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Case No: CR-2008-000019

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
7 Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 03/08/2017

Before:

THE HONOURABLE MR JUSTICE HILDYARD

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Between:

IN THE MATTER OF LEHMAN BROTHERS EUROPE LIMITED (IN ADMINISTRATION)

AND IN THE MATTER OF LEHMAN BROTHERS HOLDINGS PLC (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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THE HONOURABLE MR JUSTICE HILDYARD

Felicity Toube QC and Hannah Thornley (instructed by **Linklaters LLP**) for the LBEL Administrators
Tony Beswetherick (instructed by **Hogan Lovells International LLP**) for the LBH Administrators

Hearing dates: 19 May 2017, 15 June 2017, 11 July 2017, 21 July 2017 and 24 July 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Hildyard:

Introduction

1. The joint administrators ("the Administrators") of Lehman Brothers Europe Limited (In Administration) ("LBEL" or "the Company") have applied for directions that would enable a substantial surplus to be distributed to the sole member of LBEL, Lehman Brothers Holdings plc (In Administration) ("LBH"), while the Company remains in administration. The joint administrators of LBH ("the LBH Administrators") have also applied for directions in respect of their role in the prospective distribution.

2. The applications precede, and have been made to help facilitate, a proposed settlement of the proceedings known as "Waterfall III".

3. There would be a number of advantages to the creditors of LBEL, LBH and other parties to the proposed settlement if LBEL were able to make the distribution to its member within the administration, rather than first placing the Company into liquidation, which is the usual procedure provided for in the Insolvency Act 1986 ("the 1986 Act").

4. However, there is no express provision in the insolvency legislation for distributions to members (as distinct from creditors) within an administration. Further, in a short judgment of Briggs J (as he then was) in *Re Lehman Brothers Europe Limited* (unreported, 25 June 2012), it was held that the statutory administration regime does not permit administrators to make distributions (at least directly) to a company's members.

5. The anticipated surplus is considerable. There is no intention (and there never has been) for the Company to resume business as a going concern. The surplus must in due course be distributed. If the surplus can only be distributed in a liquidation then that is the course (as the Administrators fully appreciate and acknowledge) that will have to be followed. But liquidation would complicate and delay matters, and have disadvantageous tax consequences. Furthermore, although it is not suggested that it would become impossible, the settlement of Waterfall III would also be delayed and complicated.

6. As a consequence, the Administrators have, with some ingenuity, devised a scheme which in broad terms is intended to enable a distribution by the Company further to the exercise of the residual powers of the directors and the shareholders of the Company still vested in them under the Companies Act 2006 (the "2006 Act").

7. In brief summary, the proposal is that the Administrators would first appoint a director who, together with the single member of the Company, would be the one to implement the distribution to LBH further to a reduction of capital as permitted by the 2006 Act (in the case of a private company, without the sanction of the Court, but subject to strict and important conditions).

8. In terms:

i) the Administrators apply pursuant to paragraph 63 of Schedule B1 ("Schedule B1") of the 1986 Act for directions that they may in due course appoint a director in order (if a settlement is reached in relation to Waterfall III) to distribute surplus funds to LBH, within the administration and that thereafter LBEL shall (at the appropriate time) be dissolved rather than put into liquidation ("the Proposal"); and

ii) the LBH Administrators apply pursuant to paragraph 63 of Schedule B1 that they be at liberty to support and to take such further steps as may be considered desirable and appropriate to give effect to the Proposal.

The need for several hearings

9. The hearing of these applications for approval of the Proposal have been somewhat drawn out, reflecting the fact that I have found the issues to which it gives rise by no means straightforward or easy.

10. Following the issue of the Administrators' application notice dated 16 May 2017, it first came before me on 19 May 2017. On that occasion, I directed that the Administrators should give specific notice of the application to HM Revenue & Customs ("HMRC") and I adjourned the hearing to give HMRC an opportunity to oppose or comment on the tax implications of the application.

11. When the hearing resumed on 11 July 2017 (after a short hearing on 15 June 2017), following a response from HMRC, I directed that the LBH Administrators and the prospective director of LBEL provide certain confirmations in respect of the application and adjourned the hearing a second time so that such confirmations could be given.

12. The hearing resumed again on 21 July 2017, on which date the LBH Administrators also attended court by their counsel, Mr. Tony Beswetherick. Subsequent to that hearing, the LBH Administrators determined that they should also seek directions in respect of the Proposal, which they did by application notice dated 23 July 2017.

13. The Administrators' application has developed and been refined over time. In particular, the Administrators decided not to pursue one aspect of the application initially made, being an application in the alternative for directions that the Administrators may in due course appoint a director and (if a settlement is reached in relation to Waterfall III) terminate the administration in order to return surplus funds to the director of LBEL, so that the director may distribute the surplus funds to LBH, before LBEL is then put into members' voluntary liquidation ("Option 2").

14. Option 2 introduced its own difficulties, including complex legal issues as to the correct treatment of statutory interest and limitation. It also did not avoid the difficulties inherent in moving to liquidation, even though the move would follow, rather than be the context of, the proposed distribution. After it had been ventilated at the initial hearing, at the hearing on 21 July 2017 I was informed that Option 2 had been abandoned.

15. On 24 July 2017, after hearing brief final submissions from the Administrators' counsel, Ms. Felicity Toube QC, I granted the application in principle although I

suggested to Ms. Toube that the terms of the Order would need to be significantly more focused than the draft attached to the original application. I also reserved my reasoned judgment. This judgment sets out the reasons for my decision.

Background to these applications

16. LBEL was placed into administration on 23 September 2008 by its directors pursuant to paragraph 22 of Schedule B1.

17. The purpose of the Company's administration, as set out in the proposals of the Administrators dated 14 November 2008 and approved by creditors on 1 December 2008 ("the 2008 Proposals"), is to "achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration)" pursuant to paragraph 3(1)(b) of Schedule B1.

18. The latest progress report that I have been shown is dated 20 April 2017 and covers the period 23 September 2016 to 22 March 2017. According to that report, as at 22 March 2017 the Administrators have realised assets of just under £500 million. Following interim dividends paid in 2012, 2013 and 2014, respectively, the Company's admitted unsecured creditors have now received dividends totalling 100 pence in the pound. These creditors have not yet received any statutory interest under rule 14.23(7) of the Insolvency Rules (England and Wales) 2016 ("the 2016 Rules") (previously rule 2.88(7) of the Insolvency Rules 1986 ("the 1986 Rules")).

19. The April 2017 progress report shows that, on 22 March 2017, the Administrators held a cash balance of over £275 million. This substantial surplus cannot currently be distributed because of an outstanding claim against LBEL's estate by an affiliated company, Lehman Brothers Limited (in administration) ("LBL"), in Waterfall III. However, as already mentioned, there is now a strong prospect of a settlement of Waterfall III, whereby LBL would withdraw its claim against LBEL and a proof of debt submitted by LBEL in LBL's estate (in the amount of approximately £447 million) would be admitted in an agreed amount.

