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Case No: CR-2008-000019
8243 of 2008

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

Rolls Building,
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Date: 29/05/2020

Before :

THE HONOURABLE MR JUSTICE HILDYARD

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

**AND IN THE MATTER OF THE INSOLVENCY
ACT**

Alex Riddiford (instructed by Linklaters LLP) for the Applicant

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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THE HONOURABLE MR JUSTICE HILDYARD

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

MR JUSTICE HILDYARD:

1. This is an application (the “Application”) brought by Lehman Brothers Europe Limited (“LBEL”) and its former joint administrators Russell Downs, Gillian Eleanor Bruce, Dan Yoram Schwarzmann and Edward John Macnamara (together, the “Former Administrators”). The Former Administrators seek an Order that each be discharged from liability pursuant to paragraph 98(1) of Schedule B1 to the Insolvency Act 1986 (the “Act”), in respect of any act or omission in their individual capacity as administrators of LBEL, to take effect on the date 28 days after a copy of the Order is uploaded on to the LBEL administration website¹.
2. The application is to some extent unusual in that (a) LBEL is already in liquidation, and has been so since 1 December 2019 so that (b) the Former Administrators ceased to hold office as such on 30 November 2019, when the administration ceased (having commenced as long ago as 23 September 2008 and having then been extended from time to time by order of this court).
3. The application has been made necessary because the matter of when the Former Administrators’ discharge should take effect was never put to the Creditors’ Committee before the end of the Administration; and there is no longer any creditors’ committee nor (since all creditors have now been paid) is there any body of creditors who might resolve to determine that matter. Thus, the Administrators can only obtain an effective discharge as and from a date specified by order of the Court under paragraph 98(2)(c) of Schedule B1 to the Act.
4. Another unusual aspect of the application is that I have been invited to deal with the matter on the papers without an oral hearing. As the Former Administrators have acknowledged in the witness statement made on behalf of them all by Mr Macnamara on 30 March 2020, such an application would usually be heard in open court. That is consistent with ordinary principles of open justice and, in the particular context, because such a hearing provides a forum for anyone who opposes the order sought to have their say. However, in this case, it was submitted that such a hearing would have no real purpose or utility because:
 - (1) All the creditors have now been paid in full, and have received statutory interest on their claims;
 - (2) LBEL’s sole shareholder has received significant distributions in respect of the surplus;
 - (3) HMRC and former creditors have been given notice of the present application, the intention to seek a decision without a hearing and the opportunity to object both in terms of the procedure and as to the substance: but no objection (nor any indication of a wish to participate in the process) has been received from any of them;

¹ ie <https://www.pwc.co.uk/services/business-restructuring/administrations/non-lbie-companies/lehman-brothers-europe-limited-in-administration.html>

- (4) The application is also made in the unusual circumstances of the present “lockdown” made necessary by COVID-19, and there is a special incentive to do all that may reasonably be done to ensure the safe conduct of business and to conserve the resources of the parties and the court.
5. Although of course a remote hearing by Skype for Business or other agreed medium would be perfectly practicable, I have decided that the circumstances are such that there would be no real or sufficient purpose in an oral hearing of that kind and that the matter may appropriately be dealt with on the papers. The issue is one of domestic concern within a concluded administration, where notice through an approved medium has been given (albeit generally) to all those who might have been interested; and not only has no one objected but it is difficult to see any ground on which they could. I have, of course, taken into account the principle of and public interest in open justice; but it seems to me most unlikely that any incursion is material. Further, this judgment, given after careful consideration of the papers and the helpful skeleton argument and supplemental submissions (see below) prepared by Mr Alex Riddiford of Counsel, will be publicly available.
 6. I need not rehearse the long history of the administration, which became in due course (in June 2012) a distributing administration, save to note its success in enabling the realisation of substantial sums, the satisfaction of all creditors claims in full with statutory interest (less the applicable withholding tax paid to HMRC) and even the distribution of surplus to its only shareholder. I should, however, briefly describe the immediate backdrop to the present application, and I gratefully take the following very largely from Mr Riddiford’s helpful skeleton argument.
 7. The Administrators had hoped that they might have been able to conclude all outstanding matters in respect of LBEL by the time their appointment came to an end on 30 November 2019.
 8. The Administrators considered that the purpose of the administration was achieved by 30 November 2019, notwithstanding that the corporation tax position had not been finalised, and did not consider it appropriate to apply for a further extension of their appointments, given there were no remaining creditors.
 9. It was for that reason that LBEL’s administration ceased on 30 November 2019 and LBEL was placed into liquidation immediately thereafter and the Liquidators were appointed on 1 December 2019.
 10. In the event, however, it was not possible by 30 November 2019 to (i) finalise the corporation tax position of LBEL, (ii) make any final required payments in relation to group relief and (iii) obtain HMRC’s clearance to dissolve the company.
 11. During LBEL’s liquidation the liquidators have sought to secure HMRC’s final tax clearance, which was in the event provided by Nicola Rass of HMRC in an email to Jacqueline Dolby of LBEL dated 18th February 2020, which stated: “[HMRC is] *content for [LBEL] to be dissolved*”. HMRC’s confirmation was subject to LBEL providing certain documents to HMRC which I am told were in the event provided by email from Mrs Jacqueline Dolby to Mr David Saunders of HMRC dated 5th March 2020.

