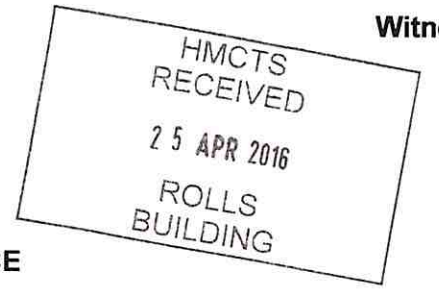
Party: Applicant
Witness: Russell Downs
Statement No: 9
Exhibit: "RD9"
Date: 22 April 2016



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:

(1) 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)

Respondents

NINTH 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 "**LBIE 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 LBIE Administrators pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 (the "**Act**"), as described below (the "**Application**").

3 There are three sets of Respondents to the Application, being the respective joint administrators of:

3.1 Lehman Brothers Limited ("**LBL**");

3.2 LB Holdings Intermediate 2 Limited ("**LBHI2**"); and

3.3 Lehman Brothers Europe Limited ("**LBEL**"),

(the "**Respondents**").

Lehman Brothers Holdings, Inc., ("**LBHI**") has requested that the LBIE Administrators name it as a respondent to the Application. However, the LBIE Administrators have not done so on the basis that they are not persuaded that LBHI is a necessary respondent to the Application nor that LBHI would satisfy the requirement for being joined as a party under Civil Procedure Rule 19.2(2) (see correspondence at **pages 415-487**).

4 The directions sought in the Application (which we refer to as the "**Waterfall III**" application) have been the subject of correspondence with the Respondents named in the Application. The drafting of the Application reflects specific comments received from LBHI2 and LBEL. Whilst LBL has not provided specific comments on the Application itself, the LBIE Administrators have included in the Application issues which they understand, based on the correspondence referred to above, to be of importance to LBL.

5 I make this statement in order to provide the relevant background to the Court for the purpose of an initial hearing in relation to the Application at which procedural directions will be sought. Although several of the issues are largely matters of law, it is likely that further evidence will be required in respect of certain of the issues to assist in their determination (particularly in relation to Issues 9-13).

6 There is now produced and shown to me a paginated bundle of documents and correspondence marked "**RD9**", to which I shall refer. Save where otherwise stated, page references in this statement are to the contents of RD9 which appears as an exhibit to this statement. References to a "Rule" are to a rule provided for in the Insolvency Rules 1986. References to a "Section" are to a section of the Insolvency Act 1986. Terms capitalised but not otherwise defined have the meaning given to them in the Application.

7 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 LBIE Administrators are entitled and no such privilege is waived.

A. BACKGROUND

8 LBIE was the principal trading company within the European group of Lehman Brothers companies and is an English unlimited company. LBIE was authorised and regulated by the Financial Services Authority. According to Companies House and LBIE's share register, LBL and LBHI2 are the only shareholders of LBIE. LBL owns one ordinary share of $1. LBHI2 owns:

8.1 2 million 5% redeemable Class A preference shares of $1000 each;

8.2 5.1 million 5% redeemable Class B shares of $1000 each; and

8.3 6,273,113,999 ordinary shares of $1 each in LBIE.

A copy of LBIE's current Articles and Memorandum of Association appears at **pages 1 to 24**. A copy of LBIE's share register is at **pages 25 to 34**.

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

10 On 2 December 2009, the High Court of Justice made an order granting permission for the LBIE Administrators to make a distribution to creditors and on 4 December 2009 the LBIE Administrators gave notice to creditors pursuant to Rule 2.95 of their intention to distribute. On 30 April 2014, the LBIE 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. There is a surplus in LBIE's estate after the payment in full of the proved claims of all general unsecured creditors (the "**Surplus**"). The Progress Report of the LBIE Administrators dated 12 April 2016 (for the period 15 September 2015 to 14 March 2016) (the "**LBIE Progress Report**") shows cash and cash equivalent balances (after having paid admitted claims in full) of £6.52bn and estimates that, subject to a number of important assumptions, the Surplus will ultimately be c.£6.6bn in a low case scenario and c.£7.8bn in a high case scenario. However, as explained further in this statement, in some scenarios the claims for post-administration interest, non-provable claims and subordinated debt claims against LBIE in respect of the Surplus will exceed the amount of the Surplus such that LBIE would wish to make claims against its unlimited liability members, LBHI2 and LBL, under Section 74. The LBIE Progress Report is at **pages 35 to 71.**

11 LBL is an English limited company. It is a shareholder of LBIE as set out at paragraph 8 above. It was the service company for the operations of the Lehman Brothers group of companies in the UK, Europe and Middle East, holding most of the service contracts and employee contracts for UK companies within the Lehman Brothers group as well as buying in services specifically for other affiliates. LBL also maintained IT systems and provided infrastructure support to the European group of Lehman Brothers companies. Furthermore, it was the head lessee for the Lehman Brothers group's European headquarters at 25 Bank Street, London, as well as the "Group Paying Agent" for UK corporation tax, the "Representative Member" for the Lehman Group VAT registration, and the "Principal Employer" under the Lehman Brothers UK Pension Scheme. LBL also provided a payroll service in relation to LBL employees seconded to other Lehman Brothers group companies and an invoice payment service (such payroll costs and invoices themselves were recharged by LBL to the relevant Lehman Brothers group company at cost). LBL charged other Lehman Brothers group companies for the costs of the services it provided with a 10% mark-up, and services agreements were put in place between LBL and various of the UK group companies including LBIE. The relevant services agreements which, to the LBIE Administrators' knowledge, were in effect as at LBIE's entry into administration are at **pages 72 to 89**.

12 On 20 June 2014, the High Court of Justice made an order granting permission for the LBL Administrators to make a distribution to creditors and on 8 July 2014 the LBL Administrators gave notice to creditors pursuant to Rule 2.95 of their intention to distribute. Its current administrators are Michael John Andrew Jervis and Zelf Hussain (the "**LBL Administrators**").

13 The LBL Administrators' Progress Report (for the period 15 September to 14 March 2016) (the "**LBL Progress Report**") states that they have paid a dividend of 100 pence in the pound to former employees with preferential unsecured claims (comprising claims for unpaid wages and holiday pay) and a first interim dividend in December 2014 of 1.66 pence in the pound to ordinary unsecured creditors with proved claims. The LBL Progress Report is at **pages 90 to 109**.

14 LBHI2 is an English limited company. It is an intermediate holding company which holds shares in LBIE as set out at paragraph 8 above. LBHI2 was the immediate lender to LBIE of certain subordinated debt as explained below at paragraph 26.3. LBHI2 had no other business of which I am aware.

15 LBHI2 entered into administration on 14 January 2009. Its current administrators are Anthony Victor Lomas, Steven Anthony Pearson, Derek Anthony Howell, Julian Guy Parr and Gillian Bruce (the "**LBHI2 Administrators**"). LBHI2's administration is not presently a distributing administration. The LBHI2 Administrators' latest progress report (for the period 14 July 2015 to 13 January 2016) (the "**LBHI2 Progress Report**") is at **pages 110 to 120**. The LBHI2 Administrators have not yet sought permission to make distributions to LBHI2's creditors.

