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]

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

(1) The Joint Liquidators of LB GP No.1 Limited (in liquidation)
(2) Deutsche Bank A.G. (London Branch)

and

[Defendant/Respondent in the Lower Court]

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.

On appeal from

Court of Appeal (Civil Division)

UKSC reference	**Date of filing**
UKSC 2021/0219	01-Dec-21

Details of the party responding ('The Respondent')

Respondent's full name

(1) The Joint Liquidators of LB GP No. 1 Limited (in liquidation)

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 November 2021

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

Daniel Moore

Solicitor's firm

Charles Russell Speechlys

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Reference

DZM/029241/00072

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

Yes ☐ **No ☒**

If yes, please provide the certificate number

Counsel's name

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Counsel's name

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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 B

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 December 2021

I certify that this document was served on
Name

Please see Continuation Sheet Part A

By

Charles Russell Speechlys 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

DX 157230 Parliament Square 4

Telephone: 020 7960 1991/1992

Email: registry@supremecourt.uk

Website: The Supreme Court

I certify that this document was served on:

1. Lehman Brothers Holdings Scottish LP 3 and Lehman Brothers Holdings Inc 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

2. The Joint Administrators of Lehman Brothers Holdings plc (in administration) c/o Hogan Lovells International LLP of Atlantic House, Holborn Viaduct, London EC1A 2FG to John.Tillman@hoganlovells.com; Crispin.Rapinet@hoganlovells.com; Rebecca.Hing@hoganlovells.com; and aliya.padhani@hoganlovells.com

3. The Joint Administrators of LB Holdings Intermediate 2 Limited (in administration) c/o Dentons UK and Middle East LLP of One Fleet Place, London EC4M 7WS to nigel.barnett@dentons.com; tessa.blank@dentons.com; jonathan.sears@dentons.com; julian.ng@dentons.com;

4. Deutsche Bank A.G. (London Branch) c/o Alston & Bird (City) LLP of 5th Floor, Octagon Point, St. Paul's, 5 Cheapside, London EC2V 6AA to Phillip.Taylor@alston.com; Paul.Morris@alston.com; Alex.Shattock@alston.com; Harry.York@alston.com

By Charles Russell Speechlys LLP by email to the above email addresses on 1 December 2021.

Signed:

_____

Daniel Moore, Partner
Charles Russell Speechlys LLP

Form 3, Page 5, Continuation Sheet Part B
Reasons of the Joint Liquidators of LB GP No.1 Ltd (In Liquidation) why permission to appeal should be refused

1. These submissions are limited to GP1's objections to LBHI's application for permission to appeal (the "**Application**") the PLC Ranking Issue. GP1 leaves the Partial Discharge Issue to Deutsche Bank. That issue becomes irrelevant if LBHI's application for permission to appeal the PLC Ranking Issue fails, as LBHI accepts at footnote 15 to §34 of the Application.

2. GP1 adopts the definitions used in the Application. Paragraph references (in form "**§**") are to the overly protracted submissions and grounds in support of the Application.

3. LBHI rehearses at length arguments on the narrow point of construction which underpins the PLC Ranking Issue. That point was unanimously determined against LBHI by the Court of Appeal after full argument, applying well-settled principles of construction. None of the eight reasons advanced by LBHI (at §§57-66) for this Court to consider that construction argument again identifies (i) an arguable point of law or one that is (ii) of general public importance. Permission should be refused.

4. Before briefly addressing those eight reasons at paragraph 5 below and following, GP1 observes that the apparent lack of authority on the relative ranking of subordinated debt instruments between themselves demonstrates that there is no public importance in the issue:

    4.1. It will be a very rare (to date, seemingly unique) case where an insolvent debtor: (i) has sufficient assets to pay all secured and senior creditors with statutory interest; (ii) has sufficient assets to pay some, but not all, of its subordinated debts; and (iii) has entered into subordinated debt agreements with different terms governing the relative ranking between those subordinated debts.

    4.2. Even then, the solution to the legal problem is a matter of construction of the individual subordination agreements in issue, applying settled principles of construction. There is no wider public interest in the applicable legal principles.