12. Once the corporation tax position of LBEL was finalised and there were no remaining claims by HMRC for LBEL to discharge, the liquidators arranged: (i) a payment to Lehman Brothers International (Europe) (in administration) (“LBIE”) in the amount of £5,955,208 in respect of tax losses transferred from LBIE to LBEL by way of group relief; and (ii) a final cash dividend to LBH (its only shareholder) in the amount of approximately £61.86 million.
13. Now that these distributions have been completed, all that remains is for the liquidators to arrange for the dissolution of LBEL.
14. Turning back to why an order of the court is required, when the Former Administrators were appointed it was envisaged that the matter would be determined by the Creditors Committee or the body of creditors. In particular, and as appears from Mr Macnamara’s witness statement in support of the application:
 - (1) Mr Schwarzmans was appointed under paragraph 22 of Schedule B1 to the Act on 23 September 2008. The position in relation to Mr Schwarzmans’s discharge from liability is dealt with in the Administrators’ proposals for the then prospective administration dated 14 November 2008 (“the Proposals”), which provided that his discharge would take effect at a time determined by the creditors’ committee, or (if no creditors’ committee has been appointed) by the general body of creditors.
 - (2) Mr Downs, Ms Bruce and Mr Macnamara were all appointed as Administrators by order of the Court dated 2 July 2018, which provided that they were to obtain their discharge on the same basis as those administrators originally appointed on 23 September 2008 (i.e. the basis set out in the Proposals, as referred to above), such that the “*discharge provided by paragraph 98(1) of Schedule B1 of the Act will take place... at a time appointed by the resolution of the creditors’ committee or, if there is no committee, by resolution of the creditors or in any case at a time specified by the court...*”
15. However, and as indicated previously, the matter of the Former Administrators’ discharge was not put to the Creditors Committee or the body of creditors, and can no longer be so. I understand this was an oversight (as explained at paragraph 19 below). The result is that the only way of fixing the time at which the discharge of the Former Administrators takes effect, and thus the only way for them to obtain an effective discharge, is by court order.
16. Paragraph 98 of Schedule B1 to the Act provides as follows:
 - (1) *Where a person ceases to be the administrator of a company (whether because he vacates office by reason of resignation, death or otherwise, because he is removed from office or because his appointment ceases to have effect) he is discharged from liability in respect of any action of his as administrator.*
 - (2) *The discharge provided by sub-paragraph (1) takes effect—*
 - (a) *in the case of an administrator who dies, on the filing with the court of notice of his death,*

(b) in the case of an administrator appointed under paragraph 14 or 22, at a time appointed by resolution of the creditors' committee or, if there is no committee, by resolution of the creditors, or

(c) in any case, at a time specified by the court.

...

(4) Discharge—

(a) applies to liability accrued before the discharge takes effect, and

(b) does not prevent the exercise of the court's powers under paragraph 75.

