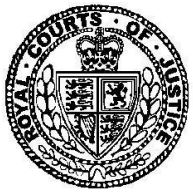

Neutral Citation Number: [2023] EWHC 3317 (Ch)

Case No: CR-2008-000026

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 21 December 2023

IN THE MATTER OF LEHMAN BROTHERS HOLDINGS PLC
(in Administration)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Before:

THE HONOURABLE MR JUSTICE HILDYARD

Between:

THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS HOLDINGS PLC (in Administration)	**Applicants**
- and –	
(1) LB GP NO.1 LIMITED (in Liquidation) **(2) LEHMAN BROTHERS HOLDINGS INC.** **(3) DEUTSCHE BANK A.G. (London Branch)**	**Respondents**

Adrian Beltrami KC, Kate Holderness (instructed by **Hogan Lovells International LLP**) for the **Applicant**
Lexa Hilliard KC, Tom Roscoe (instructed by **Charles Russell Speechlys LLP**) for the **First Respondent**
David Allison KC, Adam Al-Attar, Edoardo Lupi (instructed by **Weil, Gotshal & Manges (London) LLP**) for the **Second Respondent**
Sonia Tolaney KC, Richard Fisher KC, Tim Goldfarb (instructed by **Alston & Bird (City) LLP**) for the **Third Respondent**

Written submissions filed on: 13 December 2023

APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10:30 on 21 December 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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Mr Justice Hildyard:

1. Further to my main judgment in this matter dated 29 November 2023, there arise the usual consequential issues, and in particular, what should be the order for costs and whether I should give permission to appeal. The parties have each provided written submissions on these issues and are all content that they should be determined on the papers. That has saved time and any delay in arranging a hearing and I am grateful to them. I address the two issues in turn, using the same abbreviations as in my main judgment.

Costs

2. My Consent Order dated 12 October 2023 provided that each party is to bear its own costs in respect of (a) the Directions Application as regards Issues (2), (3), (4) and (5) and (b) the Strike Out Application as regards Issues (4) and (5). Accordingly, it is only the costs of Issue (1) that need to be determined. Further, there is a substantial measure of agreement between the parties: the only remaining dispute is between LBHI and DB.

3. It is common ground between the parties, and it would be usual in circumstances such as these, that the costs of the PLC Administrators of Issue (1) should be paid as an expense of PLC's administration. I make that order accordingly.

4. Further, LBHI accepts that it should pay GP1's costs of Issue (1), to be subject to detailed assessment on the standard basis, if not agreed. That is agreed by GP1. I make that order also.

5. That leaves for determination (a) the appropriate order in relation to LBHI's and DB's costs and (b) whether, and if so how, the costs of Issue (1) are to be distinguished. As to (a), that dispute is limited further because (subject to a proposal covering all costs described in paragraph [8] below) LBHI does not object to an order that it be required to pay GP1's and DB's costs of Issue (1), insofar as those costs relate to the Directions Application, to be subject to detailed assessment on the standard basis if not agreed. The dispute is, therefore, focused on (a) the incidence of the costs of Issue (1) insofar as those costs relate to the Strike Out Application and (b) certain proposals and counter-proposals made by DB and LBHI in that regard.

6. DB's contention is that it was, in the round, the successful party on Issue (1), and as such is entitled to its costs from LBHI as (again in the round) the unsuccessful party, subject only to some "proportionate reduction" in the amount of the costs awarded to it to reflect the fact that it "did not succeed on *res judicata*."

7. DB submits that its *res judicata* arguments were an alternative means to achieving the same outcome on Issue (1) as GP1's and DB's substantive arguments on the merits, that there is no sufficient reason for any "complex" issue-based and separate order in respect of the Strike Out Application; and, furthermore, that any such separate costs order would be unduly difficult and burdensome to delineate, and disproportionate.

8. DB proposes, as what it presents as a practical and fair solution, that LBHI should pay (a) 40% of DB's total costs of all the Applications, as being the fair percentage referable to Issue (1); (b) that the amount of costs payable to it by LBHI should be reduced by 15% to reflect the dismissal of the Strike Out Application; and that (c) such costs be subject to detailed assessment on the standard basis if not agreed.

9. LBHI has, however, rejected this proposal on the basis that it is unfair and "does not reflect the outcome of the Applications" because DB "lost a discrete application it brought in the form of the Strike Out Application, and should pay the costs of it in the ordinary way."

