

# 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]

Lehman Brothers Holdings Scottish LP 3 (A3/2020/1787)

### and

[Defendant/Respondent in the Lower Court]

Lehman Brothers Holdings plc (in administration)  
(A3/2020/1787)

Full list of parties are contained in Continuation Sheet 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

The Joint Administrators of Lehman Brothers Holdings plc (in administration)

and Lehman Brothers Holdings plc (in administration)

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**

John Tillman, Partner

**Solicitor's firm**

Hogan Lovells International LLP

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**Email**

john.tillman@hoganlovells.com

**Telephone number**

020 7296 2000

**Reference**

161762.000001

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

Yes

No

If yes, please provide the certificate number

**Counsel's name**

Adrian Beltrami QC

**Address**

3 Verulam Buildings  
Gray's Inn  
London  
WC1R 5NT

**Email**

abeltrami@3vb.com

**Telephone number**

020 7831 8441

**Counsel's name**

Adam Kramer QC

**Address**

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Gray's Inn  
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WC1R 5NT

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akramer@3vb.com

**Telephone number**

020 7831 8441

## 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.

See continuation sheet

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 B

**By**

Hogan Lovells International 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](mailto:registry@supremecourt.uk)**

**Website: [The Supreme Court](#)**

UK SUPREME COURT FORM 3 (Notice of Objection)

Continuation Sheet Part A

**Parties**

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

**Claimant/Appellant in the Lower Court**

Lehman Brothers Holdings Scottish LP 3

**Defendant/Respondent in the Lower Court**

- (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)*

**Claimant/Appellant in the Lower Court**

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

**Defendant/Respondent in the Lower Court**

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



**Continuation Sheet Part B**

**Certificate of Service**

**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](mailto:mark.lawford@weil.com) [lindsay.meritt@weil.com](mailto:lindsay.meritt@weil.com) [rosalind.meehan@weil.com](mailto:rosalind.meehan@weil.com); [maeve.brady@weil.com](mailto:maeve.brady@weil.com)
2. 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](mailto:nigel.barnett@dentons.com) [tessa.blank@dentons.com](mailto:tessa.blank@dentons.com) [jonathan.sears@dentons.com](mailto:jonathan.sears@dentons.com) [julian.ng@dentons.com](mailto:julian.ng@dentons.com)
3. 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](mailto:Phillip.Taylor@alston.com) [Paul.Morris@alston.com](mailto:Paul.Morris@alston.com) [Alex.Shattock@alston.com](mailto:Alex.Shattock@alston.com) [Harry.York@alston.com](mailto:Harry.York@alston.com)
4. The Joint Liquidators of LB GP No. 1 Limited (in liquidation) c/o Charles Russell Speechlys LLP of Compass House, Lypiatt Road, Cheltenham, Gloucestershire GL50 2QJ to [Daniel.Moore@crsblaw.com](mailto:Daniel.Moore@crsblaw.com) [James.Hyne@crsblaw.com](mailto:James.Hyne@crsblaw.com) [Katy.Ferguson@crsblaw.com](mailto:Katy.Ferguson@crsblaw.com)

By Hogan Lovells International LLP by email to the above email addresses on 1 December 2021.

**Signed:**



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**John Tillman, Partner**

**Hogan Lovells International LLP**

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FORM 3 PAGE 5 CONTINUATION SHEETS:

REASONS OF THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS HOLDINGS PLC ("PLC") WHY PERMISSION TO APPEAL SHOULD BE REFUSED

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1. PLC opposes SLP3's application for permission in relation to the priority dispute between Claims A and B in LBHI2's estate (on LBHI2's application).<sup>1</sup> PLC is neutral as regards LBHI's application for permission in relation to the priority dispute between Claims C and D in PLC's estate (on PLC's application).<sup>2</sup> Accordingly, these Reasons address the LBHI2 Ranking Issue and the Rectification Issue, but not the PLC Ranking Issue or the Partial Discharge Issue.
2. Neither the LBHI2 Ranking Issue nor the Rectification Issue raises an arguable point of law, still less one of general public importance which ought to be considered at this time.