20. Following resolution of Waterfall III, therefore, the Administrators would presently expect to be in a position to distribute the surplus (including the amount received from LBL in respect of LBEL's admitted proof of debt). The Administrators propose that this surplus be used to:

    i) make a distribution to LBEL's creditors of statutory interest at 8% simple interest per annum (estimated at the time the application was issued to be an amount of approximately £38 million in aggregate);

    ii) establish a reserve (estimated at the time the application was issued to be £105 million, but subject to potential revision) for Administrators' costs and any additional matters, including (if required) tax;

    iii) make an interim shareholder distribution ("the Interim Distribution") to LBH; and

iv) in due course (as appropriate), make a final shareholder distribution to LBH, following determination of the extent to which the reserves are required for the various purposes for which they were established.

21. The question I have had to decide is whether the Administrators can procure the payment of an Interim Distribution and any final shareholder distribution through the mechanism of the Proposal or whether the Company must first be placed into liquidation before any such distribution is made.

The steps proposed to implement the Proposal

22. The procedural steps which the Administrators propose to take under the Proposal, should I grant the application, are elaborated in the sixth witness statement of Mr. Dan Schwarzmann, one of the Administrators, dated 16 May 2017 ("Mr. Schwarzmann's sixth witness statement"). These may be summarised as follows:

i) The Administrators would first appoint a director of the Company pursuant to paragraph 61(b) of Schedule B1.

ii) Statutory interest would then be provided for or paid (as appropriate) and the necessary reserves set aside.

iii) The Administrators would sanction the exercise of "management powers" by the director and member pursuant to paragraph 64 of Schedule B1.

iv) Thus empowered, once the proposed settlement comes into effect the director and the member would implement a capital reduction in accordance with Part 17 of the 2006 Act and, using the reserve created by that reduction (together with the payment from LBL in respect of the proof of debt filed by LBEL in LBL's estate), the director would make the Interim Distribution in accordance with Part 23 of the 2006 Act.

The reasons for the applications

23. The Administrators (justifiably, in my view) considered their application for the approval of the Court to be necessary in light of the absence of express statutory mandate or power and the decision of Briggs J as to the consequences of this as noted above. They accept also that their proposed solution is novel; and they do not seek in any way to disguise that it is devised to achieve by indirect means what the statutory provisions do not enable them to do directly. The Proposal has, in other words, been designed specifically to accommodate the decision of Briggs J, while still enabling the Company to make a distribution to LBH while in administration.

24. The reasons why the Administrators would prefer to make the distribution to LBH in administration rather than liquidation are elaborated in Mr. Schwarzmann's sixth witness statement. These may be summarised as follows:

i) A shareholder distribution in a liquidation of LBEL would be treated as a distribution of capital and would therefore be subject to capital gains tax.

ii) HMRC would then (depending on the nature of the enquiries it had) have up to, and potentially more than, two years from the year-end to review the

appropriateness of any tax relief claimed. As a result, LBH would have to hold a provision equal to the potential tax liability in case the use of such base costs and/or capital losses is disputed by HMRC and LBH could not pay that amount to its creditors and/or members until that period had expired or, if later, resolution of any HMRC enquiries. (It was principally in light of this consideration that I directed that the HMRC be notified of the application.)

iii) In contrast, it is considered by the Administrators (I express no opinion as to its correctness) that a shareholder distribution in administration (following the proposed capital reduction) is likely to be treated as a distribution of income, as the distribution would be a separate step from the capital reduction and therefore not a repayment of capital. Such a distribution, it is considered (again I express no opinion) should fall within an exempt class for tax purposes because it would be in respect of non-redeemable ordinary shares.

iv) If the distribution would be tax exempt, no two-year review period (and associated provisioning requirement) would apply.

25. In oral submissions, Ms. Toube explained that the timing and provisioning issue would have a knock-on effect within the corporate group because LBH will need to make further onward distributions to its own creditors and/or members. Indeed, I was informed that if LBEL is not able to make the distribution to LBH in accordance with its Proposal, and is not able to reach agreement with LBH as to the manner in which statutory interest is to be addressed, LBEL would not be able to agree to the proposed settlement of Waterfall III in the short to medium term. This is of particular relevance. The second part of Waterfall III is due to be heard in September, the first part having already been heard in January (though the decision of the Supreme Court in Waterfall I referred to in paragraph 48 below would necessitate a supplementary hearing for that part).

26. In his sixth witness statement, Mr. Schwarzmann is keen to stress that the Administrators' proposals are not likely to affect the net amount of tax ultimately paid. His reasoning is that even if the distribution to LBH were to be made in liquidation, no capital gains tax should ultimately be payable in relation to the distribution, as: (i) LBH should be able to use allowable base costs in LBEL to reduce any such capital gains; and (ii) to the extent the base costs are insufficient to fully offset the capital gains, LBH should then be able to utilise capital losses in the wider group of Lehman Administration Companies to offset the remaining capital gains. (Obviously, I am not invited to and could not express a view on this.)

27. Mr. Schwarzmann also notes that the Proposal will have "certain tax advantages" over other options in which the Company is required to enter liquidation. The main (and only) tax advantage he describes in addition to the two-year point addressed in paragraph 24 above, is that the Proposal would enable the Company to continue the same tax accounting period, while exiting administration (under Option 2) or entering liquidation would create new tax accounting periods and this could give rise to a tax loss mismatch. Insofar as LBEL receives taxable receipts in the future (including, in particular, any statutory interest that may in due course be received from LBL (of which LBEL is a creditor)), it may become liable to corporation tax in respect of such amounts.

Events following the issue of the Administrators' application

28. As mentioned, when I first heard the Administrators' application on 16 May 2017, I directed that the Administrators should give specific notice of the application to HMRC (notwithstanding that the Proposal had been advertised on the Administrators' website) and adjourned the hearing to give HMRC an opportunity to oppose or comment on the tax implications of the Proposal. My concern, essentially, was to ensure that HMRC had the opportunity to consider the Administrators' analysis of the tax implications and raise any relevant comments or submissions with the Court.

29. Accordingly, Linklaters LLP ("Linklaters"), solicitors for the Administrators, notified HMRC of the application. HMRC's Solicitor's Office responded by letter dated 28 June 2017 in which it said, in summary, that HMRC "has no preference for any of the options put forward and makes no comment in respect of any of these options" and that it did not intend to attend the adjourned hearing of the application. Further, it was said in the letter that "HMRC takes the view that it is not being asked by our clients or the Court to consider the correctness of any of [the potential tax consequences of the application] or to give any form of "tax clearance"" and that "HMRC reserves its rights to review/investigate the tax consequences of whatever option the Court choses [sic] to direct in the Application going forward."