(1) Size of the subordinated debt market (§59)

5. The size of the subordinated debt market is of no import absent evidence of a sub-set of issuers (if any) that: (i) have issued multiple subordinated debt instruments on terms which give rise to real doubt as to the relative ranking of those instruments; and (ii) are at a material risk of insolvency during the life-time of the instruments:

   5.1. If there is such a sub-set, the affected parties will have the benefit of the Court of Appeal's current guidance which will be of greater or lesser assistance depending on the precise terms of the instruments under consideration. If future cases reveal difficulties in the application of that guidance to future factual circumstances, then further consideration of the issues by the appellate courts may be required.

   5.2. The issues publicised by these proceedings will no doubt mean that future subordinated debt instruments will be drafted to make clear how they are supposed to rank between themselves. No further legal guidance is required for that purpose.

(2) Widespread wording (§60)

6. LBHI records that Claim C (like Claim A) is on FSA Standard Form 10. The use of these standard forms is not, however, the cause of any live issue. No party in these proceedings has sought to argue that multiple debts issued on the same standard form (i.e. Claims A(i)-(iii) and C(i)-(iii)) should rank other than *pari passu* between themselves.

   6.1. Insofar as LBHI (at §60(3)) seeks to resurrect the issue of ranking as between C(i), C(ii) and C(iii) (or A(i)-(iii)), it is not now open to it to do so. The Court of Appeal did not deal with the "*endless loop*" which arises on the face of FSA Standard Form 10 because it was not asked to deal with it. No party challenged the finding at first instance (First Instance Judgment [248]) that they rank *pari passu inter se*.

   6.2. Indeed, no party had any interest in arguing for any different outcome at first instance or on appeal, because all instruments on FSA Standard Form 10 were between the same parties. Thus, if there are issues of public importance as to the relative ranking of debts when the *same* standard form is used, this is not the case to determine them.

7. Rather, the PLC Ranking issue arises because of the interaction between the standard form and an instrument with different terms. Claim D contains bespoke terminology which differs from FSA Standard Form 10. Crucially, the definition of "Subordinated Liabilities" in Claim C is different from the definition in Claim D. As the CA Judgment records, and subsequently found, "*the difference in definition made all the difference"* [79]. So:

   7.1. Contrary to LBHI's assertion (at §60), there is no evidence that the bespoke terms of Claim D (or Claim B) are in any wider use and it was no part of LBHI's case below that they were.

   7.2. Even if they were, problems would only arise if there are *also* other subordinated instruments from the same debtor with terms which do not mesh. The fact that wording such as in Claim D is used in financial markets is, on its own, unproblematic.

8. As LBHI accepts (F/Ns 36 & 37), the old FSA standard forms or wording based upon them are no longer (or are shortly not to be) of compulsory application. To the extent that the old wording led to ambiguities or construction difficulties, there can be no impediment to the use of clear wording in future.

(3) Multiple issuances (§61)

9. The fact that some financial institutions may have issued multiple subordinated instruments is also irrelevant absent evidence (and there was none) of the prevalence of issuances containing the same competing subordination provisions as in the present case:

   9.1. It is not the purpose of a second appeal to this Court, in a case involving narrow questions of construction of these particular instruments, to seek to determine wider hypothetical questions, including about how other potential (unspecified) instruments might interact with one another. Those questions do not arise, and none of the parties to these proceedings has any interest in having them resolved.

   9.2. The instruments in the present proceedings have no future relevance (*cf.* §61(1)). If there is any legal uncertainty which may affect the secondary market pricing (§61(2)) or estimates of recovery (§61(2)) for existing instruments, market

participants can and will evaluate such uncertainty (as with any other commercial or legal uncertainty) with the benefit of whatever advice they consider appropriate. Further consideration by this Court of the instruments relevant to this case will not qualitatively change that exercise.

9.3. Nor can this Court give legal *certainty* to investment firms required to carry out ICARAs in the future (§61(3)). That exercise will depend on the particular terms of the relevant instruments, and if relevant ranking uncertainties are identified then they will need to be resolved on their own facts.

(4) Consistency of treatment of *"rank… pari passu"* wording (§62)

10. Contrary to what is said at §62 (and §37(2)(b)), there was no inconsistency in the Court of Appeal's treatment of the *"rank… pari passu"* wording:

10.1. The proper meaning and effect of those words, as a matter of construction, must depend upon the instrument as a whole in which the words are contained. The subordination clauses between (unamended) Claim B and Claim D were materially different.