16 LBEL is an English limited company. LBEL's principal activity was the provision of investment banking and corporate finance services. It also arranged derivatives transactions as agent for other Lehman Brothers companies. It used employees seconded from LBL and was authorised and regulated by the Financial Services Authority.

17 LBEL entered into administration on 23 September 2008. Its current administrators are Dan Yoram Schwarzmann, Anthony Victor Lomas, Steven Anthony Pearson and Julian Guy Parr (the "**LBEL Administrators**"). On 25 June 2012, the High Court of Justice made an order granting permission for the LBEL Administrators to make a distribution to creditors and on 11 July 2012 the LBEL Administrators gave notice to creditors pursuant to Rule 2.95 of their intention to distribute. On 23

September 2014, the LBEL Administrators paid a third, final interim dividend in respect of the proved claims of unsecured creditors, which took the aggregate dividends paid to LBEL's general unsecured creditors with proved claims to 100 pence in the pound in respect of such claims. The LBEL Administrators' latest progress report (for the period 23 September 2015 to 22 March 2016) is at **pages 121 to 131**.

18 In addition to the substantial sums of cash and cash equivalents held in LBIE noted above:

18.1 according to the LBL Progress Report, LBL holds £293m;

18.2 according to the LBHI2 Progress Report, LBHI2 holds £701m; and

18.3 according to the LBEL Progress Report, after having paid admitted creditor claims in full, LBEL holds £274m.

Due to the interrelationships among the Respondents and also with their intermediate holding company Lehman Brothers Holdings plc ("**LBH**"), these cash balances cannot be distributed until a resolution is obtained in relation to the matters addressed in the Application together with those in the other Waterfall proceedings (discussed in Sections D and E below) and in one further set of proceedings to determine a material third party claim in LBL (discussed at paragraph 26.2.4 below).

19 However, once these matters are resolved, and depending on that resolution, the majority of the cash balances will move among these entities. Any residual cash following the payment of dividends to the entities' creditors will flow up the group to holding companies above LBH. In the meantime, these material sums of cash remain held at or below the LBH level, earning an immaterial interest return, with each of estates unable to be resolved.

20 Therefore, whilst LBL and LBIE have unrelated material matters which will drive their estimated final outcomes, the issues raised in this Application, unless resolved expeditiously, are likely materially to delay the ultimate conclusion of the administrations of the parties to the Application.

B. THE PARTIES' CLAIMS

21 The issues in the Application principally concern the proper treatment (but not determination or quantification, save in respect of issues 9 and 11) of the various claims the parties to the Application have filed in each other's administrations. In this section I set out the current status of those claims.

22 On 22 July 2014, LBHI2 submitted a proof of debt in the administration of LBL in the sum of £257m (which the LBIE Administrators understand to be in respect of the intercompany balance between LBHI2 and LBL as at 15 September 2008). A copy of that proof is at **pages 132 to 135**.

23 On 31 October 2014, LBIE submitted a claim for £10.4bn in LBL's administration, which includes a £10bn figure which is the LBIE Administrators' prudent assessment of LBL's contingent liability to LBIE as a contributory under Section 74. A copy of that claim is at **pages 136 to 145**.

24 On 7 November 2014, LBIE asserted a £10bn claim against LBHI2 in respect of LBHI2's contingent liability to LBIE as a contributory under Section 74. A copy of that claim is at **pages 146 to 147**.

25 LBIE's contingent claim under Section 74 in the amount of £10bn as included in its proofs against LBL and LBHI2 is based on the LBIE Administrators' prudent assessment of potential claims against the Surplus. Depending on the eventual amount of the Surplus and the outcomes of the Waterfall I and Waterfall II applications (described in more detail below at Sections D and E respectively) there is a range of potential outcomes, including scenarios in which the Surplus is insufficient to meet the remaining claims against LBIE such that LBIE would wish to make claims against its unlimited liability members, LBHI2 and LBL, under Section 74. The LBIE Progress Report (at **page 50**) sets out an illustrative high cost of funding case Contribution Claim of £1.3bn. However, a number of issues in the Waterfall applications have the potential to impact materially the quantum of claims against the Surplus and, at their upper levels (including a number of existing decisions being overturned on appeal), their combined effect could result in a Contribution Claim exceeding £10bn.

26 LBL and LBHI2 have submitted proofs of debt in LBIE's administration as follows:

26.1 On 21 December 2011 LBL submitted a proof of debt for an unsecured claim of around £363m. Whilst the LBIE Administrators have not yet

adjudicated upon this claim, they have informed LBL of their view that LBL is not a creditor of LBIE and in fact owes LBIE between c.£67m and c.£88m (before any adjustment required in light of the issues addressed in the Application), and are awaiting feedback from LBL in this regard. To the extent that it is not possible through further discussion to reach agreement on this point, it may be that the Application will need to be amended in due course to include issues relating to the intercompany position between LBIE and LBL. A copy of that proof is at **pages 148 to 166**;

26.2 On 23 September 2015 LBL requested leave of the LBIE Administrators to amend its proof of debt to £10.934bn (the "**Amended LBL Proof**") to claim a recharge of, amongst other things:

26.2.1 LBIE's estimate of LBL's contingent liability to LBIE as a contributory under Section 74 in the amount of £10bn;

26.2.2 administration expenses incurred by LBL, in the amount of £30m;

26.2.3 the unrecovered balance of claims made by LBL in the insolvent estates of other Lehman Brothers entities, where a dividend of less than 100p in the pound is expected, in the amount of £535m;

26.2.4 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; and

26.2.5 further purported recharges.

The letter in which LBL sought the LBIE Administrators' permission to amend its proof is at **pages 167 to 168**. A copy of the Amended LBL Proof is at **pages 169 to 171**. On 6 April 2016, the LBIE Administrators confirmed their consent (to the extent such consent was required) to LBL's request to amend its proof (see letter at **page 172**); and

26.3 On 24 April 2012 LBHI2 submitted a proof of debt for an unsecured claim of around £38m and for an unsecured subordinated claim in respect of sums advanced to LBIE under three subordinated debt agreements dated 1 November 2006 in the amount of around £1.254bn (the "**Sub-Debt**"). A copy of LBHI2's proof of debt in LBIE's administration is at **pages 173 to 186**.

27 On 23 September 2015, LBL submitted a proof of debt in LBHI2's estate in the sum of £10bn, in respect of a recharge of LBIE's estimate of LBL's contingent liability to LBIE as a contributory under Section 74. A copy of that proof is at **pages 187 to 190**.

28 On 31 August 2012, LBL submitted a proof of debt in LBEL's estate in the sum of £243m, 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. A copy of this proof of debt is at **pages 191 to 192**.

29 On 23 September 2015 LBL requested leave of the LBEL Administrators to amend its proof of debt to £4.9bn to include the recharge of the claims referred to in the Amended LBL Proof, such claims being:

29.1 the recharge of LBIE's asserted contingent claim pursuant to Section 74 (valued at £4.5bn);

29.2 the recharge of administration expenses incurred by LBL (valued at £22m); and

29.3 the recharge of the unrecovered balance of claims made by LBL in the insolvent estates of other Lehman Brothers entities, where a dividend of less than 100p in the pound is expected (valued at £399m).

