In the Supreme Court

of the United Kingdom

Notice of Objection

and

Notice of Acknowledgement

In the proceedings between

[Claimant/Appellant in the Lower Court] (1) Lehman Brothers Holdings Scottish LP 3 (A3/2020/1787) (2) The Joint Liquidators of LB GP No.1 Limited (in liquidation) (A3/2020/1810) (3) Deutsche Bank A.G. (London Branch) (A3/2020/1811)

and

[Defendant/Respondent in the Lower Court] Please see Continuation Sheet Part A.

On appeal from

Court of Appeal (Civil Division)

UKSC reference	**Date of filing**
UKSC 2021/0219	1-Dec-21

Details of the party responding ('The Respondent')

Respondent's full name

Deutsche Bank A.G. (London Branch)

The respondent was served with

☒ **an application for permission to appeal**

☐ **a notice of appeal**

☐ **an application notice**

Date on which notice was served

17-Nov-21

The respondent intends to ask the Court to

☒ **refuse to grant permission to appeal**

☐ **order the appellant to give security for costs if permission to appeal is granted**

☐ **dismiss the appeal**

☐ **other order (please specify)**

The respondent should attach separate sheets setting out the respondent's grounds where the respondent asks the Court to

☐ **give the respondent permission to cross-appeal**

☐ **allow the appeal for reasons which are different from, or additional to, those given by the court below**

The respondent wishes to receive notice of any hearing date and to be advised of progress **Yes ☒** **No ☐**

Solicitor's Name

Phillip Taylor (Partner)

Solicitor's firm

Alston & Bird (City) LLP

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Reference

PT/PM/AS/553387

Is the Respondent in receipt of public funding/legal aid?

Yes ☐ **No ☒**

If yes, please provide the certificate number

N/A

Counsel's name

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Counsel's name

Mr Richard Fisher QC (Please see Continuation Sheet Part B for junior counsel)

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Information about the respondent's case

Set out here or attach the reasons why permission to appeal should be refused or why the appeal should be dismissed. Include information to explain what the respondent intends to ask the Court to do.

Please see Continuation Sheet Part C.

Further information is attached/continued on a separate sheet(s)

Yes ☒ **No ☐**

Is the respondent seeking a declaration of incompatibility?

Yes ☐ No ☒

The respondent will seek to raise issues under the Human Rights Act 1998

Yes ☐ No ☒

If yes, please give details

Further information is attached/continued on a separate sheet(s)

Yes ☐ No ☒

Are you asking the Supreme Court to

Depart from one of its own decisions or from one made by the House of Lords?

Yes ☐ No ☒

Make a reference to the Court of Justice of the European Union?

Yes ☐ No ☒

If you have answered yes to either of these questions, please give details

Details are attached/continued on a separate sheet(s) Yes ☐ No ■

Is this a case where there was or should be a departure from any retained EU caselaw? Yes ☐ No ☒

If yes, please give details

Details are attached/continued on a separate sheet(s) Yes ☐ No ☒

Certificate of Service

The date on which this form was served on the Appellant(s) and any other party

1-Dec-21

I certify that this document was served on

Name

Please see Continuation Sheet Part D.

By

Alston & Bird (City) LLP

Method of Service

Email

A certificate of service is attached/continued on a separate sheet(s)

Yes ☒ **No ☐**

Please return your completed form to:

The Supreme Court of the United Kingdom

Parliament Square

London

SW1P 3BD

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Email: registry@supremecourt.uk

Website: The Supreme Court

UK SUPREME COURT FORM 3
(NOTICE OF OBJECTION)

Continuation Sheet Part A
Defendant/Respondent in the Lower Court

In the matter of LB Holdings Intermediate 2 Limited (in administration) (Court of Appeal No. A3/2020/1787)

(1) Lehman Brothers Holdings plc (in administration)
(2) Deutsche Bank A.G. (London Branch)
(3) The Joint Administrators of LB Holdings Intermediate 2 Limited (in administration)

In the matter of Lehman Brothers Holdings plc (in administration) (Court of Appeal No. A3/2020/1810 and A3/2020/1811)

(1) The Joint Administrators of Lehman Brothers Holdings plc (in administration)
(2) Lehman Brothers Holdings Inc.