17. After initial consideration of the papers, I asked for clarification by way of written submissions on two matters:

(1) Why it was that the issue of the time at which the Former Administrators' discharge should take effect was not put to the Creditors Committee before its disbandment; and

(2) Whether the fact that LBEL is in liquidation, and has been so for many months, in any way affects the power of the court or its exercise.

Mr Riddiford provided helpful supplemental submissions accordingly.

18. On the first of the two questions I raised, Mr Riddiford has clarified that when (on 6 September 2017) LBEL's admitted creditors were paid in full, so that LBEL ceased to have any creditors, the Creditors Committee was automatically disbanded as a consequence of rule 17.11(e) of the Insolvency (England and Wales) Rules 2016. That rule provides that "*A person's membership of a committee is automatically terminated if that person -ceases to be a creditor or is found never to have been a creditor.*"

19. Thus, the disbandment of the Creditors Committee was not the consequence of any specific act of dissolution or abandonment: it was simply the automatic effect of there being no longer any person entitled to be a member. Mr Riddiford frankly acknowledged (and though technically this was evidence rather than submission I understand from Counsel it is provided on instructions and I will proceed on that basis accordingly) that thought was simply not given, prior to payment to creditors in full, to the possibility and advisability of seeking a resolution of the Creditors Committee appointing a date of discharge for the Former Administrators.

20. In light of this clarification, I have considered whether the fact that the terms of the Former Administrators' respective appointments, stipulating a manner of discharge which is now impossible, in some way affects or even prevents the exercise of the power conferred on the court by paragraph 98(2)(c). However, the power does not appear to be confined. It seems to me that the court always has the power thus conferred.

21. I am further comforted that this conclusion is consistent with the fact, recorded in Mr Riddiford's Supplemental Submissions, that those instructing him (Linklaters) have experience of at least four orders made previously by Registrars of the Companies Court on applications made by former administrators for their own discharge.
22. As to the second question, and whether the fact that LBEL has been in liquidation for some time affects the power of the court in this regard or its exercise, Mr Riddiford submitted that, although there is no case law expressly confirming that a former administrator has standing to apply once the company has moved into liquidation, it must be the position that he or she does have such standing. Mr Riddiford emphasised the following points (which I take almost *verbatim* from his written submissions):
- (1) First, no restriction is expressed in paragraph 98 of Schedule B1 to the Act such as to prevent a former administrator from making an application under paragraph 98(2)(c).
 - (2) Secondly, paragraph 98(2)(c) is, on the contrary, conspicuously non-prescriptive as regards the question of the standing required to make an application, stating simply that the discharge takes effect "*in any case, at a time specified by the court*". This is in contrast to other provisions of Schedule B1 where the question of standing is provided for in detail. See, for example, the detailed standing provisions set out in paragraph 91(1) of Schedule B1 to the Act². Accordingly, the better view is that: (i) any person with a sufficient interest in the matter of an administrator's discharge (or of a former administrator's discharge³) has standing to make such an application; and (ii) the administrator (or former administrator) in question plainly qualifies as a person with a sufficient interest in the matter.
 - (3) Thirdly, other provisions of paragraph 98 contemplate that the question of the timing of an administrator's discharge may, in certain cases, arise for determination only once the administrator is no longer in office. In particular, paragraph 98(3A) provides as follows (emphasis added): "*In a case where the administrator is removed from office, a decision of the creditors for the purposes of sub-paragraph (2)(b), or of the preferential creditors for the purposes of sub-paragraph (2)(ba), must be made by a qualifying decision procedure.*" Where the relevant creditors fail to make the decision contemplated by paragraph 98(3A) – whether through inadvertence or otherwise – the former administrator would presumably be able to avail himself

² Paragraph 91(1) of Schedule B1:

"(1) Where the administrator was appointed by administration order, the court may replace the administrator on an application under this sub-paragraph made by—

- (a) a creditors' committee of the company,*
- (b) the company,*
- (c) the directors of the company,*
- (d) one or more creditors of the company, or*
- (e) where more than one person was appointed to act jointly or concurrently as the administrator, any of those persons who remains in office.*