30 LBL's claim in respect of the above matters was based on the alleged operation of pre-administration agreements under which LBL would recharge around 55% and 41% of its expenses (after applying a 10% uplift) to LBIE and LBEL respectively (with the remainder recharged to other estates).

31 On 12 November 2015, the LBEL Administrators consented to LBL's request to amend its proof. A copy of LBL's amended proof of debt in LBEL's administration is at **pages 193 to 194.**

32 On 9 September 2014 LBEL submitted a proof of debt in LBL's estate in the sum of £447m, in respect of aspects of the intercompany balance that it considered ought to be reversed. A copy of that proof is at **pages 195 to 196**. LBIE and LBEL have worked together constructively with a view to reconciling their divergent views on these aspects of the intercompany balance.

33 Presently:

(a) none of LBHI2's, LBIE's or LBEL's proofs have been adjudicated upon by the LBL Administrators;

(b) neither LBL's nor LBHI2's proofs have been adjudicated upon by the LBIE Administrators; and

(c) LBL's proof has not been adjudicated upon by the LBEL Administrators.

34 LBHI2 is not in a distributing administration, and the LBHI2 Administrators have not adjudicated upon LBL's proof, nor determined LBIE's claim.

C. STATUS OF THE SURPLUS

35 As explained above at paragraph 10, the Surplus is estimated in the LBIE Progress Report to be c.£6.6bn in a low case and c.£7.8bn in a high case. On 30 April 2014, LBIE paid its final interim dividend on unsecured debts proved as at that date. The LBIE Administrators have, as yet, been unable to make any distributions from the Surplus. Accordingly, two years have now passed without any distribution having been made from the Surplus.

36 The principal reason for the LBIE Administrators' inability, to date, to make distributions of 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.

37 In the next two Sections, I summarise the progress made to date in resolving those issues through the Waterfall I Application and Waterfall II Application, before turning to the issues left unresolved by those applications and which are the subject of this Application.

D. THE WATERFALL I APPLICATION

38 On 14 February 2013, in anticipation of a possible Surplus, the LBIE Administrators, together with the LBHI2 Administrators and the LBL Administrators, issued an application for directions (the "**Waterfall I Application**") (a copy of which is at **pages 197 to 202**) as to:

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

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

(b) the Sub-Debt;

38.2 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 the Administration Date for the purpose of proving a debt under Rule 2.86(1), 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;

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

38.4 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;

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

38.6 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

38.7 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 (the "**Rights Inter Se Issues**").

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

39.1 Lehman Brothers Holdings, Inc. ("**LBHI**"), being the ultimate parent company of the global Lehman Brothers group and (directly or indirectly) the principal creditor of LBHI2; and

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

40 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**") (a copy of which is at **pages 203 to 269**).

41 In relation to the issues outlined above at paragraph 38, Mr Justice David Richards concluded (see paragraph 250 of the Waterfall I Judgment):

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

41.2 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;

41.3 that if LBIE moved from administration into liquidation without having paid Statutory Interest accrued in the administration, Statutory Interest would only be payable to creditors from the date of liquidation. The 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 or under Section 189, 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;

41.4 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;

41.5 that whilst LBIE remains in administration, LBIE (acting by the LBIE 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

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

42 In the Waterfall I Judgment, Mr Justice David Richards did not, however, make any decision in relation to the Rights Inter Se Issues. When invited, at the consequential hearing on 14 March 2014, to give a supplemental judgment on the Rights Inter Se Issues, the Judge declined to do so, on the basis that the issues had not been fully argued and that the issues could be better considered in the context of actual claims rather than in the abstract. A copy of the transcript of the consequential hearing is at **pages 270 to 275**. To date, no further directions have been sought in relation to the Rights Inter Se Issues and, as explained below, they are included in the Application against the factual backdrop of actual claims having been asserted among the various estates.

43 Commencing on 23 March 2015, the Court of Appeal heard an appeal of all issues in the Waterfall I Application (the "**Waterfall I Appeal**"). On 14 May 2015, the Court of Appeal handed down its judgment (the "**Waterfall I Appeal Judgment**"). The Court of Appeal's directions in respect of the issues were as follows:

43.1 The Court of Appeal held (upholding the Waterfall I Judgment) that the Sub-Debt:

43.1.1 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; and

43.1.2 is a contingent debt, with the relevant contingencies being payment in full of proved debts, Statutory Interest and non-provable claims.

The Court of Appeal observed also that LBHI2's contingent claim in respect of the Sub-Debt is to be valued at zero for the purposes of proof under Rule 2.86 until such contingencies are satisfied (paragraph 41 of the Waterfall I Appeal Judgment).

43.2 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.

43.3 In relation to Statutory Interest accruing on proved debts during the period of 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) 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.

43.4 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).

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

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

44 All of the issues determined in the Waterfall I Application are now subject to appeals to the Supreme Court. The appeals have been listed to be heard from 17 October 2016 with a time estimate of four days.

E. THE WATERFALL II APPLICATION

45 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 276 to 291**). Those issues broadly fell, and were ultimately divided for the purposes of case management, into three categories:

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

45.2 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

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

46 The respondents to the Waterfall II Application were:

46.1 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 Currency Conversion Claims;

46.2 Wentworth Sons Sub-Debt S.a.r.l, which is part of the "**Wentworth**" joint venture which includes LBHI and LBHI2. Wentworth holds both ordinary unsecured claims and the Sub-Debt, and is primarily focused on enhancing the amount of the Surplus available to repay the Sub-Debt;

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

46.4 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.

47 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 and orders (the "**Waterfall IIA Order**" and "**Waterfall IIB Order**") on 27 November 2015. Copies of those documents have been included in RD9 as follows:

47.1 the Waterfall IIA Judgment at **pages 292 to 350**;

47.2 the Waterfall IIB Judgment at **pages 351 to 397**;

47.3 the Waterfall IIA Order at **pages 398 to 405**; and

47.4 the Waterfall IIB Order at **pages 406 to 409**.

48 The Waterfall IIA Judgment and Waterfall IIB Judgment are subject to appeals, which are listed to be heard together commencing on 3 April 2017.

49 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 has agreed to give supplemental judgments in relation to those issues. The parties are currently awaiting those judgments. Two updates to LBIE's creditors which set out those supplemental issues are at **pages 410 to 412**.

50 The trial of Waterfall IIC took place before Mr Justice Hildyard between 9 and 25 November 2015. The parties are currently awaiting judgment.

F. OUTSTANDING LEGAL ISSUES

51 Although the Waterfall I Application and Waterfall II Application have, subject to appeals, given the LBIE Administrators useful guidance in relation to certain issues, there remain significant issues which, for a number of reasons, have not been addressed by those applications.

52 First, the Waterfall I Application, as explained above at paragraph 42, has left unanswered the Rights Inter Se Issues. As to that:

52.1 LBIE has, as explained above at paragraphs 23-25, now submitted (on a contingent basis) Contribution Claims against its Members. This has highlighted the need for clarity as to:

52.1.1 the nature of the Members' liabilities under Section 74 (that is, whether they are joint and several or otherwise); and

52.1.2 the rights of the Members as between themselves in respect of contributions made under Section 74.