Continuation Sheet Part B
Details of Deutsche Bank's Junior Counsel

Counsel's name: Timothy Goldfarb
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Continuation Sheet Part C: Deutsche Bank's Grounds of Objection[1]

Overview

1. Despite their lengthy submissions, the Appellants have failed to identify any arguable point of law of general public importance that merits consideration by the Supreme Court. Further and in any case, the Court of Appeal's judgment was undoubtedly correct and well-reasoned.[2] Accordingly, permission to appeal should be refused.

2. Specifically, the proposed appeals raise three sets of issues: the Ranking Issues, the Rectification Issue and the Partial Discharge Issue (adopting the Appellants' terminology).[3] All of these issues turn on the particular facts of the present case and do not raise any arguable points of law.

3. First, the Court of Appeal determined the Ranking Issues by applying well-established and binding principles of contractual interpretation ([27]-[31]) and the Appellants have not identified any principle of contract law which requires consideration by the Supreme Court. Instead, the Appellants' case amounts to the submission that the Court of Appeal failed sufficiently to take into account the factual context in which the relevant contracts were issued. There is no substance to these criticisms, but even if there were that would not give rise to an arguable point of law. Further, the fact that the contracts in issue concern a great deal of money cannot elevate a straightforward dispute about contractual interpretation into an arguable point of law, let alone one of general public importance meriting consideration by the Supreme Court.

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[1] Terms defined in the Application for Permission to Appeal (the "**Application**") are adopted. Paragraph references to (i) the Court of Appeal's Judgment are in the form [##]; and (ii) the Appellant's submissions on permission to appeal are in the form ¶##.

[2] The Appellants' submissions in support of their application are unusually long (running to 52 additional pages). It is not possible to respond to every point made within the page limits prescribed by Practice Direction 3.1.10, and Deutsche Bank has focused on the threshold test for permission to appeal. However, many of the factual assertions made by the Appellants are not accepted and need to be treated with caution. Some are inconsistent with the factual findings of Smith J at first instance and the Court of Appeal (for example in [7](2) the Appellants state that there is a "*default position that Lower Tier 2/Tier 3 regulatory debt …rank pari passu*". As Lewison LJ notes at [20], "*the Judge* [at first instance] *found at [61](3)(c) that the regulators were indifferent to the relative priority between subordinated debt instruments*"). Others express sweeping statements about the subordinated debt markets, without the benefit of expert evidence, none having been adduced in the courts below, or indeed any verifiable source information (for example the assertions based on footnotes 34 and 38 of the Appellant's submissions, which have not been submitted in evidence in the proceedings). If it would assist the Supreme Court, Deutsche Bank can make further written submissions pursuant to Practice Direction 3.3.6(a) as to these factual assertions and the reasons why the Court of Appeal's decision was, in any event, correct.

[3] The Appellants also complain (at ¶¶69-70) that the Court of Appeal referred to authorities not cited by the parties. This point goes nowhere. There is no basis to suggest that these additional cases were wrongly decided or that they were determinative of any issue in the appeals. In any case this issue does not raise an arguable point of law. If the Appellants had any concern about the fairness of the Court of Appeal's approach, this ought to have been (but was not) raised with the Court of Appeal following circulation of the draft judgment.

4. Second, SLP3's claim for rectification failed on the facts both at first instance and on appeal. A further attempt to overcome the many factual obstacles is hopeless and, in any event, does not raise an arguable point of law of general public importance. Indeed, SLP3 appeared to have accepted this reality when it chose not to seek permission to appeal on rectification from the Court of Appeal. As a result, and pursuant to Rule 10(2) of the Supreme Court Rules, it is now in any event too late for it to seek to revive an appeal on this issue.