10. Instead, LBHI seeks an order that DB be required to pay LBHI its costs of Issue (1) insofar as those costs relate to the Strike Out Application, to be subject to detailed assessment on the standard basis if not agreed. Further, LBHI contends that the costs agreed or assessed as owing by DB to LBHI should be set off against the amount assessed as owing by LBHI to DB, with any balance to be paid by the paying party, pursuant to CPR, r. 44.12(1)(a) or the Court's inherent jurisdiction (see *Izzo v Philip Ross & Co* [2002] B.P.I.R. 310 *per* Neuberger J). Alternatively, to obviate the need for a detailed assessment of costs, LBHI submits that, overall, a fair and proportionate approach would be for there to be no order as to costs between DB and LBHI to reflect the fact that DB won on the substance of Issue (1) but lost its Strike Out Application.

11. In my judgment, DB should pay LBHI the costs of its lost Strike Out Application (on the standard basis, to be assessed if not agreed). I acknowledge, as I expressly stated in paragraph [84] of my main judgment, that (consistently with the consensus of all parties) I directed that any argument under the general portmanteau of estoppel or *res judicata* should be heard as part and parcel of and subsumed within the submissions on the substantive legal points. But there was a number of reasons for that direction, as I explained in the same paragraph of my main judgment; and the fact remains that the Strike Out Application was conceived and proceeded with as a separate application which generated specific evidence and required discrete analysis, even though the analyses of each of the substantive Issue (1) and of the Strike Out Application shed light on one another. I consider that the Strike Out Application should be treated as a separate and failed adventure.

12. I am reinforced in that conclusion by the difficulty, even when using (as is almost inevitably required) a broad brush, of determining any fair percentage order such as is posited by CPR, r. 44.2(6)(a). I do not consider that a 15% reduction of a 40% split between Issue (1) and the other Issues as recommended by DB would be fair. As to the figure of 15%, I accept LBHI's points to the effect that (a) most of the evidence went to the issues of *res judicata* and abuse of process/issue estoppel, and (b) DB's submissions (both written and oral) focused on those issues.

13. Obviously, a solution which would avoid the need for detailed assessment would be preferable. However, I am not persuaded that LBHI's proposal that there should be no order for costs, thereby equating the costs of the substantive issue with the costs of the Strike Out Application would be fair either. I was not told whether separate brief fees were agreed; nor what the split of chargeable time was even in general terms. I would be guessing, which is to my mind an impermissible step beyond the application of a broad brush. I would be even less able to pretend to assess that DB's costs of Issue (1) should be taken to be 40% of its reasonable and proportionate costs of the entire

proceedings (encompassing also Issues (2), (3), (4) and (5), which were settled before the hearing). The most I consider I should say, in case it assists assessment of the costs of the hearing of Issue (1), is that my overall impression was that at the hearing, and in terms of the weight of argument, about 70% of the time was referable to the substantive issue; and I note, for example, that 31 of the 42 pages of my main judgment concerned the substantive issue.

14. Naturally, I would hope that DB and LBHI are able to agree the costs, and the resultant balance between them. Detailed assessment is inevitably expensive and time consuming. But I am not persuaded that there is another fair solution absent agreement.

15. Finally, if a single resultant balance cannot be agreed, so that the costs must be assessed, it seems to me fair to order also that the amounts assessed to be owing by one party should be set off against the costs owing by the other, as sought by LBHI: and see *Izzo v Philip Ross & Co* [2002] B.P.I.R. 310.

Permission to Appeal

16. LBHI provided me with its detailed reasons for seeking permission to appeal the declaration in paragraph 1 of the Order and in support of its contention, contrary to my decision, that the principal amount of Claim C should be paid in priority to statutory interest payable on Claim D. LBHI also provided me with draft Grounds of Appeal.

17. LBHI pointed out more generally that Issue (1) involves substantial amounts of money, with a 'swing' of approximately £235 million according to the ultimate outcome, and drew my attention also to the "significant ramifications for the LBHI estate which, unlike the PLC estate, still has a substantial deficiency in respect of unsecured creditor claims."

18. These points were made with tact and economy. However, I shall not myself give permission to appeal. Given my conclusion that the decisions in *Waterfall I* and *ECAPS1* supported my analysis of contractual provisions substantially common to all three cases, I consider that I should leave this (if pursued) to the Court of Appeal for it to determine whether permission should be given.