52.2 Further complexity has been added to these issues as a result of the decisions already obtained in the Waterfall I Application. In particular, in light of the decision (see paragraph 53.2 below) that a Contribution Claim is subject to set-off against the Members' provable claims against LBIE, the Rights Inter Se Issues now overlap to a significant extent with issues as to set-off among LBIE, LBL and LBHI2.

53 Second, the judgments in the Waterfall I Application have given rise to new issues. Specifically:

53.1 Following the first instance and Court of Appeal decisions in the Waterfall I Application (and subject only to the Supreme Court appeal to be heard in October 2016), the Members' liability under Section 74 extends to the making of a contribution to meet any shortfall in LBIE's ability to pay Statutory Interest and Currency Conversion Claims. Whether or not such a shortfall will arise, and in what amount, depends upon the ultimate outcomes of the Waterfall I Application and Waterfall II Application. However, it is due to the possibility of such a shortfall, and uncertainty as to its scale, that the LBIE Administrators have made claims in the administrations of its Members as explained at paragraphs 23-25 above.

53.2 The first instance and Court of Appeal decisions in the Waterfall I Application also establish that LBIE's claims against the Members under Section 74 are subject to insolvency set-off against the Members' provable claims against LBIE. The inter-related nature of such claims (including, in particular, the Sub-Debt and any Contribution Claim LBIE may be able to make in respect of it) means that the application of insolvency set-off as determined in the Waterfall I Application is potentially highly complex and gives rise to further issues on which the Court's guidance is required.

54 Third, the filing of the Amended LBL Proof (and the filing by LBL of equivalent claims in the estates of LBEL and LBHI2) in September 2015 gives rise to new issues, in particular as to LBL's ability to recharge to LBIE, LBEL and/or LBHI2 the claims referred to in paragraph 26.2 and 29, including any Contribution Claim. In addition to being a significant issue in its own right, such a claim would add a further layer of complexity to:

54.1 set-off issues, in circumstances where a Contribution Claim is, further to the judgments in the Waterfall I Application, subject to set-off against LBL's provable claims; and

54.2 the Rights Inter Se Issues, insofar as a recharge of a Contribution Claim might prevent LBIE from making a Contribution Claim against LBL.

55 Appendix 1 to this witness statement provides more detail, in relation to each of the issues in the Application, as to how the issue arises and its practical and/or economic significance in the LBIE Administration.

56 In addition, issues arise as between LBEL and LBL regarding the ability of the latter to recharge to the former certain claims (referred to above at paragraphs 26.2 and 29), including any Contribution Claim. Since these issues arise in much the same way as equivalent issues (referred to above) as between LBL and LBIE, it is convenient that they be dealt with as part of the present Application. Exhibited to this statement at **pages 413 to 414** is a letter from the LBEL Administrator explaining the significance of these issues to LBEL.

G. REASONS FOR MAKING THE APPLICATION

57 In keeping with the approach they have taken throughout the LBIE Administration, including in the Waterfall I Application and Waterfall II Application, the LBIE Administrators consider that they have a duty to seek resolution as expeditiously as possible of issues which prevent them from making distributions to LBIE's creditors and concluding the administration.

58 In addition, the LBIE Administrators are conscious that the Waterfall I Application and Waterfall II Application are now moving through the appellate courts, giving LBIE and its key stakeholders increasing certainty in relation to key issues impacting the size of both the Surplus and the claims in respect of it, thereby narrowing the divergence of possible outcomes for creditors. In that context, the LBIE Administrators envisage that such increasing certainty may give rise to an opportunity for the LBIE Administrators and key stakeholders to agree terms allowing the LBIE Administrators to make distributions from the Surplus.

59 The issues which are the subject of this Application have, by contrast, as yet not been the subject of any direct judicial consideration (albeit, as noted elsewhere in

this statement, the LBIE Administrators do consider that the answers to certain issues are apparent from judgments already obtained). The LBIE Administrators are concerned that a lack of progress in the resolution of these issues may be a material impediment to a commercial settlement among LBIE and its creditors being reached.

60 The LBIE Administrators have considered the different options open to them in order to progress the various issues to judicial determination. The LBIE Administrators are conscious, in particular, that one option open to them, given that all of the issues in the Application arise from or relate to the claims forming the basis of the Members' proofs of debt, is to reject the Amended LBL Proof (and/or the LBHI2 proof) and have the issues to which the proofs give rise determined by way of any appeal against a rejection that may follow pursuant to Rule 2.78(1). However, given the overlap between those issues and the other key issues outstanding between LBIE and its Members, as well as the direct interest of LBEL in a number of issues in the Application, the LBIE Administrators have concluded that the most appropriate approach is for them all to be dealt with by way of an application for directions pursuant to paragraph 63 of Schedule B1 of the Insolvency Act.

61 The recharge of LBIE's Contribution Claim is the largest head of claim contained within the Amended LBL Proof and is the aspect of the Amended LBL Proof that has the most commonality with the other issues set out in the Application. However, the other matters referred to in paragraph 26.2 above, contained in the Amended LBL Proof, are also disputed and depend upon a consideration of the same evidence and rights of recharge between the parties for their resolution. It is therefore expedient for such matters to be addressed in the Application, insofar as they remain in dispute.

H. THE TIMING OF THE APPLICATION

62 LBL and LBHI2 have expressed concerns about issuing the Application at this stage. The correspondence in which these concerns have been discussed among the parties is at **pages 415 to 487**.

63 In particular, the LBL Administrators have indicated that they are currently conducting further investigations into the factual background to certain of the

issues. The LBIE Administrators understand that the LBL Administrators are principally concerned with locating evidence to support arguments to the effect that LBL should not bear unlimited liability as a shareholder of LBIE. The LBL Administrators have suggested that the Application should not be issued until they have completed those investigations. In particular, they have raised a concern that the issues themselves cannot properly be articulated pending the completion of those investigations.

64 The LBL Administrators have also made particular reference to a dispute between LBIE and LBL during the second half of 2015 which, according to LBL, unreasonably hindered LBL's ability to conduct its further factual investigations. That dispute, including its resolution at the end of 2015, is summarised at Appendix 2.

65 As to the concern raised by the LBL Administrators, whilst the LBIE Administrators are sympathetic to the LBL Administrators' desire to ensure that the issues are resolved on the basis of all relevant evidence and arguments, the LBIE Administrators do not accept that LBL's desire to conduct further factual investigations justifies delaying the issuance of the Application. In particular:

65.1 the parties have already, as part of the disclosure exercise ordered by Mr Justice David Richards in the Waterfall I Application, conducted an extensive document review aimed at locating material relevant to some of the issues in the Application. In such circumstances, the LBIE Administrators consider it unlikely that any further materially relevant material will now be located;

65.2 to the extent that further document review is required (even a process of the magnitude apparently envisaged by LBL), that process can be progressed as part of the case management of the Application, including if necessary as part of a formal disclosure exercise;

65.3 the LBIE Administrators consider it unlikely that the LBL Administrators' further factual investigations will materially shape the issues in dispute themselves. Most of the issues in the Application will need to be resolved on any view. However, to the extent that material emerging from the LBL Administrators' further investigations does impact on the formulation of the issues, the issues can (where appropriate) readily be amended or

supplemented in due course. In this regard, the Waterfall II Application was, almost a year after its issuance, amended without significant inconvenience or difficulty to accommodate changes to certain of the questions as originally included in the application;

65.4 as explained in Appendix 2, the LBL Administrators have now had access to the Archive for a period of over three months; and

65.5 the LBL Administrators have not indicated with any precision a likely timescale for the completion of their further investigations other than that they anticipate their document review will be complete in "early summer", with their investigations continuing throughout the summer.