5. Third, the Court of Appeal decided the Partial Discharge Issue by applying the clear dicta in two previous Court of Appeal authorities – *MS Fashions v BCCI* [1993] Ch 425 and *Milverton Group Ltd v Warner World Ltd* [1995] 2 EGLR 28 – to the effect that a partial payment by a guarantor discharges *pro tanto* the amount of the principal debt (leaving aside special rules applicable in an insolvency) [100]-[134]. The law on that issue is settled. The only novelty in this case is how that settled principle should be applied in the very peculiar factual situation that arose in this case where the guarantor had released its right to an indemnity from the insolvent principal debtor. This unusual scenario is unlikely to arise with any frequency (it has not arisen before) and, if it did, the correct approach has been clearly set out by the Court of Appeal [167]-[172]. There is no point of law of general importance meriting consideration by the Supreme Court. In any case, the Appellants themselves accept that the issue is academic between the parties in light of the Court of Appeal's conclusions on the Ranking Issues.[4]

The Ranking Issues

6. The Appellants identify six headline reasons why they say the Ranking Issues ought to be considered by the Supreme Court (¶57).[5]

7. The first and second reasons have nothing to do with any point of law, and concern only the alleged commercial significance of the dispute on the basis that it concerns the interpretation of a contract in an FCA standard form. This is a red herring. Although some of the contracts in issue are based on an FSA standard form subordinated debt agreement[6], the Court of Appeal's decision in both the LBHI2 dispute (Claim A vs Claim B) and the PLC dispute (Claim C vs Claim D) turned entirely on <u>bespoke terms</u> that had been inserted into these contracts, and which do not form any part of any FSA standard form, as follows:

   (1) In relation to the LBHI2 Ranking Issue, the Court of Appeal's reasoning turned on the effect

[4] See footnote 15 of the Appellants' submissions.

[5] These are expanded into eight separate points in ¶¶59-66, each of which is addressed below.

[6] The LBHI2 Sub-Notes are not and were not required to be in an FSA standard form (Trial Witness Statement of Stephen Miller at paragraph 42 and [211] of the Judgment of Marcus Smith J)). The PLC Sub-Debt forming Claim C deviated in certain respects from the FSA Standard Form 10 ([323] and [325] of the Judgment of Marcus Smith J). The PLC Sub-Notes forming Claim D differed from FSA Standard Form 10 [74].

of the amendments made to the terms of the LBHI2 Sub-Notes (Claim B) (see [36]-[37], [46]-[47]), which have nothing to do with any standard form.

(2) In relation to the PLC Ranking Issue, the Court of Appeal's reasoning turned on the different definition of "*Subordinated Liabilities*" used in the PLC Sub-Notes (Claim D) compared with the definition used in the PLC Sub-Debt (Claim C) (the latter being based on an FSA standard form but with variations to the standard wording (see [323] and [325] of the Judgment of Marcus Smith J and [74] and [78] of the Court of Appeal's Judgment)).

(3) As a result, it is irrelevant that "*Claim A and Claim C are taken directly from FSA Standard Form 10*" (¶60(1)), because the key provisions involved in this case were in Claim B and Claim D, and the Court of Appeal's conclusions on the meaning of those bespoke provisions cannot possibly be relevant to the wider market or any parties using the FSA standard form.

8. Further, the facts of the present case, in which multiple subordinated debts were issued by the same entity to different persons using a mixture of standard forms and bespoke forms, may be unique (the Appellants have not identified any comparable structure in use in the market). There is no reason why the Court of Appeal's decision would be of any relevance to firms that do not employ this unusual capital structure and, consequently, the number of firms listed by the Appellants as being subject to MIPRU 4, IPRU(INV) 3, 9 and 13 is irrelevant. In any event, as the Appellants note at footnote 36 of their submissions, a replacement regulatory regime for many of the provisions relied on by the Appellants is coming into effect from 1 January 2022.

9. The Appellants' third reason is dressed up as a point about legal certainty ("*the need for legal certainty as regards the operation of subordination in light of the Court of Appeal's treatment of Waterfall I*" (¶57(3))). However, there is nothing inconsistent between the Court of Appeal's judgment and *Waterfall I* and, on analysis, this point appears to be simply a complaint that Lewison LJ held that he did not need to decide how the relevant Insolvency Officers should give effect to the Court of Appeal's conclusions on the meaning of the contracts (¶64). That has never been an issue in dispute in these proceedings and none of the relevant Insolvency Officers have raised any concern about how to apply the Court of Appeal's decision. The surprising suggestion that the Supreme Court should hear an appeal merely to give (unsolicited) practical advice to the Insolvency Officers should be rejected.