³ An order under paragraph 98(2)(c) of Schedule B1 may be made in relation to a former administrator. Indeed, on 20th March 2019 this Court granted an order discharging a former administrator of Lehman Brothers International (Europe) (in administration), Mr Guy Parr, on an application by the company's then-current administrators. See *Re Lehman Brother International (Europe) (in administration)* [2019] EWHC 2370 (Ch).

of paragraph 98(2)(c) and apply to the Court for an order fixing the date of his discharge (this at a time when, necessarily, he had already become a former administrator). The express words of paragraph 98(2)(c) support this view – noting that the words “*in any case*”, as used in paragraph 98(2)(c), must include at the very least all cases expressly contemplated by paragraph 98 itself (which includes the case of the administrator who is “*removed from office*” (paragraph 98(3A)).

(4) Finally, it is also right to note that the date on which the Court typically orders that an administrator’s discharge will take effect under paragraph 98(2)(c) of Schedule B1 is a date after the termination of the administration. In these circumstances it would be surprising if paragraph 98(2)(c) of Schedule B1 included an implied restriction to the effect that an application could only be made prior to the administration’s termination.

23. I accept these submissions. In my judgment, there is no expressed limitation to the power of the court, provided its jurisdiction is invoked by a person with standing; the Former Administrators are plainly such persons; and the exercise of the power is appropriate and expedient.
24. In all the circumstances, and having noted especially (a) that, after notification in a habitual manner, there has been no objection from HMRC or any creditor (a position which Mr Riddiford again confirmed in his Supplemental Submissions) and (b) the Former Administrators have expressly confirmed that none of them is aware of any claims against them nor of any facts which would give rise to such claims, I see no reason not to make the order.
25. As to the timing of the discharge, in *Re Hellas Telecommunications (Luxembourg) II SCA (In Administration)* [2013] 1 BCLC 426, an application by administrators for relief under paragraph 98(2)(c) of Schedule B1 opposed by a creditor group for reasons set out at paragraph [8] of the judgment, Sales J (as he then was) concluded as follows (emphasis added):

“96. In my view, there are no good grounds to depart from what I was told is the usual practice of ordering that an administrator be discharged from liability under paragraph 98 of Schedule B1 to take effect 28 days after he has filed his final report. The reason that it will usually be right to order such a discharge is that the administrator will no longer retain in his hands the assets of the company out of which he is entitled to meet any liability properly incurred by him, so that it is unfair to leave him on risk generally. In so far as there is a good arguable case against him of improper conduct or misfeasance, that can be proceeded with after the discharge is given, in accordance with paragraph 98 of Schedule B1 read with paragraph 75.”

26. In *Re Lehman Brothers Holdings UK Limited (in administration)* [2016] EWHC 3552 (Ch), this Court adopted a different approach to timing. At [10], it was explained (emphasis added):

“...As will be apparent, and as I understand is the ordinary practice, the trigger for the discharge sought is 28 days after (as the application puts it) the filing of the final receipts and payments account with the Registrar of Companies, save in relation to claims made before that date. I can quite see that that is, in practical terms, a perfectly workable solution, but it did strike me, albeit possible out of an abundance of caution, that, in truth, as will be apparent from my description of paragraph 98(1), the court’s discretion to determine when the discharge should take effect is premised on the conditions of paragraph 98(1) having been satisfied, the prominent condition being that the person concerned should have ceased to be administrator of the company. In point of detail, that does not happen until registration under paragraph 84(4) of the notice to be given under paragraph 84(1) and, therefore, in absolute strictness, I think it is preferable that the order should be drawn so as to reflect the clockwork I have described.”

27. Snowden J has since followed that approach (as set out above): see *Re Nortel Networks* [2018] EWHC 2266 (Ch), at [18]; and *Re Nortel Networks* [2019] EWHC 1182 (Ch), at [17].
28. I adopt the same approach again.
29. I have considered whether I should depart from the usual order for costs in light of the fact that a court application might have been avoided. I have determined that there is no sufficient reason to do so. Any omission to deal with the issue of the time at which discharge should take effect is entirely understandable in the circumstances of the unusually long, but ultimately successful, process of administering LBEL.
30. Accordingly, I approve the order as drafted.