66 The LBIE Administrators have engaged, through solicitors' correspondence (see **pages 415 to 487**), with the LBL Administrators with a view to reaching an agreed approach to the resolution of the issues in the Application. However, it has not been possible for the parties to reach agreement.

67 The LBHI2 Administrators have suggested that issuance of the Application ought to await the outcome of the Supreme Court appeals on the Waterfall I Application, on the basis that the outcome of that appeal might affect some of the issues in this Application.

68 Again, whilst they well understand the concern raised by the LBHI2 Administrators, the LBIE Administrators do not accept that the Application should be held back until the Supreme Court has ruled on the Waterfall I appeals. In particular:

68.1 whilst the LBIE Administrators accept that, in the event that the Supreme Court were to overturn the lower Courts' decision that the Sub-Debt ranks below Statutory Interest and Currency Conversion Claims, the legal and/or economic significance of certain of the issues in this Application may alter, they do not consider that to be a likely eventuality. The ranking of the Sub-Debt has been the subject of strong and clear judgments from the High Court and Court of Appeal;

68.2 the possibility of a Supreme Court judgment in the Waterfall I Application altering the legal and/or economic significance of issues in this Application is not in itself a reason for delaying issuance of the Application. The LBIE Administrators do not consider it a sensible approach to delay commencing

the process of resolving certain issues until earlier associated issues have been determined by the Supreme Court. I note in this regard that issues in the Waterfall II Application also have the potential to have an impact on the legal and/or economic significance of the issues in the Application. As summarised above at Section E, the Waterfall II Application has, to date, only been heard in the High Court, with appeals of Parts A and B listed for April 2017 and any final Supreme Court determination of all issues in that application (in the event that further appeals follow) likely to be a number of years away;

68.3 indeed, in the various Waterfall proceedings to date, the Court has taken the approach of advancing issues towards resolution even if they may be in some way potentially impacted by other pending issues. For example, the Court has been content to consider, in the Waterfall II Application, issues relating to Currency Conversion Claims notwithstanding the possibility that such claims will ultimately be held, in the Waterfall I Application, not to exist at all; and

68.4 it is unlikely that a Supreme Court judgment in respect of the Waterfall I Application would be obtained before the first quarter of 2017. The delay suggested by the LBHI2 Administrators would therefore be a significant one.

69 The LBIE Administrators of course accept that there is a risk of the Supreme Court's decision having an impact on the issues raised by this Application, but they do not consider that that risk means that this Application should be put on hold in the meantime. That sort of approach would prolong the Administration and further delay the LBIE Administrators' ability to distribute the Surplus. It was for that reason that all involved in the Waterfall II Application considered that, notwithstanding the same risk that LBHI2 has identified in this case, the better course was to press on and commence the process of having the Waterfall II issues determined.

70 The LBIE Administrators are also conscious of the possibility that the issues in the Waterfall I Application and/or the Waterfall II Application may be the subject of a commercial resolution which would allow the LBIE Administrators to make distributions to creditors from the Surplus. A comprehensive settlement is likely to be more difficult to reach if there remain significant legal issues on which no judicial guidance at all has been obtained.

71 Accordingly, having considered all issues (including the concerns raised by LBL and LBHI2), the LBIE Administrators consider that the Application ought to be issued and advanced at this stage, to be amended in due course to the extent necessary to accommodate either relevant material that emerges from the LBL Administrators' further factual investigations and/or any relevant Supreme Court judgment in the Waterfall I Application. It is that course which the LBIE Administrators consider to be in the best interests of LBIE's creditors.

72 I understand that the LBEL Administrators agree. Exhibited to this statement at **pages 413 to 414** is a letter from the LBEL Administrators, confirming that the resolution of those of the issues in the Application that apply to LBEL is the only matter that (subject to the manner in which those issues are ultimately resolved) is currently preventing the LBEL Administrators from distributing LBEL's surplus to LBEL's creditors (by way of statutory interest) and, in respect of any surplus remaining thereafter, to LBEL's shareholder.

73 The LBIE Administrators have sought comments on the Application from the Respondents. Those comments received have been incorporated into the form of the Application itself and, as noted below, the proposed procedural directions have been prepared so as to progress matters efficiently and as quickly as possible while addressing and accommodating the concerns noted by the Respondents.

74 In the next section, I set out the LBIE Administrators' proposals for directions which will allow the Application to proceed while accommodating appropriately the concerns of LBL and LBHI2.

I. PROPOSED DIRECTIONS

75 With a view to making progress with the Application while accommodating the concerns raised by LBL and LBHI2, the LBIE Administrators propose the following initial procedural steps:

75.1 a Case Management Conference to deal with any procedural matters which cannot be agreed among the parties (albeit the LBIE Administrators have proposed directions and remain hopeful that the parties will engage on their terms to avoid the need for a CMC);

75.2 the listing of the trial of the Application, so that the Application can be determined at the earliest sensibly achievable opportunity. The LBIE Administrators have established that the Court would be able to accommodate a trial of the Application in November 2016;

75.3 the exchange of position papers in which the parties set out their positions on each of the issues;

75.4 a disclosure process in which relevant documents (including any such documents generated by LBL's further investigations) are exchanged;

75.5 a further Case Management Conference to:

75.5.1 obtain further procedural directions;

75.5.2 amend the Application, if necessary, in light of position papers and disclosure; and

75.5.3 consider whether the trial date can maintained.

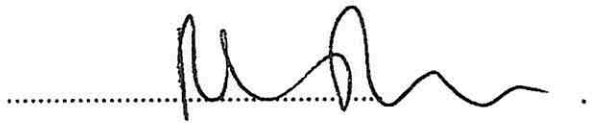
76 As noted, the LBIE Administrators are seeking to agree directions for the above procedural steps ahead of the initial hearing of the Application.

J. CONCLUSION

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

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

Dated 22 April 2016



Russell Downs

Party: Applicant
Witness: Russell Downs
Statement No: 9
Exhibit: "RD9"
Date: 22 April 2016

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

EXHIBIT "RD9" TO
NINTH WITNESS STATEMENT OF RUSSELL DOWNS

This is the exhibit marked "RD9" referred to in the Ninth Witness Statement of Russell Downs dated 22 April 2016.

Signed .....