30. When the hearing resumed on 11 July 2017, Ms. Toube informed me that Linklaters and/or the Administrators had been involved in ongoing discussions with HMRC about the tax consequences of the application and that HMRC had not yet expressed a final view as to whether it agreed with the Administrators' analysis of those consequences. I was told on 11 July, and again on 21 July (at a further hearing), that HMRC were awaiting my decision on the application before taking a firm position. I found this less than entirely clear or satisfactory; but I take it (and I understood Ms. Toube to have confirmed) that their decision not to appear, despite the opportunity afforded to them to do so, signifies that HMRC accept that they will not seek to contend that the proposed solution is not available: any continuing dispute and negotiations are as to its tax treatment and consequences.

31. As also referred to above, I directed at the hearing on 11 July that: (i) the LBH Administrators should confirm that they are supportive of the Administrators' application; and (ii) the prospective director of LBEL should confirm that he fully understands what is proposed and what his duties in that connection will be and that (acting in accordance with those duties) he would anticipate being in a position to give effect to the Proposal.

32. In seeking these confirmations, I was primarily concerned to ensure: (i) that the LBH Administrators had fully considered and were supportive of the application from LBH's particular point of view, taking into account (as well as undoubted advantages in resolving Waterfall III and securing a route to earlier distribution) any downside of early settlement (given, for example, the possibility that a liquidation could result in creditors losing the right to statutory interest, to the advantage of contributories such as LBH); and (ii) related to the first point, that the prospective director of LBEL understood the Proposal and (without impermissibly binding himself in advance of the exercise of his discretion and powers and duties as a director) anticipated that he would be able to approve and implement it in light of his duties to LBH as a member of the Company.

33. The Administrators subsequently filed a witness statement of Mr. Derek Howell ("Mr. Howell") dated 20 July 2017. Mr. Howell is both one of the LBH Administrators (as well as a joint administrator of certain other members of the Lehman Brothers group) and the person who it was proposed would act as the director of LBEL for the purposes of the Proposal. In short, Mr. Howell provided the confirmations I had asked for, including by exhibiting to his witness statement a letter from the LBH Administrators' solicitors expressing their clients support for the application. In addition, LBEL's major creditor, Lehman Brothers Holdings Incorporated, also provided a letter confirming its support for the application.

34. At the hearing on 21 July 2017, Mr. Beswetherick also repeated and expanded on the reasons why the LBH Administrators supported the Proposal. Put briefly, the LBH Administrators felt that the overall advantages of the proposed settlement plainly outweighed any potential disadvantages. In light of the support for the Proposal expressed by the LBEL Administrators and by the LBH Administrators (LBH being the sole member of LBEL), Mr. Howell was confident that he could implement the Proposal while complying with his duties as a director of the Company.

35. Further, in the context of the LBH Administrators' application for directions in respect of the Proposal, and the various applications for directions in respect of the proposed settlement of Waterfall III which I heard on 24 July 2017, I have also been provided with additional materials in support of those applications, including evidence put in by the LBH Administrators in support of the applications by them, which satisfied me that the LBH Administrators, without being infected by conflict of interest, have come to a rational and proper view that the proposed settlement is in the best interests of LBH and its creditors.

Issues to be decided

36. In her written and oral submissions, Ms. Toube helpfully identified, and sought to address, a number of potential issues arising from the Proposal. I would summarise these, in slightly adjusted form, as follows:

    i) whether the Court should approve a procedure which is not set out in statute and, indeed, has been specifically designed to overcome its absence;

    ii) whether any action taken by the Administrators and/or the director to implement the Proposal would need to further the statutory purpose of the administration and, if so, whether the Proposal does in fact further that purpose;

    iii) whether the 2008 Proposals, which make no mention of shareholder distributions, restrict the Administrators' capacity to pursue the Proposal; and

    iv) whether in a distributing administration the assets are held on a statutory trust, as they are in liquidation and, if so, whether this means that the Administrators are not allowed to consent to the distribution by a director of assets which form part of the statutory trust.

Whether a distribution to members by a director in an administration should be permitted in the absence of statutory provision to the contrary

37. The 1986 Act provides two clear routes to achieve a distribution of surplus assets to members at the end of an administration:

    i) The administrator may terminate the administration pursuant to paragraph 80 of Schedule B1 (on the basis that the purpose of the administration has been sufficiently achieved) and return the management of the company to its directors. The directors would then initiate a members' voluntary liquidation pursuant to sections 84 and 86 of the 1986 Act and the distribution to members would be effected by the liquidator or the company would continue to trade and could make distributions in due course.

    ii) Alternatively, the administrator could convert the administration to a creditors' voluntary liquidation pursuant to paragraph 83 of Schedule B1 and the distribution to members would again be effected by the liquidator.

38. Either way, the company in administration must be placed in liquidation or continue trading as a going concern before any distributions are made to members. The 1986 Act does not set out any other mechanism by which a distribution to members can be made at the end of an administration. As the Administrators appreciate, it could therefore be argued that the fact that Parliament, though it has made provision for distributions to creditors, has not expressly provided for administrators themselves to make distributions to members, signifies a statutory intention that no such distributions to members should be made within an administration indirectly either.

39. The Administrators counter that argument by submitting that, despite the absence of statutory provisions to the contrary, the Court should not infer that there was therefore a bar against any other route for achieving distribution to members outside liquidation; and in particular, it should not infer that routes available under the 2006 Act were thereby cut off. The Administrators contend that their application should succeed for the following reasons:

    i) There is no policy reason against distributions to members in an administration. The Administrators draw comfort in this regard from remarks made by Briggs J in his judgment referred to above (and quoted in paragraph [41] below). The statutory gap should not be construed as a prohibition.

    ii) Although there is nothing in the insolvency legislation that expressly permits the Proposal, the 1986 Act did enable administrators to appoint directors and to consent to the exercise of management powers by directors and members. The 2006 Act's provisions for reductions of capital and shareholder distributions should not be treated as circumscribed or unavailable in the context of a surplus available in a company in administration which has never been and is not intended to revert to trading as a going concern.

    iii) The administration of LBEL (and the administration of the wider group of Lehman entities) is highly unusual in a variety of ways. These include the fact that a substantial surplus is (or is likely soon to be) available in circumstances where there are no plans to restore the Company to a going concern, the size of the sums involved, the intricacy of the interrelated claims and cross-claims

among the Lehman group administrations, the complexity of the legal and commercial issues at stake in the wider Lehman insolvency (as demonstrated by the various Waterfall proceedings) and the fact that (due to the complex interrelationships between the Lehman group companies) a settlement is proposed which requires several administrations to be in a position to make distributions to members and/or creditors more or less at the same time. Parliament may simply (and understandably) never have contemplated such an exceptional situation when the rules on administration in what is now Schedule B1 were introduced.

iv) The Proposal will not prejudice creditors, provided creditors' claims are properly reserved for. On the contrary, the Administrators submit, creditors would benefit from the proposed settlement, although their submissions on this point developed over the course of the twice-adjourned hearing. Initially, the Administrators said that creditors would benefit generally from expedient resolution of the matter and, in particular, earlier payment to them of statutory interest if the distribution to LBH is not subjected to the two-year HMRC review.

