

IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
COMPANIES COURT

Mr Justice Hildyard  
Monday, 16 January 2017



**IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL  
(EUROPE) (IN ADMINISTRATION)  
AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**B E T W E E N :**

**THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS  
INTERNATIONAL (EUROPE) (IN ADMINISTRATION)**

Applicants

**-and-**

- (1) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS  
LIMITED (IN ADMINISTRATION)**
- (2) THE JOINT ADMINISTRATORS OF LB HOLDINGS  
INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)**
- (3) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS  
EUROPE LIMITED (IN ADMINISTRATION)**
- (4) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS HOLDINGS PLC  
(IN ADMINISTRATION)**

Respondents

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**ORDER**

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**UPON THE APPLICATION** of the Applicants (the “**LBIE Administrators**”) by Application Notice dated 22 April 2016 (the “**Waterfall III Application**”)

**AND UPON THE CROSS APPLICATION** of the First Respondents (the “**LBL Administrators**”) by Application Notice dated 17 October 2016 (the “**Cross Application**”)

**AND UPON THE APPLICATION** of the LBL Administrators by Application Notice dated 10 January 2016 (the “**CMC Application**”)

**AND UPON READING** the evidence

**AND UPON** the Court being satisfied that there is a need for expert evidence in relation to US tax law

**AND UPON HEARING** William Trower QC, Daniel Bayfield QC and Stephen Robins for the LBIE Administrators, Philip Marshall QC and Ruth den Besten for the First Respondents, Peter Arden QC, Louise Hutton and Rosanna Foskett for the Second Respondents (the “**LBHI2 Administrators**”), Felicity Toubé QC for the Third Respondents (the “**LBEL Administrators**”) and Stephen Atherton QC and Tony Beswetherick for the Fourth Respondents (the “**LBH Administrators**”)

**IT IS ORDERED**, in relation to the Part A Issues (as defined in the order of Mr Justice Hildyard dated 4 November 2016), that:

Trial preparation

1. The parties use their best endeavours to seek to agree, by 20 January 2017, a list identifying which of the Part A Issues are in dispute (and as between which parties) and which are not in dispute.
2. The time and date by which skeleton arguments for trial are required to be filed and exchanged be extended to 4.30pm on 23 January 2017.
3. Paragraph 18 of the Court’s Order of 4 November 2016 be varied such that the LBIE Administrators’ solicitors are required to prepare a composite bundle of authorities and to lodge it at Court and serve it on the other parties as soon as is reasonably practicable and in any event by 4.30pm on 26 January 2017.
4. The parties use their best endeavours, by 4pm on 27 January 2017, to agree and file:  
(i) a trial timetable; and (ii) a reading list.

**AND IT IS ORDERED**, in relation to the Part B Issues (as defined in the order of Mr Justice Hildyard dated 4 November 2016), that:

### The “priority issue”

1. The LBL Administrators shall, by 4.30pm on 20 February 2017, serve on each of the other parties their response to the Schedule hereto, as served by LBH Plc, LBHI2 and LBEL on 18 January 2017 pursuant to Rule 7.60(1)(a) of the Insolvency Rules 1986 and CPR Part 18 (which Schedule adopts the terms defined in the Waterfall III Application and above). If, owing to the scope of enquiries required to be undertaken in order to answer the requests made in paragraph (3)(b) of the Schedule, the LBL Administrators are not able to respond to paragraph (3)(b) of the Schedule by 20 February 2017, they shall indicate by 10am on Monday 30 January when they anticipate being able to do so.

### Position papers

2. The LBH Administrators shall, by 4pm on 17 March 2017, file and serve on the other parties a position paper setting out in detail (i) their position (insofar as they take any position) and (ii) the basis upon which they adopt such positions, including references to the principal authorities which they anticipate, at that stage, relying upon at trial.
3. The LBL Administrators shall (if so advised), by 4pm on 19 April 2017, file and serve on the other parties a position paper in reply to that filed by the LBH Administrators pursuant to paragraph 2 above.

### Schedule of Facts

4. The LBIE Administrators, the LBHI2 Administrators and the LBEL Administrators shall, by 4pm on 28 February 2017, inform the LBL Administrators (and the other parties) which, if any, of the facts and matters (or parts of those facts and matters) set out in Sections B and C of the LBL Administrators’ Schedule of Facts (circulated to the parties under cover of a letter from Dechert LLP dated 6 January 2017) are at that stage admitted by them for the purposes of the trial of the Part B Issues.
5. The LBH Administrators shall by 4pm on 17 March 2017, inform the LBL Administrators (and the other parties) which, if any, of the facts and matters (or parts of

those facts or matters) set out in Sections B and C of the LBL Administrators' Schedule of Facts (circulated to the parties under cover of a letter from Dechert LLP dated 6 January 2017) are at that stage admitted by them for the purposes of the trial of the Part B Issues. In the event that the LBH Administrators require sight of certain documents in order to admit any facts or matters, they are to request the same in writing from the LBL Administrators who shall comply with such requests to the extent that they are able to do so as soon as reasonably practicable.