Party: Applicant
Witness: Russell Downs
Statement No: 9
Exhibit: "RD9"
Date: 22 April 2016

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

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

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

NINTH WITNESS STATEMENT
OF
RUSSELL DOWNS

Linklaters LLP
One Silk Street
London EC2Y 8HQ

Tel: (+44) 20 7456 2000
Fax: (+44) 20 7456 2222
Solicitors for the Claimant
Ref: Tony Bugg/Euan Clarke/Jared Oyston

Appendix 1: Summary of the issues in the Application

Issue 1

1 This issue concerns whether the obligation of LBIE's members, under Section 74, to contribute to LBIE's assets includes an obligation to contribute to LBIE's assets to the extent necessary to enable LBIE to pay the Sub-Debt (referred to in the Application as a "**Sub-Debt Contribution Claim**"). This specific point was not dealt with expressly in the Waterfall I Judgment. Although the LBIE Administrators considered that it followed from that judgment that the obligation under Section 74 does extend to the Sub-Debt, LBL took the opposing view such that it was not possible for the parties to agree a direction to be included in the draft Waterfall I Order. The relevant correspondence on this point is at **pages 488 to 497**. At the consequential hearing following the Waterfall I Judgment, the Judge declined to give a direction clarifying the position in the Waterfall I Order as handed down. The transcript of that hearing is at **pages 270 to 275**.

2 Given the amount of the Sub-Debt (in the amount £1.254 billion plus interest), this issue is of considerable economic significance to the LBIE, LBL, LBHI2 and LBEL estates. Specifically, in the event that LBIE's assets are insufficient to pay the Sub-Debt (at all or in full), and if the members' liability under Section 74 does not extend to the Sub-Debt:

2.1 LBIE's liquidator would be unable to make a call on LBIE's members under Section 74 to enable it to repay the Sub-Debt;

2.2 similarly, LBIE's contingent claim (during its administration) for the Section 74 debt would not cover sums required to enable it to repay the Sub-Debt; and

2.3 despite LBIE being an unlimited liability company and its members having assets that would otherwise be available to pay a Sub-Debt Contribution Claim (in whole or in part), LBIE would not be put in funds in respect of that aspect of its liabilities to its creditors.

Issue 2

3 This issue is closely related to the first, and concerns whether, to the extent that LBIE's members are obliged under Section 74 to meet a Sub-Debt Contribution Claim, such

claim is to be included in the insolvency set-off account in LBIE's administration as against the provable claims of LBHI2 and/or LBL. Again, whilst the LBIE Administrators considered that it followed from the Waterfall I Judgment that a Sub-Debt Contribution Claim does go into the LBIE set-off account as against the provable claims of both LBHI2 and LBL, it was not possible to agree a direction on this point in the Waterfall I Order and the Judge declined to give a direction clarifying the position.

4 The significance of this issue is, again, considerable in light of the sums involved. Specifically, in the event that (further to the first issue above) LBIE is entitled to make a Sub-Debt Contribution Claim, but the Sub-Debt Contribution Claim is not included in the insolvency set-off account as against the provable claims of:

4.1 LBHI2:

4.1.1 LBHI2 would be able to pursue repayment of the Sub-Debt in full, whilst itself paying only a dividend in respect of the corresponding Sub-Debt Contribution Claim;

4.1.2 any sums paid to LBHI2 in respect of the Sub-Debt would increase the assets available to LBHI2 to meet the Sub-Debt Contribution Claim, giving rise to circularity and a need for an iterative distribution process to resolve the estates; and

4.1.3 any repayment by LBIE of the Sub-Debt might be funded (in whole or in part) by a Sub-Debt Contribution Claim against LBL;

4.2 LBL:

4.2.1 LBL would be able to pursue repayment of its provable debts from LBIE in full, while itself paying only a dividend in respect of the Sub-Debt Contribution Claim (albeit this may be further complicated by issue 9 below and the interaction with LBL's alleged claim to recharge to LBIE any Contribution Claim).

Issue 3

5 This issue concerns the value of any Sub-Debt Contribution Claim for the purposes of proof and set-off. In the Waterfall I Appeal Judgment, the Court of Appeal, while

upholding the decision of the Judge that the Sub-Debt ranks below Statutory Interest and Currency Conversion Claims for payment from the Surplus, observed that the Sub-Debt is a provable contingent claim which is to be accorded nil value for the purposes of proof under Rule 2.81 until such time as Statutory Interest and Currency Conversion Claims have been paid in full.

6 This decision (which is subject to an appeal to the Supreme Court), gives rise to a question as to how any Sub-Debt Contribution Claim is to be valued for the purposes of proof and set-off. Specifically, the LBIE Administrators consider that the following approaches might be taken:

6.1 the value of the Sub-Debt Contribution Claim could be limited to the value of the Sub-Debt for the purposes of proof, as that is the amount which LBIE will actually have to pay in respect of the Sub-Debt; or

6.2 the value of the Sub-Debt Contribution Claim could be the full value of the Sub-Debt, since that is the value of the "liability" (for the purposes of Section 74) of the Sub-Debt on LBIE's balance sheet.

7 This issue will obviously have a significant impact on the economic value to the LBIE estate of any Sub-Debt Contribution Claim. Specifically:

7.1 if the value of the Sub-Debt Contribution Claim is limited to the value of the Sub-Debt for the purposes of proof, LBIE would effectively not be able to make a Sub-Debt Contribution Claim until such time as it already had sufficient assets to pay at least some of the Sub-Debt. It would not, therefore, be able to make a Sub-Debt Contribution Claim for the purpose of putting itself in a position to be able to make repayments of the Sub-Debt; and

7.2 if the value of the Sub-Debt Contribution Claim is the full amount of the Sub-Debt notwithstanding its value for the purposes of proof, LBIE would, in circumstances where Statutory Interest and Currency Conversion Claims had not yet been paid in full, be able to make a Sub-Debt Contribution Claim with a view to paying LBIE's liabilities to the maximum extent possible (including putting itself in a position to be able to make repayments of the Sub-Debt itself).

Issue 4

8 This issue concerns the impact, if any, of insolvency set-off between LBIE and LBHI2 on LBIE's ability to make a Sub-Debt Contribution Claim against LBL. Specifically, to the extent that insolvency set-off has taken effect as between LBHI2's claim in LBIE's administration in respect of the Sub-Debt and LBIE's Sub-Debt Contribution Claim against LBHI2, this gives rise to the question of whether LBIE can make a parallel Sub-Debt Contribution Claim against LBL (subject only to the principle against double recovery). The LBIE Administrators estimate that this issue could have a significant impact on the value LBIE is able to recover from LBL and LBHI2 in respect of its Contribution Claims.

Issue 5

9 This issue concerns the application, if any, of insolvency set-off in the administrations of LBL and/or LBHI2 on those companies' claims against, and liabilities to, LBIE, in circumstances where insolvency set-off had already taken effect in LBIE's administration as at 4 December 2009. The LBIE Administrators consider it clear that insolvency set-off in LBIE's administration had substantive effect on LBIE's claims against, and liabilities to, LBL and LBHI2, leaving only statutory balances payable such that any subsequent actions in relation to the underlying claims (including insolvency set-off in the administration of LBL and/or LBHI2) has no impact on LBIE's claims against, and liabilities to, LBL and LBHI2. However, the LBIE Administrators understand, having sought views in correspondence with the Respondents, that this point is not agreed, and therefore seek a direction in relation to it.