In oral submissions made on 21 July 2017, Ms. Toube explained further that LBEL's creditors may also receive more money under the proposed settlement (and not just payment sooner). That is because one of the matters in dispute in Waterfall III is a contribution claim by LBL against LBEL which, if upheld by the courts, would exceed the entire surplus in LBEL and therefore mean that no statutory interest could be paid to LBEL's creditors. The proposed settlement would ensure that there remained a surplus from which to pay statutory interest and this could be paid now, rather than after final determination of Waterfall III in the courts. The Proposal is thus in the interests of creditors.

v) Further, LBEL's creditors have been notified of the Proposal by notice on the website of the administration since 5 May 2017 and at a meeting of the creditors' committee on 8 May 2017, and have either expressed support for the Proposal or not raised any objections or concerns. To this can be added the letter from LBEL's major creditor confirming its support for the application.

40. As to (i) in paragraph 39 above, the Administrators have provided me with a copy of Briggs J's judgment, by way of an exhibit to Mr. Schwarzmann's sixth witness statement. The judgment is very short, comprising only three paragraphs.

41. Given both the relevance of this judgment to the present application and its brevity (as provided to me), I set it out in full:

> "1. I am sorry. I think it is a bridge too far. I do not mind saying that it would have been sensible if the framers of the Enterprise Act had included distribution to members at the end of a solvent administration, all the more so because the whole concept of administration is it may produce a better outcome than winding up. Even a winding up can produce an unexpected solvency.

> 2. It would be a good idea, it seems to me, if the rule makers when they had a moment include by way of a further amendment just this power, but it does seem to me that if you look historically at the present position, the Enterprise Act, sensibly of course, introduced the power to make distributions to creditors in terms. If it had been intended generally to enable administrators to wind the company up in all respects rather than in that respect which would do the trick for the purposes of an insolvency administration, it seems to me parliament would have said so. To go further, however sensible in terms of ensuring efficiency and maximisation of return to stakeholders is, I am afraid it seems to me, just a step beyond that which mere judges ought to do in a totally statutory network.
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> 3. I am afraid I am not persuaded that because in a very brief description phrase, the insolvency regulation now includes winding up through administration, that was intended to alter our substantive law as to what kind of winding up you can achieve through administration. Nor am I persuaded that the general width of the administrators' powers, which are for the better performance of the effectuation of their functions, enables one to say that, because the powers are wide, therefore the functions are wider that they are stated to be."

42. I accept, as the Administrators submit, that Briggs J does not identify any issue of public policy that should prevent a distribution being made to members within an administration and indeed appears to encourage statutory provision to enable one to be introduced at an appropriate time.

43. However, what is (at least) equally apparent is his conclusion that it was inappropriate for such a procedure to be introduced judicially given the clear statutory framework governing administrations.

44. To that, Ms. Toube contended in oral submissions that the question before Briggs J was different to the one which I have to consider. She said that the application heard by Briggs J brought only the 1986 Act into play: the issue he had to determine was whether the 1986 Act permitted administrators to make distributions to members. However, she submitted that the present application differs in bringing the 2006 Act into play, relying on the continuing roles for, and (subject in certain cases to express permission of the administrators) the exercise of management powers by, a director and the members expressly permitted by the 1986 Act. The two statutes should be read as complementary in this context; the 1986 Act should not be interpreted as restricting the management powers available under the 2006 Act in matters relating to surplus in which creditors were (*ex hypothesi*) not interested.

45. I accept these submissions in principle, but I think they need elaboration to carry the Administrators to their objective. It is clear from paragraph 64 of Schedule B1 that directors and shareholders can do things which are not inconsistent with the administration, and may exercise "management powers" (defined by paragraph

64(2)(a) as "a power which could be exercised so as to interfere with the exercise of the administrator's powers"), though only with the administrators' consent, and any residual powers which are not "management powers". To the extent that any directors continue to perform a role in a company in administration, they of course remain subject to the applicable provisions of the 2006 Act. They retain their duties under the 2006 Act to keep records and file accounts and returns, for example.

46. However, the scope and limits of directors' and members' powers in an administration have not been comprehensively defined in either statute or the case law. Even if the 2006 Act supplies the statutory architecture for capital reductions and shareholder distributions in companies, that does not assist with the more significant question, which is whether that architecture is available for use notwithstanding administration, or whether the Proposal runs contrary to the limitations of the statutory administration regime implicit in the absence from it of any process for distributions to members.

47. As to (iii) in paragraph 39 above, I accept that the circumstances of this case are highly exceptional for all the reasons submitted. This is a relevant factor although, in my judgment, it is not enough to justify departing from statute. Further, while I am not aware of the detail of the application in 2012 which led to the judgment of Briggs J refusing it ("the 2012 Application"), or whether this point was put to Briggs J when he was considering the 2012 Application, at least some of the unusual circumstances in this case (such as the general scale and complexity of the Lehman administrations) would also have been present then.

48. As to (iv) and (v) in paragraph 39 above, I have seen no sign that LBEL's creditors would suffer any prejudice if the Proposal is implemented (provided their claims are properly reserved for). I also accept that the Proposal, and the wider proposed settlement, will benefit the Company's creditors for the reasons provided by the Administrators.

49. In their judgments in Waterfall I (*Re Lehman Brothers International (Europe)* [2017] UKSC 38), the Supreme Court provided some guidance to judges considering whether to formulate or extend a rule to fill a gap in the insolvency legislation. In comments on the 1986 Act and the 1986 Rules, Lord Neuberger said as follows at paragraph 13 of his judgment:

> "… despite its lengthy and detailed provisions, the 1986 legislation does not constitute a complete insolvency code. Certain long-established judge-made rules, albeit developed at a time when the insolvency legislation was far less detailed, indeed by modern standards sometimes positively exiguous, none the less survive. Recently invoked examples include the anti-deprivation principle (see *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd [2012] 1 AC 383* , the rule against double-proof (discussed in *In re Kaupthing Singer & Friedlander Ltd [2012] 1 AC 804* , paras 8—12), the rule in Cherry v Boultbee (1839) 4 My & Cr 442 (also discussed in *In re Kaupthing Singer & Friedlander Ltd [2012] 1 AC 804* , paras 13—20), and certain rules of fairness (alluded to in *In re Nortel GmbH [2014] AC 209* , para 122). Provided that a

> judge-made rule is well-established, consistent with the terms and underlying principles of current legislative provisions, and reasonably necessary to achieve justice, it continues to apply. And, 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. However, particularly in the light of the full and detailed nature of the current insolvency legislation and the need for certainty, any judge should think long and hard before extending or adapting an existing rule, and, even more, before formulating a new rule."