#### Witness statements

6. The LBL Administrators shall file and serve any witness statements on which they intend to rely at trial (and any notices of intention to rely on hearsay evidence) by 4pm on 3 May 2017.
7. The other parties shall file and serve any witness statements on which they intend to rely at trial (and any notices of intention to rely on hearsay evidence) by 4pm on 7 June 2017.
8. The LBL Administrators have liberty to file and serve witness statements in reply to the witness statements of the other parties by 4pm on 28 June 2017.
9. Unless otherwise ordered, the witness statements are to stand as the evidence in chief of the witnesses at trial. The parties shall, by 4pm on 21 July 2017, notify the other parties of their intention to cross-examine any witnesses.

#### Expert evidence

10. Each party has permission to adduce expert evidence from an expert in US tax law in relation to matters of US tax law.
11. The parties adducing expert evidence shall use their best endeavours to agree the list of questions to be addressed by the experts by 31 March 2017 and in any event by 7 April 2017, and, once agreed, shall submit the list of questions to the Judge.

12. The LBL Administrators shall file and serve a report of their expert by 4pm on 16 May 2017.
13. Each of the other parties shall (if so advised) file and serve a report of their expert by 4pm on 16 June 2017.
14. By 4pm on 14 July 2017:
  - a) The LBL Administrators shall be at liberty to file and serve an expert report in reply to the expert reports served by the other parties;
  - b) If any experts report(s) is/are served by parties other than the LBIE Administrators and the LBL Administrators, each of the parties that file and serve expert reports pursuant to paragraph 13 above shall be at liberty to file and serve an expert report in reply to each of the other expert reports served pursuant to paragraph 13.
15. The parties' respective experts shall hold a discussion as soon as possible after 14 July 2017 for the purpose of:
  - a) identifying the issues, if any, between them; and
  - b) where possible, reaching agreement on those issues.
16. The parties' respective experts shall, by 28 July 2017, prepare and file a joint statement with the Court stating:
  - a) the issues on which they are agreed;
  - b) the issues on which they disagree and a summary of the reasons for their disagreement.

### Pre-trial review

17. A pre-trial review (the “**PTR**”) shall take place before Mr Justice Hildyard during the week commencing 24 July 2017, or on 31 July 2017, with a time estimate of one day. The parties shall liaise with the Judge’s clerk to fix the date of the PTR.

### Trial

18. The trial shall take place before Mr Justice Hildyard commencing on 11 September 2017 with a time estimate of 15 days (including 2 reading days on 11 and 12 September).
19. 21 and 22 September 2017 shall be non-sitting days.

### Trial preparation

20. The parties’ solicitors shall discuss and agree the index for the trial bundle by 4.00pm on 30 June 2017.
21. The LBIE Administrators shall be responsible for preparing the trial bundle and shall serve a copy on each of the other parties by 7 July 2017.
22. The LBIE Administrators shall file a copy of the trial bundle for the use of the Judge with the Chancery Listing Office by such time and date as the Judge indicates would be convenient to him.
23. Skeleton arguments shall be filed and exchanged by 4pm on 7 September 2017, and copies of all authorities mentioned in the skeleton arguments shall be provided to the LBIE Administrators’ solicitors at the same time.
24. The LBIE Administrators’ solicitors shall prepare a composite bundle of authorities, which shall be lodged at court and served on the other parties as soon as practicable after 7 September 2017.

Costs

25. Costs in the Waterfall III Application.

Liberty to Apply

26. The parties shall have liberty to apply.

**Service of this Order**

The Court has provided a sealed copy of this Order to the serving party:

Linklaters LLP, One Silk Street, London EC2Y 8HQ (ref: Euan Clarke/Jared Oyston)

## SCHEDULE

- (1) As to the LBL Administrators' case that LBHI2, LBEL, and LBH are each alleged to be liable to LBL pursuant to the alleged Recharge Agreement (as defined at paragraph 80 of the LBL Administrators' Position Paper dated 30 September 2016 (the "LBL Administrators' Position Paper")) please provide details of:
- (a) The original parties to the alleged Recharge Agreement;
  - (b) The means by which and from which date each of the aforesaid original parties became parties to the alleged Recharge Agreement;
  - (c) The terms and scope of the alleged Recharge Agreement, including:
    - (i) The nature of the costs, expenses, other liabilities or items to which it applied;
    - (ii) The proportions in which such sums were to be recharged to each Lehman Group entity (including but not limited to LBHI2, LBEL, and LBH) said to be liable to LBL; and
    - (iii) Each other term (whether express or implied and, if implied, the basis for such implication) of the Recharge Agreement on which the LBL Administrators rely against one or more of the parties;
  - (d) Any further term of the alleged Recharge Agreement on which the LBL Administrators rely against one or more of the parties and which is alleged to have been introduced by amendment of the alleged Recharge Agreement;
  - (e) In respect of each of the alleged parties (in particular LBHI2, LBEL and LBH), how and when each such further term became an effective and binding contractual term of the alleged Recharge Agreement;