Issue 6

10 This issue asks the same question as the fifth issue, but in relation to LBEL. Insolvency set-off took effect in LBEL's administration on 11 July 2012.

Issue 7

11 This issue seeks resolution of the Rights Inter Se Issues. As explained above at 38.7 and 42, these issues were included in a substantially similar form in the Waterfall I Application but were not determined by Mr Justice David Richards.

12 This issue is of considerable economic significance to LBIE, LBL and LBHI2. Specifically, from the perspective of the LBIE Administrators in particular, in the event that the members' liabilities under section 74 were to be other than joint and several, and/or if the LBIE Administrators were to be directed to assert less than 100% of the Contribution Claim against LBL and/or LBHI2, that could have a significant impact on the value LBIE is ultimately able to recover in respect of its Contribution Claims.

13 My understanding in this regard is that:

13.1 LBL has a net cash balance of £292 million (based on the LBL Progress Report); and

13.2 LBHI2 has a net cash balance of £701 million (based on the LBHI2 Progress Report).

It is clear, on this basis, that a limitation on a LBIE liquidator's ability to make a call on, and LBIE in administration's ability to prove against, both LBL and LBHI2 in respect of the full amount of a Contribution Claim, would be likely to have a real impact on LBIE's recoveries in respect of its Contribution Claim.

Issue 8

14 This issue concerns any right of contribution or indemnity LBL and/or LBHI2 may have (depending on the Court's answer to the seventh issue). To the extent that either member does have such a right of contribution or indemnity against the other, this would give rise to a question as to whether the member could pursue such a claim in circumstances where LBIE had not yet been paid in full in respect of a Contribution Claim. Specifically, this issue asks whether the rule against double-proof would be engaged in these circumstances.

15 This issue is of considerable economic significance to LBIE, LBL and LBHI2. From LBIE's perspective, if the rule against double-proof were not engaged in these circumstances, LBIE would potentially find its Contribution Claim against one member

competing for dividends against a contribution or indemnity claim from the other member in respect of its payment in respect of the Contribution Claim. This can be illustrated by the following simplified example:

15.1 LBIE makes a contribution claim of £1 billion against LBL and LBHI2 on a joint and several basis;

15.2 LBL pays LBIE dividends of £250 million in respect of the Contribution Claim, leaving £750 million of the Contribution Claim outstanding;

15.3 LBL makes a claim against LBHI2 for a contribution or indemnity in respect of its payment to LBIE of £250 million in respect of the Contribution Claim;

15.4 LBHI2 has £800 million of assets available for distribution, but has not yet made any payment to LBIE in respect of the Contribution Claim;

15.5 LBIE's £750 million claim against LBHI2 in respect of the unsatisfied portion of the Contribution Claim would, prima facie, rank pari passu with LBL's £250 million indemnity claim against LBHI2;

15.6 LBL's indemnity claim would therefore have the effect of diluting significantly the assets available to LBHI2 to pay LBIE's Contribution Claim; and

15.7 although funds received by LBL from LBHI2 in respect of an indemnity claim would be available to LBIE in respect of its Contribution Claim against LBL, the Contribution Claim would only rank pari passu with other unsecured claims in the LBL estate.

Issue 9

16 This issue concerns LBL's claim to recover from LBIE certain sums, including:

16.1 sums paid or payable by it to LBIE in respect of a Contribution Claim;

16.2 sums claimed by LBL, but not recovered from, other Lehman Brothers companies; and

16.3 expenses of LBL's administration.

17 This issue is of considerable economic and practical significance to LBIE and LBL. In particular, if LBL were to be able to recharge to LBIE all or part of any Contribution Claim:

17.1 this would give rise to a potential circularity in which LBL's ability to recharge the Contribution Claim to LBIE would in turn increase LBIE's Contribution Claim against LBL;

17.2 the LBIE Administrators would potentially not be able, or would be limited in their ability, to recover economic value from LBL in respect of LBIE's Contribution Claim;

17.3 LBL would effectively have escaped a statutory liability by contract.

Issue 10

18 This issue asks how, if LBL is entitled to recover from LBIE sums paid or payable in respect of a Sub-Debt Contribution Claim, such a claim ranks relative to LBHI2's claim against LBIE in respect of the Sub-Debt itself.

Issue 11

19 This issue asks the same question as the ninth, but in respect of LBEL, from which LBL also purports to be able to recover certain sums on a similar basis.

Issue 12

20 This issue asks how LBL's ability (if any) to recharge a Contribution Claim to LBEL is impacted by set-off having already occurred in LBIE's administration between such Contribution Claim and the provable claims of LBL against LBIE. Specifically, to the extent that LBL is able to recharge a Contribution Claim to LBIE and LBEL and insolvency set-off has taken effect as between LBIE and LBL, is the sum to be recharged to LBEL reduced on account of such set off. This can be illustrated by the following example, which is illustrative only and for simplicity does not take into account

that a relatively small proportion of any such liability would be borne by Lehman estates other than LBIE and LBEL:

20.1 LBIE makes a Contribution Claim of £1bn against LBL;

20.2 LBL successfully asserts that the Contribution Claim is capable of recharge to LBIE and LBEL in the following proportions £600m (being 60% of the Contribution Claim) to LBIE and £400m (being 40% of the Contribution Claim) to LBEL;

20.3 insolvency set-off is applied between LBIE's Contribution Claim and LBL's recharge of that claim, extinguishing the two gross claims and resulting in a net claim in favour of LBIE in the sum of £400m;

20.4 in these circumstances is LBL's claim against LBEL reduced to a recharge of 40% of the net claim (i.e. £160m, being 40% of £400m) and if so, is LBL able to recover the balance of the net claim from LBIE; or

20.5 does LBL remain able to claim 40% of the gross claim (i.e. without having to take account of the insolvency set off in LBIE's administration) against LBEL.

21 This issue is of significant economic and practical significance to LBIE, LBL and LBEL.

Issue 13

22 This issue concerns:

22.1 whether LBIE's share register ought to be rectified in order to remove LBL as a registered shareholder of LBIE; and/or

22.2 whether, irrespective of whether LBL is a registered shareholder of LBIE, LBL ought not to be liable as a shareholder of LBIE.

23 This issue has been included because the LBIE Administrators understand that the LBL Administrators are seeking to argue that there is a basis for LBL not being liable for the obligations that would ordinarily flow from being a member of an unlimited liability company with a shortfall pursuant to Section 74. The LBL Administrators have so far declined to expand on their position in this regard and, if the LBL Administrators do not pursue the argument, Issue 13 can be removed from the Application.