50. That passage in Lord Neuberger's speech describes the tension arising when what is broadly perceived to be a complete code does not deal with a matter arising which is not there addressed. Whilst the Court has, in principle, jurisdiction to continue to implement old, and to formulate new, rules to plug gaps in the legislation, on the other hand, judges need to think especially "long and hard" before adopting such an expedient, and especially so in formulating any new rule.

51. The tension is the greater because it is clear from the *ratio* of the judgment that certain provisions of the insolvency legislation do provide a complete statutory code. For example, in paragraphs 125-126 of his judgment, Lord Neuberger says as follows:

> "In my judgment, contrary to the conclusion reached by David Richards J, the contractual right to interest for the post-administration period does not revive or survive in favour of a creditor who has proved for his debt and been paid out on his proof in a distributing administration. As already mentioned in *In re Humber Ironworks* LR 4 Ch App 643, 647, Giffard LJ, having held that a creditor could only prove for contractual interest up to the liquidation date, explained that "[t]hat rule … works with … fairness", because "where the estate is solvent …, as soon as it is ascertained that there is a surplus, the creditor … is remitted to his rights under his contract". However, as I have also explained, that observation was made in the context of a decision which was wholly based on what Giffard LJ expressly described as "Judge-made law", because the contemporary statutory provisions gave no guidance as to how contractual interest was to be dealt with in a winding-up. The position is, of course, very different now, especially in relation to interest on proved debts in liquidations and administrations. In that connection, I consider that the legislative provisions discussed above, namely rules 2.88 and 4.93 and section 189 provide a complete statutory code for the recovery of interest on proved debts in administrations and liquidations, and there is now no room for the Judge-made law which was invoked by Giffard LJ. It seems to me that this view is consistent with what David Richards J said in *In re Lehman Brothers International (Europe) (in administration)* [2016] Bus

> LR 17, para 164, although the point which was there being considered was more limited.
>
> This issue has some echoes of the currency conversion claim issue. In each case, I consider that the contractual right (in this case to recover interest and in the case of currency conversion claims, to be paid at a particular rate of exchange) has been replaced by legislative rules. On that basis, there is no room for the contractual right to revive just because those rules contain a *casus omissus* or because they result in a worse outcome for a creditor than he would have enjoyed under the contract."

52. Notwithstanding these tensions, the imperative of securing the efficient completion of administration may be sufficient to overcome the usual presumption that the code is complete and exclusive. An example of judge-made law may be the very recent case of *Re Nortel Networks UK Ltd* [2017] EWHC 1429 (Ch). In that case, Snowden J considered an application for directions for which there was no express provision in the 1986 Act or the 2016 Rules. There, the administrators of companies in the Nortel group applied for directions in relation to potential claims for administration expenses. They were concerned about outstanding expense claims and wanted directions that they should inform potential claimants that any expense claims not yet made should be notified to the administrators by a specified date. The problem was that neither the 1986 Act nor the 2016 Rules contain any express provision for the mechanism the administrators wanted to adopt; and therefore Snowden J had to consider whether the directions sought would amount to impermissible judicial legislation.

53. In finding that he could and would provide the directions applied for, Snowden J considered, in brief summary, that: (i) similar directions had been made in cases preceding the 1986 legislation which met Lord Neuberger's requirements; (ii) this type of direction provided "a pragmatic solution to a practical problem", even if it risked prejudicing claimants who had delayed in bringing their claims; (iii) the directions sought were consistent with judicial observations that the insolvency legislation implicitly requires office-holders to proceed expeditiously to collect in and distribute the assets of an insolvent company; and (iv) the directions sought were very similar to the express scheme that applies as between unsecured creditors with provable debts in administrations.

54. The present applications are somewhat different from the application before Snowden J, including, importantly, because there is no applicable authority under the pre-1986 legislation (not least because the current statutory regime was not then in place). However, what the decisions of Lord Neuberger and Snowden J make clear is that, notwithstanding that the 1986 Act is fashioned as a complete code it is not entirely exclusive and the Courts do have jurisdiction to supplement the legislation in appropriate circumstances, and particularly in areas where there is an apparent gap which might be covered or plugged by recourse to other legislation which is not expressly ousted or confined.

55. That seems to me to be the distinguishing feature in this case, which, even if it does not dissolve it, reduces the tension I have described. In these applications, the solution

seems to me to be in a complementary Act (the 2006 Act), rather than in the formulation of any extension of the 1986 Act.

56. In my judgment, the 1986 Act and the 2016 Rules do not prevent recourse to the provisions of the 2006 Act in relation to distributions of the surplus further to a reduction of capital, nor do they curtail the residual powers of the directors and members of the company in that regard. On the premise that the Administrators hold a surplus in which only the members are interested but which the Administrators cannot themselves distribute to them, it would seem to me unlikely that it was intended to exclude the powers of the directors and members under the 2006 Act to release and distribute such surplus, leaving liquidation as the only route, unless the purposes of the administration can be said thereby to be impeded or frustrated.

Whether it is necessary that the Proposal is consistent with and furthers the purpose of the administration

57. As explained, the purpose of the administration is to achieve a better result for the Company's creditors as a whole than would be likely if the Company were wound up without first being in administration.

58. The Administrators initially did not seek to assert that the Proposal would further the statutory purpose of the LBEL administration. Rather, they claimed that: (i) there is no bar on making such a distribution where doing so does not cut across the statutory purpose; and (ii) by ensuring that creditors' claims are properly reserved for, the Proposal would not prejudice creditors and, accordingly, the Administrators could consent to the exercise of "management powers" by the director and member where such consent is conditional upon funds identified by the Administrators as being required for the discharge of creditor claims remaining unaffected by the exercise of management powers.

59. However, their position was modified on 21 July 2017, when Ms. Toube explained and emphasised the direct benefits that the Proposal would provide to creditors (as described above) and submitted that, while she was not convinced that the Proposal needed to comply with the statutory purpose, that purpose was in fact furthered in this case.

60. As to (i) in paragraph 57 above, the key statutory provision of relevance is paragraph 3(1) of Schedule B1, which states that: "[t]he administrator of a company must perform his functions with the objective of" the statutory purpose of the administration.