- (f) How each of LBHI2, LBEL and LBH is alleged to have become a party to the alleged Recharge Agreement and from what date each of those parties is alleged to have become bound by the terms of the alleged Recharge Agreement;
- (g) Whether any written document is relied on by the LBL Administrators as evidence of the alleged Recharge Agreement as against any of the parties and, if so, (i) give the date of that written document and (ii) provide a copy of the relevant document;
- (h) If it is alleged that the alleged Recharge Agreement was contained in, and/or was recorded "*in part*" by, any written document identified in response to (b) above:
- (i) In relation to, respectively, each of the Contribution Claim, the Bad Debt Claim and/or the Administration Expenses (as defined in paragraph 78 of the LBL Administrators' Position Paper) as well as each category of "*administrative cost*" set out in Appendix 3 to the LBL Administrators' Position Paper, whether it is alleged that each category of such Recharges falls within the written agreement or outside of the written agreement;
  - (ii) To the extent that it is alleged that a particular category of such Recharges falls within the written agreement, each term of the written agreement on which the LBL Administrators rely against one or more of the parties (whether express or implied and, if implied, the basis for such implication);
- (i) If it is alleged that any of LBHI2, LBEL and/or LBH became party to the alleged Recharge Agreement by means of an oral agreement, (i) which individual(s) (on behalf of each of LBL and each of LBHI2, LBEL and LBH) made such oral agreement and (ii) full particulars of what was orally agreed, including when and where it was made and its terms; and
- (j) If it is alleged that the existence of the alleged Recharge Agreement between LBL and any one or more of LBHI2, LBEL and LBH is to be inferred from conduct,

the particular conduct and/or documentary evidence on which the LBL Administrators rely in support of that inference;

(2) As to the LBL Administrators' case that, further or alternatively, LBHI2, LBEL and LBH are each alleged to be liable to LBL pursuant to an agreement by custom (and/or, where applicable, collateral contract) (as alleged at paragraph 93 of the LBL Administrators' Position Paper):

(a) The original parties to the agreement by custom and/or collateral contract (and, in the case of the collateral contract, the parties to the relevant principal contract);

(b) The matters relied on to show, (i) the existence of the agreement by custom and/or collateral contract and (ii) that each of the aforesaid original parties became party to the agreement by custom and/or collateral contract;

(c) The terms and scope of the agreement by custom and/or collateral contract (and, in the case of the collateral contract, the scope of the relevant principal contract), including:

(i) The nature of the costs, expenses, other liabilities or items to which it applied;

(ii) The proportions in which such sums were to be recharged to each Lehman Group entity (including but not limited to LBHI2, LBEL, and LBH) said to be liable to LBL; and

(iii) Each other term of the agreement by custom and/or collateral contract (and, in the case of the collateral contract, each other term of the relevant principal contract) on which the LBL Administrators rely against one or more of the parties;

(d) Any further term of the agreement by custom and/or collateral contract on which the LBL Administrators rely against one or more of the parties and which is

- alleged to have been introduced by amendment to the agreement by custom and/or collateral contract;
- (e) The matters relied on to show that each such further term became an effective and binding contractual term of the agreement by custom and/or collateral contract;
  - (f) The matters relied on to show that each of LBHI2, LBEL and LBH became a party to the agreement by custom and/or collateral contract and from what date each of those parties is alleged to have been bound by the terms of the agreement by custom and/or collateral contract;
  - (g) Whether any written document is relied on by the LBL Administrators as evidence of the agreement as against any of the parties and, if so, (i) give the date of that written document and (ii) provide a copy of the document;
  - (h) If it is alleged that any of LBHI2, LBEL and/or LBH became party to the said agreement by means of an oral agreement, (i) which individual(s) (on behalf of each of LBL and each of LBHI2, LBEL and LBH) made such oral agreement and (ii) full particulars of what was orally agreed, including where and when it was made and its terms;
- (3) In relation to each of the categories of costs identified in Appendix 3 to the LBL Administrators' Position Paper, please identify:
- a. The alleged nature of each of the categories of costs identified in Appendix 3;
  - b. The dates on which each category of costs identified in Appendix 3 were recharged to each such Lehman Group entity; and
  - c. The proportions in which the costs identified in Appendix 3 were allegedly recharged to each such entity;

- (4) The examples of recharges made to holding companies (including any examples of recharges made to LBHI2 and/or LBH, if any) referred to by the LBL Administrators in their Reply Position Paper dated 30 December 2016 at paragraph 32.1 (as requested in Dentons' letter to Dechert of 6 January 2017);
- (5) Without prejudice to the matters set out above, whether it is asserted that the holding of a share in LBIE by LBL was a service provided to one or more of LBH, LBHI2 or LBIE within the ambit of the Recharge Agreement and if so:
- a. What is the basis of such assertion, in particular by reference to the specific terms of the alleged Recharge Agreement;
  - b. Specifically, to which of the alleged parties to the Recharge Agreement the said service was provided;
  - c. Insofar as it is said that the costs and expenses of holding a share in LBIE was analogous to other expenses incurred and recharged by LBL (see paragraph 19.4 of LBL Administrators' Supplemental Position Paper) the precise basis upon which it is asserted that such an analogous expense was capable of being recharged under the alleged Recharge Agreement, including in particular by reference to the specific terms of the alleged Recharge Agreement.