10. The Appellants' fourth reason (¶¶57(4), 63) is the unfounded assertion that the Ranking Issues raise "*novel*" legal issues. They do not. Instead, as the Court of Appeal explained, they turn entirely on the interpretation of the relevant contracts on entirely orthodox principles of contractual interpretation ([27]-[31]). The Appellants rely on the peculiar facts of this dispute and say that this is the first case of that kind (¶63) – but they cannot and do not identify why

the particular factual context of the relevant contracts in this case should give rise to novel legal issues. In any case, there is nothing unusual about a Court having to determine the meaning of separate but related contracts that do not expressly cross-refer to each other.

11. The fifth reason given is that the Court of Appeal failed to take sufficient account of the terms of the FSA's waiver direction (¶¶48, 57(5)). The Appellants also rely on the alleged significance of the regulatory context in which these contracts were made (¶63(3)). Neither of these issues raises any point of law: each concerns merely how the admissible factual matrix affects the interpretation of the contracts, and the Court of Appeal took these matters into account ([31]) and (in common with the Judge at first instance) held they were not factually relevant ([76]).

12. The sixth reason given is that there is a great deal of money at stake in this case, said to be some £500 million (¶65). The amount at stake is not a point of law, nor does the significance of the case to these parties mean there is any wider public importance, nor is it a particularly exceptional sum to be at issue in a dispute about contractual interpretation in the English courts.

13. The Appellants also say that the Court of Appeal's conclusion was commercially surprising (¶66). This assertion is wrong and is unsustainable in light of the Court of Appeal's conclusion that there were good commercial reasons for the priority of Claim D over Claim C (¶91). A reasonable person would expect the Lehman Group to have prioritised Claims A and D, which funded external debt, over the purely intra-Lehman liabilities represented by Claims B and C.

The Rectification Issue

14. SLP3 did not seek permission to appeal from the Court of Appeal, and it should not now be entitled to apply for permission in contravention of Rule 10(2) of the Supreme Court Rules. In any case, SLP3's claim for rectification failed comprehensively both before the Judge at first instance and in the Court of Appeal, and it remains hopeless. In short:

    (1) The premise of SLP3's claim was and is that the amendments to Claim B changed the relative ranking of Claim A and Claim B ([49]). This premise is false: both before and after the amendments, Claim B was subordinated to Claim A, such that the claim for rectification does not arise ([63]). This conclusion follows as a matter of contractual interpretation and does not involve any arguable point of law.

    (2) The claim faces "*insuperable hurdles on the facts*" ([64]), and does not turn on any arguable point of law. The factual premise of SLP3's proposed appeal – that SLP3's intention was "*only*" to defer interest, and that the effect of this limited intention raises points of law left open in *FSHC v GLAS* – is unsustainable. The Court of Appeal held that this premise "*is flatly contrary to the facts*" ([64]).

(3) There are further insuperable factual hurdles to the claim in light of the Judge's findings as to the absence of any relevant positive intention ([66]).

(4) In any case, the legal effect of the relevant terms was "*exactly what was intended*" ([65]). Instead, the alleged "*mistake*" on SLP3's own case "*is no more than an uncontemplated knock-on effect of the words deliberately inserted*" ([65]). This is not and has never been a basis for rectification: the position is clearly settled in the authorities and was confirmed by the Court of Appeal in *FSHC v GLAS* at [179]-[181]. There is no point of law that has been left open for the Supreme Court to resolve (*cf* ¶*67*).

The Partial Discharge Issue

15. None of the reasons given by the Appellants (¶¶52-55, and 68) as to why the Partial Discharge Issue should be considered by the Supreme Court at this time provides a sufficient or good reason to grant permission to appeal. In any case, the Appellants themselves accept that the issue is academic unless the Court of Appeal's decision on the PLC Ranking Issue is overturned: see footnote 15 of the Appellants' application.