61. The term "functions" is not defined in the 1986 Act. However, paragraph 1(1) of Schedule B1 defines an "administrator" by reference to what may be considered his role or functions, as follows: "For the purposes of this Act "administrator" of a company means a person appointed under this Schedule to manage the company's affairs, business and property." In like terms, paragraph 59(1) empowers an administrator to "do anything necessary or expedient for the management of the affairs, business and property of the company."

62. The performance of such broad functions, however, is of course subject to certain statutory constraints, which include the requirement for an administrator to perform his functions with the objective of fulfilling the purposes of the administration.

63. In my judgment, there is little doubt that any action taken by the Administrators to give effect to the Proposal, including the appointment of a director and consenting to the exercise of management powers by the director and members, would be a performance of their functions as administrators of the Company.

64. Accordingly, it seems to me that on a plain reading of paragraph 3(1) of Schedule B1, any such function must be performed with the objective of the administration's statutory purpose. That provision does not, as the Administrators at one point seemed to contend, permit an administrator to perform any of his functions so long as doing so does not conflict with the statutory purpose of the administration. If it had been Parliament's intention to so provide, it could easily have done so. Rather, the statute is clear that any performance of an administrator's function must be performed for, and only for, the administration's purpose.

65. As to whether the prospective director (and the Company's members) would need to act in accordance with the purpose of the administration, the position is less clear. Directors and administrators owe different duties. But it must be a very rare case in which a director is asked (as here) to take steps typically suited to the purposes of a trading company but in fact for the purposes of bringing the administration to an end. Indeed, in response to my questions, neither Ms. Toube nor Mr. Beswetherick was able to identify from authority or anecdote any instance where a director of a company in administration which was not intended to be returned to a going concern did anything other than comply with his recording and accounting duties. Of course, paragraph 64 of Schedule B1 does not prevent directors from taking action to challenge the appointment of an administrator (see: *Stephen, Petitioner* [2011] CSOH 119; *Closegate Hotel Development (Durham) Ltd v McLean* [2013] EWHC 3237 (Ch)). But this is a power inherent in the status of the company as a company in administration, not a power, such as the powers which the director would need to make use of for the purposes of the Proposal, which is more typically suited to the purposes of a trading company.

66. Since "management powers" can only be exercised with the administrator's consent (see paragraphs 64(1) and (64(2) of Schedule B1) and the administrator can only perform his functions for the statutory objectives (se paragraph 3(1) of Schedule B1) I tend to the view that whilst a company is in administration, any exercise by the company or its directors of "management powers" would have to be consistent with the purposes of the administration: that seems to me to be the intent or corollary of paragraph 64 of Schedule B1.

67. However, in this case I do not think I need decide whether the powers to be exercised by the director and the general meeting respectively are "management powers" as defined for the purposes of paragraph 64 or other powers of the company, nor whether the exercise of such powers by the director and/or the general meeting must be consistent with the purposes of the administration: for I am satisfied that in the particular circumstances of the case, the contemplated exercise of their powers by the member and proposed director, even assuming them to be "management powers" and

this subject to the constraints of paragraph 64(2) of Schedule B1, is calculated to achieve the purposes of the administration.

68. In particular, while the primary objective of the Proposal appears to be to expedite distributions to the Company's member, I accept Ms. Toube's submissions, on the basis of her further explanation provided on 21 July, that approval and adoption of the Proposal would in fact materially benefit creditors by enabling the proposed settlement of Waterfall III and thereby further the statutory purpose of the administration.

Whether the Administrators are restricted by the 2008 Proposals

69. The Administrators' submissions in relation to the impact of the 2008 Proposals are similar to those initially made in respect of the administration's statutory purposes. As Ms. Toube put it in her written submissions:

> "… in the absence of legal provisions to the contrary, administrators ought to be entitled to give their consent to a transaction that would produce a commercially positive result and expedient outcome for shareholders, provided that it does not prejudice the interests of creditors."

70. Paragraph 68 of Schedule B1 sets out the administrators' duties to comply with the proposals and the court's powers to make directions in the context of the proposals, as follows:

> "(1) Subject to sub-paragraph (2), the administrator of a company shall manage its affairs, business and property in accordance with-
>
> (a) any proposals approved under paragraph 53,
>
> (b) any revision of those proposals which is made by him and which he does not consider substantial, and
>
> (c) any revision of those proposals approved under paragraph 54.
>
> (2) If the court gives directions to the administrator of a company in connection with any aspect of his management of the company's affairs, business or property, the administrator shall comply with the directions.
>
> (3) The court may give directions under sub-paragraph (2) only if-

> (a) no proposals have been approved under paragraph 53,
>
> (b) the directions are consistent with any proposals or revision approved under paragraph 53 or 54,
>
> (c) the court thinks the directions are required in order to reflect a change in circumstances since the approval of proposals or a revision under paragraph 53 or 54, or
>
> (d) the court thinks the directions are desirable because of a misunderstanding about proposals or a revision approved under paragraph 53 or 54."

71. Like paragraph 3(1) of Schedule B1, which contains a positive obligation on an administrator to "perform his functions with the objective of" the statutory purpose of the administration, paragraph 65(1) contains a positive obligation on an administrator to "manage its affairs, business and property in accordance with … [the] proposals" (subject to any permissible revision of the proposals or directions of the Court). It is not sufficient, as the Administrators submit, for an administrator generally (and absent directions of the Court) to perform his functions in a way that does not cut across the proposals.

72. A copy of 2008 Proposals is exhibited to Mr. Schwarzmann's sixth witness statement. The 2008 Proposals include the following proposals for achieving the purpose of the administration:

> "i) The Administrators will continue to manage and finance LBEL's business, affairs and property from asset realisations in such manner as they consider expedient with a view to achieving a better result for LBEL's creditors as a whole than would be likely if LBEL had been immediately liquidated.
>
> ii) The Administrators may investigate and, if appropriate, pursue any claims that LBEL may have had under the Companies Act 1985, the Companies Act 2006 or the Insolvency Act 1986 ("IA86") or otherwise. In addition, the Administrators shall do all such other things and generally exercise all their powers as Administrators as they in their discretion consider desirable in order to achieve the purpose of the Administration or to protect and preserve the assets of LBEL or to maximise their realisations or for any other purpose incidental to these proposals.
>
> iii) The Administrators will at their discretion establish in principle the claims of unsecured creditors for adjudication by a subsequent liquidator and the costs of so doing shall be met as a cost of the Administration as part of the Administrators' remuneration.