**A. The LBHI2 Ranking Issue**

3. SLP3 seeks to characterise the LBHI2 Ranking Issue as important to the multi-billion pound London subordinated debt market and FSA standard forms (Form 1 [7(3)], [57(1)] and [59]-[60(1)]). However, the Issue was resolved by reference to the very specific wording of a solvency condition added by amendment to Claim B, itself a non-standard subordinated note instrument (FSA standard forms for such instruments not being mandatory since the beginning of 2007). There has never been any suggestion (or evidence) that the form of the solvency condition in amended Claim B, which the draftsman himself described in his evidence as a "*bespoke solution*", has been replicated in any other debt instrument, in Lehman or anywhere else.<sup>3</sup> As to the wording in Claim A, SLP3's figures in Form 1 [60(1)] (which are not in evidence, advanced now for the first time, and not readily verifiable, and so they are not accepted) somewhat disguise the fact that wording similar to Claim A is only mandatory for around 900 firms (not including banks, unlike GENPRU) where they choose to issue subordinated debt, and then only for another month, undermining the suggestion that they

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<sup>1</sup> For the record, PLC also objects to the length of SLP3's Grounds of Appeal. This is no more complex a case than many that come before the Supreme Court, and the reasons given by SLP3 at Form 1 [1] do not justify exceeding by 8 pages the 10 page limit for Grounds of Appeal. It is a matter for the Supreme Court whether they nevertheless entertain the permission application despite that exceedance.

<sup>2</sup> Contrary to what is said in Form 1 [5(1)], PLC has been neutral on the PLC Ranking Issue from the beginning and remains neutral.

<sup>3</sup> Witness statement of Thomas James Grant dated 19 March 2019 [49] "*a bespoke solution which I drafted to deal with the potential uncertainty regarding tax. It is not something which I had or had seen drafted with respect to Lower Tier 2 security before. Nor is it something which I have or have seen drafted since.*"

are in 'widespread use in the market today'.<sup>4</sup>

4. In any event, the existence of any dispute between subordinated debt holders is itself highly unusual, and it is unlikely that the combination of circumstances generated by the Lehman insolvency will be repeated. It follows that there is no evidence, and it is not credible to suggest, that the *inter se* ranking of subordinated debt has an effect on the pricing of the coupon of a material amount or to a material number of firms' planning under their future Internal Capital and Risk Assessment (not yet in force), or to a material number of firms' planning for bank resolution under the Bank Recovery and Resolution Directive merely because the Prudential Regulation Authority has a power to in particular cases require details of the firm's liabilities (points raised for the first time in Form 1 [61(1)-(3)]). The multi-billion pound London subordinated debt market is unaffected by this dispute and the CA decision.
5. In fact, the LBHI2 Ranking Issue is merely a construction dispute, as to which four experienced commercial judges (with the CA judgment being given by Lewison LJ) have unanimously agreed as to the correct construction. Nor is it a difficult construction problem. The 'notional holder' solvency condition in the amended Claim B (quoted at CA Jment [36]) was crystal clear in achieving subordination by deeming Claim B ("*there shall be payable such amount... as would have been payable... if... such Noteholder were the holder of one of a class of preference shares...*") to rank at the level of preference shares but just above other (i.e. real) preference shares, which means below all other debt including subordinated debt such as Claim A. It was clear and could have no other purpose: CA Jment [42]-[44]. Accordingly, within the meaning of the subordination provisions in Claim A quoted at CA Jment [33], Claim B was expressed to rank junior to Claim A and so was an Excluded Liability within the meaning of Claim A, and Claim A was *not* expressed to rank junior to Claim B and so was a Senior Creditor within the meaning of Claim B: CA Jment [44]-[48].
6. The same conclusion obtains as a result of the solvency condition in Claim B which remained unamended during the amendments and also expressed juniority to all other subordinated debts (see paragraph 10 below).<sup>5</sup> SLP3 still (Form 1 [38]-[39]) is unable to advance a sensible construction of these words that helps it.

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<sup>4</sup> This wording is only *mandatory* for firms subject to IPRU-INV 9 and IPRU-INV 13, which SLP3 numbers at 900. The wording is only *suggested* for firms subject to MIPRU 4; firms subject to IPRU-INV 3 can apply for a *waiver* from using the standard form (or modification). SLP3 numbers these firms at 9,900 and 3,200 respectively. And, as noted in Form 1 footnote 36, even the mandatory requirements are being replaced in January 2022 with the move to IFPR/MIFIDPRU.