16. The application of the rule against double proof to the unusual facts of this case is not one of public importance that should be considered by the Supreme Court at this time.[7] The present scenario has never arisen before, is unlikely to arise again (certainly in light of the Court of Appeal's decision) and cannot credibly be described as a "*serious inroad into the rule*" (*cf* ¶68(1)) or otherwise such as to render the decision of relevance to the operation of the insolvency regime generally (*cf* ¶68(4)).

(1) The unusual circumstances of this case (a release of the surety's claim for an indemnity) necessarily involved some development of the rules in *Re Sass* / against double proof. But that is precisely the type of scenario when incremental and careful developments of judge made rules are required, and there was nothing unprincipled or objectionable in the approach adopted by the Court of Appeal[8].

(2) In any event, the rule is ultimately an equitable rule of fairness concerning the appropriate method of administering an insolvent estate, and there is no credible basis to suggest that

[7] *Cf* footnote 47, Midland Banking Co v Chambers (1869) LR 4 Ch App 398 did not concern an analogous situation. There was no waiver or release of a right of indemnity in favour of the debtor in Chambers. Instead, there was a covenant by the surety in favour of the creditor not to seek to assert the creditor's claim by way of subrogation: see page 400.

[8] In the sentence immediately preceding that cited by the Applicants at [68] from Lord Neuberger's speech in Waterfall I, Lord Neuberger stated that "… *as Judge-made rules are ultimately part of the common law, there is no reason in principle why they cannot be developed, or indeed why new rules cannot be formulated.*"

the Court of Appeal erred in this regard (*cf* (¶68(2)):

i. The underlying rationale for the rules in *Re Sass* / against double proof is no longer justified once the surety releases any claim for an indemnity (see, for example, *Goode and Gullifer, Legal Problems of Credit and Security (6th Edition)* at §8-18). That rationale is to prevent unjust enrichment of the estate in circumstances where the surety cannot assert its indemnity right in competition with the creditor. Once the surety's claim is released, that rationale falls away.

ii. In contrast, applying the rule against double-proof notwithstanding the release of the surety's indemnity claim risks substantive unfairness and a windfall to the creditor, as illustrated by the example given by Lewison LJ at [169].

(3) The Applicants' arguments appear to assume that payment by the surety does not discharge the underlying debt (see, for example, footnote 28 and ¶54 generally), that the decision leads to confusion for the law outside insolvent scenarios, or that the Court of Appeal decision opens up scope for abuse by a surety (see ¶¶55(3), 68(2)-(5)). However:

i. The Court of Appeal correctly analysed the decision in *MS Fashions,* which was consistent with the approach in other commonwealth jurisdictions, and which held that a payment by a surety does reduce the principal debt owed to the creditor.

ii. It makes no sense to suggest that a creditor's underlying debt claim remains unaffected by a payment from a surety (whatever the type of guarantee, and whether involving a principal debtor clause or not) such that the debtor can be sued for the full amount, or interest is treated as running on the full amount of the debt. A payment by a surety is treated as made both in satisfaction of the obligation owed by the debtor and the surety.

iii. If a creditor wishes to avoid the reduction of the principal debt because of payment by a surety, its guarantee agreement should provide (as is now typical) for a mechanism such as a suspense account. There is no commercial difficulty or problem created by the decision of the Court of Appeal.

iv. In any case, any criticism of the Court of Appeal's analysis of the position outside of an insolvency does not impact on the issue in the present case in an insolvency.

Sonia Tolaney QC
Richard Fisher QC
Tim Goldfarb

1 December 2021

Continuation Sheet Part D

Certificate of Service

I certify that this document was served on:

1. Lehman Brothers Holdings Inc. and Lehman Brothers Holdings Scottish LP 3 c/o Weil, Gotshal & Manges (London) LLP of 110 Fetter Lane, London EC4A 1AY to mark.lawford@weil.com lindsay.merritt@weil.com Rosalind.Meehan@weil.com Maeve.Brady@weil.com

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By Alston & Bird (City) LLP by email to the above email addresses on Wednesday, 1 December 2021.

Signed:

_____

Alex Shattock, Counsel
Alston & Bird (City) LLP