> iv) The Administrators may at their discretion make an application to court for permission to make distributions to unsecured creditors under Paragraph 65(3) Sch.B1 IA86.
>
> …
>
> vii) The Administrators may use any or a combination of "exit route" strategies in order to bring the Administration to an end. The Administrators wish to retain a number of the options which are available to them, including: -
>
> (a) The Administrators may place LBEL into creditors' voluntary liquidation …
>
> (b) Once all of the assets have been realised and the Administrators have concluded all work within the Administration, the Administrators will file a notice under Paragraph 84(1) Sch.B1 IA86 with the Registrar of Companies, following registration of which the Company will be dissolved three months later or apply to court under Paragraph 79 Sch.B1 for the Administration to be ended, or
>
> (c) The Administrators may apply to the Court to allow the Administrators to distribute surplus funds to unsecured non-preferential creditors. If such permission is given, the Administration will be brought to an end by notice to the Registrar of Companies under Paragraph 84 Sch.B1 IA86, following registration of which LBEL will be dissolved three months later. If permission is not granted the Administrators will place LBEL into creditors' voluntary liquidation or otherwise act in accordance with any order of the court.…"

73. For reasons akin to those expressed above in assessing compliance with the statutory objectives or purposes of administration, I have concluded that the Proposal accords with paragraph (i) and also paragraph (ii) of the 2008 Proposals to the extent that it relates to the exercise of the Administrators' powers in order to achieve the purpose of the administration. In summary, I am satisfied that both the Proposal and the proposed settlement are in accordance with the 2008 Proposals: adoption of the Proposal will enable a settlement of Waterfall III to be concluded and allow creditors to be paid their entitlements earlier than would otherwise be the case.

74. The Proposal is also, to my mind, consistent with the remainder of paragraph (ii) as, by the proposed settlement, the LBEL Administrators are seeking to pursue (and compromise) claims under the 1986 Act, to protect and preserve the assets of LBEL and to maximise their realisations. Even if the Proposal were inconsistent with these sections of the 2008 Proposals, it certainly meets the latter part of paragraph (ii) which permits the Administrators to do anything incidental to the 2008 Proposals.

75. I have taken into account that it may be said that the exit routes set out in paragraph (vii) do not include the mechanism for ending the administration contemplated by the Proposal. Further, paragraphs (iii) and (iv) refer to the subsequent liquidator and

distributions to unsecured creditors, respectively, but do not envisage distributions to members. However, each of the actions described in these paragraphs is expressly stated to be at the discretion of the Administrators and I have concluded that they would do not preclude other means of fulfilling the 2008 Proposals in the interests of the creditors.

Whether a statutory trust arises over assets in a distributing administration and, if so, what its impact is

76. Ms Toube rightly identified as a further issue whether it might be contended that the Administrators are not allowed to consent to the distribution by directors of assets in the Company's administration on the basis that they form part of a statutory trust.

77. It is well-established that the assets of a company in liquidation are held subject to what is often termed a 'statutory trust.' In an early reported case, *Re Oriental Inland Steam Co.* (1873-74) L.R. 9 Ch. App. 557, Mellish LJ said as follows at 560:

> "No doubt winding-up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustees or assignees, whereas in a winding-up the legal estate still remains in the company. But, in my opinion, the beneficial interest is clearly taken out of the company. What the statute says in the 95th section is, that from the time of the winding-up order all the powers of the directors of the company to carry on the trade or to deal with the assets of the company shall be wholly determined, and nobody shall have any power to deal with them except the official liquidator, and he is to deal with them for the purpose of collecting the assets and dividing them amongst the creditors. It appears to me that that does, in strictness, constitute a trust for the benefit of all the creditors, and, as far as this Court has jurisdiction, no one creditor can be allowed to have a larger share of the assets than any other creditor."

78. The issue was considered (in the context of liquidation) by the House of Lords almost a century later in *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167. Lord Diplock, leading the judgment, sought to clarify the distinction between the "statutory trust" arising in liquidation and the strict concept of the "trust" as it has developed in equity. After reviewing a number of the earlier authorities, he said as follows at 180:

> "My Lords, it is not to be supposed that in using the expression "trust" and "trust property" in reference to the assets of a company in liquidation the distinguished Chancery judges whose judgments I have cited and those who followed them were oblivious to the fact that the statutory scheme for dealing with the assets of a company in the course of winding up its affairs differed in several aspects from a trust of specific property created by the voluntary act of the settlor. Some respects in which it differed were similar to those which

> distinguished the administration of estates of deceased persons and of bankrupts from an ordinary trust; another peculiar to the winding up of a company is that the actual custody, control, realisation and distribution of the proceeds of the property which is subject to the statutory scheme are taken out of the hands of the legal owner of the property, the company, and vested in a third party, the liquidator, over whom the company has no control. His status, as was held by Romer J. in *Knowles* v. *Scott* [1891] 1 Ch. 717 differs from that of a trustee "in the strict sense" for the individual creditors and members of the company who are entitled to share in the proceeds of realisation. He does not owe to them all the duties that a trustee in equity owes to his cestui que trust. All that was intended to be conveyed by the use of the expression "trust property" and "trust" in these and subsequent cases (of which the most recent is *Pritchard* v. *M. H. Builders (Wilmslow) Ltd.* [1969] 1 W.L.R. 409) was that the effect of the statute was to give to the property of a company in liquidation that essential characteristic which distinguished trust property from other property, viz., that it could not be used or disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons."

79. As in the case of an estate in bankruptcy:

> "It is no misuse of language to describe the property as being held by the trustee [or, here, a liquidator] on a statutory trust if the qualifying adjective "statutory" is understood as indicating that the trust does not bear all the indicia which characterise a trust as it was recognised by the Court of Chancery apart from statute" (at 178, *per* Lord Diplock).

80. As far as I am aware, there is no authority as to whether a statutory trust arises over the assets of a company in administration or, if so, what the scope and implications of that trust might be. I was referred to *Harms Offshore AHT "Taurus" GmbH & Co. KG* [2009] EWCA Civ 632, in which the Court of Appeal was asked to consider whether the assets of a company in administration are subject to the trust that justifies anti-suit injunctions against creditors of companies in liquidation. However, in the circumstances of that case, the Court of Appeal did not find it necessary to determine the wider question as to the existence of a statutory trust in an administration, noting only (at [24] and [27], *per* Stanley Burton LJ):

> "It seems to me that the trust the existence of which was established in *Re Oriental Inland Steam Company* was a legal construct created to achieve the equitable distribution of the proceeds of the realisation of the assets of the company wherever situated. As Millett LJ pointed out in *Mitchell v Carter*, it is a trust which confers no beneficial interest on the creditors, who are the beneficiaries. Their only right is to have

> the assets of the company dealt with in accordance with the statutory scheme applicable to a company that is the subject of a winding up order. Similarly, the creditors of a company in administration are entitled to have the company and its assets dealt with in accordance with the statutory scheme applicable to such companies.
>
> …
>
> The Court should exercise its powers so as to enable the administrators to exercise their statutory functions and to fulfil their statutory duties, so far as necessary in any particular case."

