBL in respect of the Contribution Claim.
45. There is no dispute between LBL and LBEL in relation to this issue: see LBL 1, paragraphs 137 to 140 [1/14/48 to 49]; LBEL, paragraphs 27 to 32 [1/18/9 to 10]; LBL 3, paragraph 2.8 [1/20/3].<sup>9</sup> LBH has also expressed agreement with the above position: see LBH 1, paragraphs 43 and 44 [1/19/19].
46. The Court is therefore asked to make the declaration sought.

**FELICITY TOUBE QC**  
**GEORGINA PETERS**  
**23 January 2017**

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<sup>9</sup> As was foreshadowed in the letter from Linklaters LLP dated 8 June 2016 on behalf of the Joint Administrators of LBEL, paragraph 3.4.