10.2. In particular, the Court of Appeal's conclusions on the relative ranking of (unamended) Claim B properly placed weight on the fact that Claim B was not to be paid unless the borrower was able to pay all of *"its debts as they fall due"*, not just its "Senior Liabilities". That, Lewison LJ correctly concluded, was an expression of juniority to Claim A, because Claim B could not be paid until Claim A had been: [57] and [59] of the CA Judgment.

10.3. Claim D's ranking mechanism was in materially different terms, and served only to delay payment until after "Senior Liabilities", *not* all other debts.

(5) Legally novel issues (§63)

11. The four candidate issues identified by LBHI under this head are not novel:

11.1. The ranking of each instrument depends on the construction of each instrument in turn, and then a comparison of the results of the construction exercises. The first

step requires two ordinary exercises of construction. The second is a simple application of logic to the outcome of the exercises.

11.2. The extent to which *"commerciality"* is a factor to be taken into account in construing written instruments, whether on standard forms, other sophisticated professionally drafted documents or otherwise, has already been authoritatively determined by this Court, which has cautioned against the utility of further judicial statements on the subject: *Wood v Capita Insurance* [2017] UKSC 24, [2017] AC 1173, per Lord Hodge at [9]. The *pari passu* principle in insolvency is also well understood and of no significance here because the whole point of subordination clauses is to depart from a *pari passu* ranking. In seeking to determine the extent of subordination, reference back to the principle of *pari passu* ranking of unsecured unsubordinated debts is unhelpful.

11.3. The principle that instruments entered into in a regulatory context fall be to be construed against that context is also not novel: and this is a point that the Court of Appeal expressly dealt with (per Lewison LJ at [29]-[31]) by reference to existing authoritative precedent. In this case, Marcus Smith J *found* that the FSA was not interested in the ranking of subordinated debts between themselves (only that the debts were subordinated to unsubordinated debts) (First Instance Judgment [61(3)(b)&(c)] & [69]). There was no challenge to this finding which the Court of Appeal noted at [76]. There can be no serious challenge to the correctness of the Court of Appeal's conclusion at [76] that the regulatory background was not *"of any real moment"* on the facts of this case.

11.4. The relative weight to be given to the definitions, payment conditions or mechanisms spelling out the commercial effect of the definitions is part of any construction exercise. The Ranking Issue does not give rise to any legally novel concepts that are deserving of consideration by this Court.

(6) *Waterfall I* and legal certainty (§64)

12. There is nothing in the Court of Appeal's treatment of *Waterfall 1* which creates uncertainty. §64 of the Application does not expand on its assertion:

12.1. The Court of Appeal was right to find (CA Judgment [15] to [19]) that subordinated creditors are not, necessarily, required to prove at the same time; entitlement to prove "*is a question of interpretation of the various contractual instruments involved, rather than a question of rules"*. Lewison LJ also concluded at [19] that a creditor who could otherwise prove at an earlier time may (by way of a subordination mechanism) agree only to prove later.

12.2. The CA Judgment does not contradict *Waterfall I*, or make the authoritative statements of law of this Court in that case any less clear.

12.3. If the applicant office holders of LBHI2 and PLC who had sought directions on the Ranking Issues had had any doubts about the effect of the CA Judgment and the time for proving of Claim C or D, they would have raised them. They did not. Permission to appeal should not be granted just in case this Court's guidance might be of use to a future insolvency officer. If a future insolvency officer requires court directions, they can be applied for in a case where the point is relevant.

(7) Number of stakeholders (§65)

13. This is an unsuccessful attempt to dress up in elaborate clothing an argument that the outcome of these proceedings is financially important to the parties and, in turn, those who stand ultimately to benefit from the flow of funds in the waterfall. The fact that the sums at stake are large or that the financial press have reported on the outcome of these proceedings, does not result in the legal issues being of any wider public importance or indicate any wider concern about the operation of subordinated debt instruments.

(8) Commercial surprise at the outcome (§66)

14. The final argument is that the Court of Appeal's judgment is "*surprising from a commercial perspective"*. It is not clear whose perspective is being referred to, but it is presumably LBHI's creditors. The fact that the outcome of an appeal is surprising to commercial creditors whose debtor lost does not indicate that any arguable point of law arises, still less one of general public importance.

LEXA HILLIARD QC
TOM ROSCOE