<sup>5</sup> It was agreed by the parties and CA (CA Jment [39]) that the two parts must be read together holistically. SLP3 nevertheless continues to seek to downplay the deeming provision (see CA Jment [38]) and indeed now even suggests

7. SLP3 seeks (and has throughout the dispute sought) to characterise the LBHI2 Ranking Issue as being determined in some way by the default *pari passu* rule (Form 1 [35(3)], [63(2)]), but (as was not disputed) that rule is a default that gives way to contrary intention in the instrument and the question for the court was whether the instruments evince such an intention (CA Jment [14]-[19]).<sup>6</sup> Moreover, one of the instruments (Claim A) does not even contemplate that it might rank *pari passu* rather than above or below another subordinated instrument, and the other (Claim B) expressly contemplates that it might be subordinated to other subordinated creditors (CA Jment [44]). The question remains one of construction.
8. SLP3 also persists in trying to create the appearance of a disputed point of law by invoking the dispute between the different courts in *Waterfall I* and the manner in which subordination is given effect within an insolvency (Form 1 [7(6)], [28(1)], [31(1)], [57(3)], [64]). However, as Lewison LJ (who gave the CA judgment in *Waterfall I*) observed in this case, that dispute was as to whether simple contractual subordination postpones the right to prove, i.e. the mechanics of giving effect to an intention to subordinate, and does not affect the construction question (CA Jment [15] and [25]-[26]). That this is the true position is evident from the fact that despite invoking it many times to seek permission, when it comes to actually setting out its arguments in relation to the LBHI2 Ranking Issue, SLP3 does not mention *Waterfall I* (Form 1 [35]-[40]). Permission to appeal cannot be justified as seeking clarification from the Supreme Court as to how a decision on ranking is to be implemented by the Insolvency Officer (as SLP3 says in Form 1 [64(2)]) where that point is not in issue between the parties in this case.

## **B. Rectification**

9. SLP3 did not seek permission to appeal on the rectification issue from the Court of Appeal when it sought permission on the other issues. It is accordingly not now open to it to seek permission directly from the Supreme Court.<sup>7</sup> No explanation or justification has been advanced, and there is no reason to waive this non-compliance (although SLP3 has in any event not sought such a waiver). In reality, SLP3 did not seek permission because it (correctly) recognised that any appeal was on a question of

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that the reasonable person might “*look principally*” to one half rather than the other half (Form 1 [63(4)]), despite there being no legal basis for such an approach to construction.

<sup>6</sup> And SLP3 chose not to advance any expert evidence of any custom or practice of *pari passu* that could influence the construction exercise. Moreover, although SLP3 accurately records that the parties agreed that the default position was *pari passu* within a regulatory capital tier at Form 1 [17], it fails to note PLC’s express caveat (supported by SLP3’s own witness) that this was always subject to any layering provided for in the instruments: PLC CA Skeleton [9].

<sup>7</sup> The Supreme Court Rules 2009 (SI 2009 No. 1603), rule 10(2).

fact. The following points apply only if the Supreme Court entertains SLP3's application for permission on rectification.

10. SLP3 sought rectification of the amended Claim B if it lost on the LBHI2 Ranking Issue of construction but if it won on its construction of the unamended Claim B such that prior to amendment, Claim B did *not* rank junior to Claim A (hence the amendment changed the ranking, which SLP3 says was a mistake). The Court of Appeal concluded (disagreeing with the trial Judge, who had made a basic error of logic: CA Jment [52]-[53]) that the solvency condition in the unamended Claim B means that the claim is not payable unless LBHI2 can pay all "*its debts*" which must include Claim A, that Claim B therefore ranked junior to Claim A even before the amendment of Claim B, and therefore the rectification argument fell away: CA Jment [54]-[63]. SLP3's challenge to this construction in order to revive the rectification argument (Form 1 [38(1)]) requires unlicensed surgery to the words used. Equally, the (new) argument at Form 1 [38(2)] that the solvency condition at clause 5(2) of Claim A is substantively the same as the "*cash flow*" condition in unamended Claim B does no justice to the obviously different wording in the two clauses.
11. Rectification therefore only arose *obiter* (CA Jment [64]) and in any case was a question of fact. The claim foundered on the fact that SLP3 sought to rectify to remove in its entirety some 30 lines of text which were deliberately inserted by amendment in order to deal with a tax sensitivity and consequential ranking issue, on which there was no mistake, a claim to rectification that therefore failed on the facts: CA Jment [64] and [67].<sup>8</sup> The point about this being a mistake as to knock-on effects rather than meaning or *legal* effect was only an additional reason of the Court (CA Jment [65] and [67]) and moreover is correct—the parties may not have remembered when amending Claim B that there was another subordinated debt<sup>9</sup> but that was not a mistake as to the legal effect of the amendment (to rank Claim B as if a preference share), which legal effect was clear and intended. (Form 1 [42] suggests there was a mistake as to legal effect but not what it was.)
12. There was no substantial dispute of law, the parties agreeing (i) that a positive intention not to change the ranking of Claim B is required, and (ii) a positive intention not to change the ranking of Claim B could be shown by demonstrating a positive intention only to make a limited change X and not to effect any other change including to change the ranking of Claim B. Contrary to Form 1 [43], the CA summary at CA Jment [66] was correct and not inconsistent with such an intention being shown by means of a positive intention only to make change X. Contrary to Form 1 [67], there is no novel

