



Re Lehman Brothers International (Europe)

ADMINISTRATORS' DISCRETION UPHELD

The Companies Court has declined to make an order requiring the administrators of Lehman Brothers International (Europe) to provide certain written information in respect of securities held for four private investment funds. While the administrators should balance the need to proceed with the administration in the interests of creditors as a whole against the desirability of responding to legitimate enquiries, it is for the administrators to decide where the balance lies (in the absence of plainly wrongful conduct on their part). This briefing sets out our view on the implications of *Re Lehman Brothers International (Europe)* [2008] EWHC 2869 (Ch).

Background

The Companies Court considered an application for an order that the administrators of Lehman Brothers International (Europe) (LBIE) provide information in respect of securities held for the applicant investment funds (the Funds). Each Fund was a customer of Lehman Brothers Inc. (LBI), and was a party to a prime brokerage agreement with (among others) LBI and LBIE and a margin lending agreement with LBIE. The Funds lodged securities with LBI as their 'prime broker', which LBI transferred to LBIE. Under the margin lending agreements, LBIE was authorised to lend the securities and to pledge, re-pledge, hypothecate and rehypothecate them. The Funds were not counterparties to any derivative transactions that needed to be unwound.

It was submitted that the investment managers of two of the Funds needed substantially more information than was currently available by mid-December. Without such information, the investment managers would be unable to give assurances as to the likelihood of and time by which those Funds would have recovered all or nearly all of their property at LBIE. In those circumstances, the two Funds were likely to be wound down soon afterwards.

The judge in the case, Mr Justice Blackburne, had made an order on 7 October 2008 as to how the administrators should identify and deal with property held by LBIE and what steps they should take to identify and deal with claims to that property by counterparties. He had approved a protocol that (among other things):

- set out a methodology for the administrators to follow in relation to such property; and

- contemplated a sub-committee to monitor the efficiency and fairness of the methodology – the sub-committee was to review the principles applicable to prioritising the determination of claims of particular counterparties by identifying 'high profile problems or hardship issues, to ensure that the overriding objective of treating all counterparties fairly is not prejudicial to the interests of a minority or that there is not otherwise a problem that requires specific and accelerated attention'.

The application

The Funds sought an order for the administrators to state certain information. To the extent the administrators were unable to obtain the information sought, the order would require them to set out what steps had been taken to procure the information and why it could not be provided.

The Funds contended that the court was able to make the order sought:

- under paragraph 74(1)(b) of Schedule B1 to the Insolvency Act 1986 (Schedule B1), which permits the court to grant relief where an administrator proposes to act in a way that would unfairly harm the interests of the applicant;
- under paragraphs 68(2) and 68(3) of Schedule B1, which provide that the court may make directions to an administrator in connection with his management of the company's affairs, business or property; or
- under its jurisdiction with respect to trusts.

The administrators' case

The administrators submitted that there were a number of complexities and difficulties in providing the requested information. Their general position was that they were content to provide (and had provided) the Funds with information readily available to the administrators 'without the making of specific and very time intensive bespoke enquiries to exchanges, clearing houses and custodians'. However, the administrators were unwilling to divert resources to making further investigations except in accordance with a generic approach (which was not detailed in the judgment). The administrators submitted that the Funds' predicament was shared by many other clients with assets held by LBIE.

The judgment

Mr Justice Blackburne declined to order that the administrators provide the requested information, for the following reasons.

- Any harm suffered by the Funds was not 'unfair' within the meaning of paragraph 74 of Schedule B1, as the administrators were:
 - seeking in good faith to carry out their functions in the interests of LBIE's creditors and asset claimants as a whole in accordance with their obligations under Schedule B1 and the protocol; and
 - endeavouring to avoid being deflected from that course by devoting what they fairly regarded as a disproportionate amount of time and resources to dealing with requests for information from a particular group of former clients such as the Funds.
- The order should not be made under paragraph 68(2) or by recourse to the court's equitable jurisdiction in respect of trusts. Where there is no suggestion that an administrator is acting improperly, it would 'run flat contrary to the nature and purpose of an administration if the court were to interfere in the detailed day to day management of the administration in the way that this application seeks'.
- While an administrator 'must seek to balance the need to proceed with the administration in the interests of creditors as a whole against the desirability of responding to legitimate enquiries from individual creditors and others... in the absence of some plainly wrongful conduct on the administrator's part, it is for him to decide where the balance lies'.

What does the decision mean?

The 'hardship' test

Creditors and other interested parties may be concerned that the Funds were not seen to be entitled to the information requested. Evidence was submitted that two of the Funds were likely to be wound down within weeks in the absence of the order sought.

Counsel for the administrators contended that the 'hardship' of which the Funds complained was shared by many other parties. Notably, the judge did not conclude that the Funds should not be prioritised as 'hardship' cases under the court-approved protocol. However, the judgment shows that it is for the administrators to consider how cases should be prioritised, including in relation to requests for information. It is clear that the court will be reluctant to interfere with the administrators' commercial decisions in carrying out that process.

This underlines the importance of demonstrating to the administrators any circumstances justifying the prioritisation of a claim or a request for information.

Entitlement to information

It appears from the judgment that the administrators had willingly provided the Funds with such information as was readily available to the administrators without 'specific and very time intensive bespoke inquiries'. It may be possible for other creditors to ask the administrators at least for information of that nature.

In considering the type and extent of responses to provide to queries, the administrators may find it appropriate to have in mind a balancing test between the interests of the creditors as a whole and the desirability of responding to legitimate enquiries. The provision by the administrators to the Funds of 'readily available' information may support other creditors' arguments for obtaining similar levels of information.

Wider application?

While this case focused on an application for the provision of information, administrators are likely to refer to it more broadly as demonstrating that the administrator, as an officer of the court, has a wide discretion in determining how best to proceed. It seems that a creditor or other interested party has a high hurdle to clear before a court will overrule the administrator's

decision. This underlines once again the importance of good administrator appointment: once an administrator is in office, he can very largely manage the administration as he sees fit within the confines of the insolvency regime and, barring impropriety, the court will be unlikely to intervene.

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