81. The authors of *Totty, Moss & Segal*: *Insolvency* make the following comment on this issue at H7-12:

> "Lord Diplock said in the *C & K (Construction)* case that upon the making of a winding-up order:
>
> "All powers of dealing with the company's assets, including the power to carry on its business so far as may be necessary for its beneficial winding up, are exercisable by the liquidator for the benefit of those persons only who are entitled to share in the proceeds of realisation of the assets under the statutory scheme."
>
> He concluded that "the company itself as a legal person, distinct from its members, can never be entitled to any part of the proceeds".
>
> That, however, does not appear to be the position in the case of a company which is the subject of an administration order.
>
> The directors' powers are not supplanted by the making of the administration order and the Act curtails the directors' powers only by requiring them to be exercisable with the consent of the administrator, insofar as their powers might otherwise be exercisable in such a way as to interfere with the exercise by the administrator of his own powers. It is a feature of a winding up that the liquidator is under a statutory duty to collect in the assets of the company, to pay its liabilities and to distribute any surplus amongst the members in accordance with their rights. The statutory duties of the administrator are quite different. They are limited to taking into his custody or control all the property of the company, to managing its affairs, business and property and to summoning a meeting of its creditors in certain circumstances. The purposes for which an administration order may be made are specified in s.8(3) of the Act and do not, even by implication, extend to the winding up or dissolution of the company. Until a winding up commences or the company is

> dissolved, it is the company itself that remains entitled to its assets and the proceeds of their realisation.
>
> Therefore it is considered that upon the making of an administration order a company does not cease to be the beneficial owner of its assets for the purposes of s.402 of the Income and Corporation Taxes Act 1988. This has been confirmed by the Inland Revenue which has advised that it would not normally regard the making of an administration order as affecting beneficial ownership."

82. The point is or could be of concern insofar as it suggests that the office holder, as (borrowing the nomenclature) statutory trustee, cannot, during the pendency of the administration (or "trust") exercise his own or encourage the use of any distributive powers of the directors or the company which would release the funds from the "trust".

83. Ms. Toube submitted that, in this case as in *Harms Offshore AHT "Taurus" GmbH & Co. KG,* it was not necessary to decide the point; that it was an issue as to the proper semantic description of a process rather than a term of art or concept of law; and that in the particular circumstances, the issue concerned not monies due to creditors regulated by the statutory scheme or trust, but surplus payable to members which she described as "either excess to the statutory trust or not in it at all."

84. In my view, the obvious distinctions between the position of a company in administration and a company in liquidation, illustrated by the retention by directors and the company of powers subject to the constraints of paragraph 64 of Schedule B1, make the description "statutory trust" inapposite in the case of administration. However, neither Ms. Toube nor Mr. Beswetherick encouraged me to decide the point: and I am content not to do so, since I am also persuaded by the arguments they advanced that whatever "trust" there is does not embrace or prevent the exercise of management powers in relation to a surplus with the permission of the Administrators (and it may well be without it).

Conclusion

85. The need for judicial caution, in the context of an existing administration, before enabling an act or exercise of power not expressly enabled by the provisions of the 1986 Act, which are full and detailed and ordinarily taken to be comprehensive and often exclusive, is plain. I have borne anxiously in mind throughout Lord Neuberger's admonition as expressed in the last sentence of paragraph 13 of his judgment in *Re Lehman Brothers International (Europe)* [2017] UKSC 38 (quoted in paragraph 48 above). The need for caution is the greater having regard to the firm refusal of Briggs J to give the approval sought in the 2012 Application for a distribution by the Administrators themselves on the simple ground that the 1986 Act (even as amended to enable distributions to creditors with the permission of the Court) did not provide any such power.

86. I have also had well in mind that the fact that a proposed course is beneficial and pragmatic in the particular and rare and exceptional circumstances does not justify assuming or presuming, let alone exercising, power where none in law exists; and *a*

fortiori if such power is prohibited. It is important also that the objectives of having a full and detailed code, and especially the objective of certainty for office-holders and creditors alike, should not be undermined by unwarranted judicial intervention and, indeed, invention.

87. Thirdly, and this is not the only context in which the difficulty arises especially in the Insolvency and Companies Court where many substantial applications are *ex parte*, the Court is bound to feel especial concern given that it has not had the benefit of adversarial argument in this context, though Ms. Toube has been properly vigilant to raise any points that she has identified as relevant for and against her position and to address points that have arisen along the way.

88. For all these reasons, and in the fundamental nature of the problem, I have found this a difficult matter to determine.

89. However, after considerable consideration and hesitation, I have concluded that in this particular case, the gap can be filled, not by judicial intervention in terms of expounding a new rule or expanding the ambit of a provision of the 1986 Act or the 2016 Rules, but by permitting reliance on parallel legislation and the specific provisions of the 2006 Act enabling reductions of capital (see sections 641 *et seq.*)

90. Paragraph 64 of Schedule B1 to the 1986 Act specifically acknowledges and envisages the exercise by the Company, by its members in general meeting or its board (as appropriate or mandated by the 2006 Act). If the powers concerned could be exercised so as to interfere with the exercise of the administrator's own powers they are "management powers" (as defined in paragraph 64) and their exercise requires the consent of the administrator; if not, they can still be exercised in accordance with the 2006 Act (and, of course, the general law). On either footing, such power seems to me to include the power to resolve to reduce capital and release and distribute capital and to undertake the necessary tasks to satisfy the conditions to make that legitimate.

91. Consent has been offered; and I am satisfied that the exercise of powers contemplated under the Proposal with the consent of the Administrators would not (provided properly considered and exercised in good faith) offend the statutory scheme or offend or undermine the purpose of the administration. I consider, therefore, that the directions sought in the present application provide a pragmatic solution to a practical problem and are consistent with the Administrators' duty to deal with the administration for the purpose for which it was sought, in the interests of creditors and expeditiously.

92. There is the additional comfort in this case that all relevant constituencies, the creditors, the shareholder and the Administrators as well as the intended director himself, are all supportive of the Proposal, or at least (in the case of creditors, including contingently or prospectively, HMRC) have raised no objection.

93. The circumstances in which such reliance is both necessary and possible will be very rare: the combination of a substantial surplus, but no prospect of intention of the company being restored to activities as a going concern is unusual.

94. In short, in this rare and exceptional case, I am satisfied that the Proposal is legally permissible as well as pragmatic and beneficial. Subject to detailed consideration of the Order I shall give the permission sought.

Postscript

95. After hearing the instant applications, I heard applications from the joint administrators of other companies within the UK Lehman Brothers group, including LBH, for directions in respect of the proposed settlement. I granted the directions sought on 28 July 2017 for the reasons given in my judgment of [28 July 2017]: [[2017] EWHC 2032 (Ch)].