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<sup>8</sup> This was the factual foundation (and it should be noted that SLP3 did not seek to demonstrate that the tax sensitivity was itself a mistake and there was no tax issue). The CA's rejection of rectification did not depend merely upon the fact that the words used were intended, as Form 1 [8(2)] and [42] wrongly suggests.

<sup>9</sup> Mr Grant at A&O certainly did not know about it: Trial Transcript Day 2/130.7-131.8.

and important point about the application and scope of the remedy of rectification (although it is noted that SLP3 does not itself seek to identify what that novel and important point is), and contrary to Form 1 [8(4)], the law is not left in a state of any uncertainty (and it is noted that SLP3 does not identify the supposed uncertainty).

13. As to Form 1 [44], the case that Allen & Overy's intentions were the relevant intentions for the purposes of establishing a mistake, to be attributed to the four Lehman decision-makers, is one that was expressly disavowed at trial and on appeal. It was SLP3's case that the only relevant intentions to be attributed to SLP3 and LBHI2 were those of Ms Dolby and/or Ms McMorrow,<sup>10</sup> and not Mr Grant (a junior associate at the time, the only A&O witness involved in the amendment). It is more than surprising that SLP3 seeks to advance this new case before the Supreme Court without explanation when its leading counsel stated at trial "*we do not and never have said Mr Grant was the relevant decision-maker; he was not. Nor do we say that Ms Dolby adopted or shared his intention*"<sup>11</sup> and "*the person whose intention was NOT relevant was Mr Grant's. He was not a decision-maker,*"<sup>12</sup> and on appeal: "*My learned friend referred to the intention of Mr Grant. He did that at page 127. Can I be clear: it has never been part of our case that he was a decision-maker. He was just the draftsman.*"<sup>13</sup> Thus not only was there no evidence that A&O were the relevant decision-makers or that their intentions should be attributed to the Lehman decision-makers because (which would be very surprising) the senior Lehman personnel had entirely delegated decision-making to A&O,<sup>14</sup> but it is too late to raise the argument as PLC has lost the chance to examine the witness as to any such contention.

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<sup>10</sup> SLP3 Trial Skeleton [437-8], SLP3 Appeal Skeleton footnote 96 to [79]. PLC contended that the Court had to look to the four formal decision-makers Ms Upton and Mr Triolo of SLP3 and Mr Rush and Mr Jameson of LBHI2. The Judge did not need to determine this point; PLC advanced it by Respondent's Notice before the CA as an additional reason why rectification should be refused (i.e. that any necessary intention had not been shown for the relevant decision-makers); the CA also did not need to determine the point, but if there were an appeal on rectification to the Supreme Court then PLC would seek advance this point as an additional reason why the CA was correct under Supreme Court rule 25(1).

<sup>11</sup> Trial transcript day 7/12.11-13.

<sup>12</sup> SLP3's Trial Rectification Reply Closing page 5.

<sup>13</sup> Appeal transcript day 3/21.18-23.

<sup>14</sup> Yet this test for attribution, from *Murray Holdings Ltd v Oscatello Investments Ltd* [2018] EWHC 162 (Ch), canvassed in the skeletons (e.g. PLC Appeal Skeleton [100-102]) in relation to the possibility of Ms Dolby and Ms McMorrow's intentions being attributed to the true Lehman decision-makers Ms Upton, Mr Triolo, Mr Rush and Mr Jameson, was never disputed by SLP3.