Appendix 2: Summary of archive access issue

1 Prior to the collapse of the Lehman Brothers group, LBL acted as custodian to the hard copy and electronic books and records, archives, systems and data of the UK group companies (the "**Archive**"). LBL continued to perform that role for several years following its entry into administration. Similarly LBL continued its pre-administration role in providing services to other Lehman companies and costs associated with employees, rent, IT and other systems were re-charged by LBL to other Lehman companies in administration. Under a Services Agreement entered into in June 2013, however, it was agreed that LBIE would assume responsibility for providing services (including employees) to certain entities within the group. A copy of that Services Agreement is at **pages 498 to 521**. These services include the management and custodianship of the Archive. Consequently, LBIE took over custodianship of the Archive.

2 During 2013, when LBL was still custodian of the Archive, the parties to the Waterfall I Application had agreed an approach to disclosure which allowed the parties access to relevant material in the Archive which was responsive to an agreed set of search terms. Such an approach was efficient and cost-effective, avoiding the duplication of effort that would have arisen had LBIE, LBL and LBHI2 each independently sought material from Archive. The Court approved this approach by way of a directions order dated 2 May 2013 (a copy of which is at **pages 522 to 541**).

3 In April 2015, LBL requested boxes of records from the Archive. Although LBL did not disclose the purpose of its investigation, in or around early May 2015 it became clear that LBL wished to review documents to which LBL was not a party and that the investigation might lead to litigation against and/or involving other Lehman affiliates.

4 LBIE was concerned that some of the documents might contain the privileged/confidential information of other group companies and informed LBL that it was not prepared to grant LBL access until appropriate protections were put in place in respect of such information. It was in this context that LBIE (and LBHI2) sought to establish a protocol for this matter similar to that which had been adopted in the Waterfall I Application, and there followed discussions among LBIE, LBHI2 and LBL with this objective in mind.

5 As a result, email correspondence and discussions ensued between Michael Jervis, in his capacity as an LBL Administrator, and Guy Parr, in his capacity as a LBIE Administrator, and between members of their respective teams, as to the basis on which access ought to be granted. The parties' positions at this time can be summarised as follows:

5.1 LBIE did not object to LBL accessing its own papers or the information collated for the Waterfall I Application (which had been drawn from the records of LBL, LBHI, LBHI2 and LBIE) held in a forensic archive which the parties agreed to share when preparing for that application. However, LBIE was not prepared to provide LBL unrestricted access to the documents of other Lehman group entities stored in the Archive, on the basis that they may contain information which was confidential as against LBL (a concern shared by other Lehman companies). It took the view that, as custodian, it had a duty to maintain that confidentiality, such that it would be necessary to establish a protocol under which any documents returned by the searches run by LBL would be subject to prior review by LBIE as custodian (or some other party) in order to identify any documents which contained such confidential information. If LBL wished to access any of those documents, it would then need to seek the consent of the relevant group entity.

5.2 LBL's stated position, by this stage, was that no information in the Archive was capable of being confidential as against LBL. In short, this was said to be because (i) as the former custodian, LBL had previously enjoyed "unfettered" access to the Archive and (ii) the individuals working for the Lehman group within the UK pre-administration were, as a formal matter, employed by LBL, with the consequence that LBL employees would likely have been the author or addressee of all of the documents in the Archive. As such, LBL's view was that there was no need to include any limits on its access.

5.3 In response, LBIE did not accept that the previous access that LBL may have enjoyed meant that no documents in the Archive could be confidential as against it, particularly given that LBL did not appear to be asserting that it had in fact accessed all of those documents. Further, while LBL was the ultimate employer of UK group employees, these employees were regularly seconded to, or in effect worked for, other members of the group. To the extent that such personnel

accessed documents in the Archive, it is by no means clear that they were doing so in their capacity as LBL employees (indeed, for the most part, the contrary seemed likely). LBIE was also concerned that the Archive may contain documents which were not created by, or addressed to, UK group employees. LBHI2 was aware of, and supported, LBIE's position.

6 Discussions continued over the following weeks, with LBL formalising its access request in a letter to LBIE, LBHI2 and various other UK group companies dated 12 June 2015. On 26 June 2015, Linklaters responded to LBL's letter confirming LBIE's willingness to cooperate, raising certain concerns as to the protection of confidentiality and privilege and proposing a meeting between the parties to agree a way forward. A without prejudice meeting was arranged promptly and took place at the offices of LBL's solicitors, DLA Piper, on 1 July 2015. Following the meeting, LBIE's representatives worked to draft a proposed protocol reflecting the approach discussed at the meeting. This was provided to LBL in mid-July 2015. The parties exchanged further correspondence and had further discussions on a without prejudice basis regarding the draft protocol during the ensuing two month period. On the basis of those discussions, LBIE was hopeful that an approach to Archive access acceptable to both parties could be reached.

7 Those discussions were ongoing when, shortly before midday on 23 September 2015, DLA Piper (on behalf of LBL) wrote to Linklaters (on LBIE's behalf) and LBHI2's solicitors, Dentons, informing them that, unless LBL was given access to the Archive by the close of business that day, LBL intended to issue proceedings seeking directions as to LBL's purported rights to access the Archive. Given its continued concerns about protecting confidentiality and privilege, LBIE was not able to grant the access sought. In any event, Linklaters proposed an open meeting between the parties, with a view to continuing discussions about a consensual solution. This meeting was held at Linklaters' offices on 28 September 2015.

8 Following that meeting, correspondence as to the basis on which LBL could be granted access continued throughout October and November 2015. This correspondence ultimately resulted in Linklaters putting forward, in a without prejudice letter to DLA Piper (copied to Dentons) dated 19 November 2015, a revised proposal for a compromise of the dispute. The parties and their representatives then exchanged further

correspondence and held further discussions on a without prejudice basis over the next month or so.

9 As a consequence of those discussions, on 30 December 2015, LBIE, LBL and LBHI2 entered into a "*Binding Heads of Terms*" (the "**Heads of Terms**"), setting out the basis on which LBL and others with documents in the Archive (the "**Beneficiary Parties**") would be allowed access to the Archive. A copy of the Heads of Terms is at **pages 542 to 548**.

9.1 Clause 4 of the Heads of Terms provides that, following the expiry of a notice period on 8 January 2016, LBL and the Beneficiary Parties would be granted full access to the Archive insofar as it contains pre-appointment documents. Further, they would be allowed to run whatever searches they wanted and inspect the results without any prior review by LBIE or any other party. Clause 4 also provided for the review process to be fully transparent, with LBIE to be granted access to both lists of searches undertaken and the results returned by them.

9.2 Under clause 5, LBIE, LBL and LBHI2 agreed to waive any and all confidentiality and privilege as they may have had against one another in respect of any documents in the Archive.

9.3 LBIE's concerns about protecting the confidentiality and privilege of others were addressed by LBL giving an undertaking in clause 6 not to assert that any confidentiality and privilege that any Beneficiary Party (other than LBIE) may have in the documents in the Archive has been lost as result of LBL being given access to the documents.

9.4 This undertaking was subject to clause 7, which provided that it did not apply to any documents concerning (i) LBL's holding of a single share in LBIE or (ii) LBL's recharge to other Lehman group entities of its costs of providing services.

10 Accordingly, as a result of this compromise, LBL has had full, unfettered access to any and all documents in the Archive concerning the matters at issue in this Application since early January this year.

11 A copy of all relevant open correspondence in relation to the above process is at **pages 549 to 608**.