

1 March 2012

Dutch Senate

13/00553 RM

Supreme Court of the Netherlands

Ruling

in the case of:

LEHMAN BROTHERS FINANCE S.A. (in the process of being wound up), with its registered office in Zurich, Switzerland,

PETITIONER in cassation, lawyer: mr. R.J. van Galen,

versus

1. LEHMAN BROTHER TREASURY CO. B.V.
(in a state of liquidation), with its registered office in Amsterdam,
2. Mr. R.J. SCHIMMELPENNINCK and mr. F. VERHOEVEN,
both acting in their capacity of trustee in the bankruptcy of Lehman Brothers Treasury Co. B.V.,
with its principal place of business in Amsterdam,

RESPONDENTS in cassation,

lawyers: mr. B.T.M van der Wiel and mr. D.A. van der Kooij.

Parties will hereinafter also be referred to as LBF, LBT and the trustees.

1. The proceedings in the fact-finding instances

For the course of the proceedings in the fact-finding instances, the Supreme Court refers to the following documents:

- a. the decision in the case 08/494-F of the supervisory judge in the court in Amsterdam dated 6 December 2 012;
- b. the decision in the case 534587/FT RK 13-136 of the Court in Amsterdam dated 24 January 2013.

The judgment of the court is attached to this judgment.

2. The proceedings in cassation

LBF has filed an appeal in cassation against the judgment of the court. The cassation application is attached to this present ruling and forms a part of it.

LBT and the trustees have requested that the appeal be rejected. The other interested parties - having appeared in appeal proceedings - have not submitted a statement of defence.

The Opinion of the Advocate-General L. Timmerman is that the appeal should be dismissed.

LBF's lawyer responded to the Opinion in a letter of 14 February 2013.

3. Assessment of the ground for cassation

3.1 In cassation, the facts that are stated in the Opinion of the Advocate-General under 1.1-1.9 can be started from. Briefly stated, said facts entail the following.

(i) LBF asserts that it has a total claim against LBT of approximately USD 4.6 billion, approximately USD 1 billion of which consists of claims based on '**Notes**' issued by LBT. On the website of LBT, all relevant information about the bankruptcy of LBT and the progress thereof is continuously published. On 30 November 2012, a '**draft Composition Plan**' was posted on the website.

(ii) In a decision of 6 December 2012 (hereinafter also: the decision), the supervisory judge in the bankruptcy set the deadline for the claims to be submitted and the date of the first creditors' meeting. The decision also states that the '**Consent Solicitation Memorandum**' (hereinafter also: the CSM) and what is provided therein with regard to, among other things, submitting the claims, providing instructions for the benefit of the vote about the composition offered by the bankrupt to its joint creditors, and the manner of representation at the first creditors' meeting, applies to the creditors that want to issue a claim by virtue of the Notes issued by LBT (hereinafter also jointly: the Noteholders). The decision furthermore states that for the assessment whether the permission required for the composition was obtained, with regard to these Noteholders the information that was obtained from the proceedings contained in the CSM will be started from, and that in applying articles 109 and 115 Bankruptcy Act in respect of the Noteholders, the

trustees can suffice with (electronic) notification via the clearing institutions.

(iii) On 6 December 2012, the curators have sent the dates mentioned under (ii) as established in the decision in a **Notice** sent to the Noteholders, including LBF, electronically via the clearing institutions. The Notice refers to the public reports and the other information that was published on the LBT website. With regard to the claims that are based on the Notes issued by LBT, reference is furthermore made to the procedure for submitting claims and the vote about the composition as stated in the CSM, "*attached as annex II to the Composition Plan*". The Notice furthermore provides that a "draft Composition Plan" of 30 November 2012 is available on the LBT website as an annex to the fourteenth bankruptcy report, and furthermore that the (final) Composition Plan will be filed with the court on 10 December 2012 and will be published on the LBT website.

(iv) The final Composition Plan and the related CSM were placed on the LBT website on 10 December 2012. Pages 4-5 of the Composition Plan provide (both in the draft version of 30 November 2012 and in the final draft of 10 December 2012):

"NOTEHOLDERS ARE REQUESTED TO READ CAREFULLY THE CONSENT SOLICITATION MEMORANDUM
The Supervisory Judge has approved the filing and voting procedures as described and laid down in the Consent Solicitation Memorandum."

The heading of the CSM also states (both in the draft version of 30

November 2012 and in the final draft of 10 December 2012) that the CSM has been approved by the supervisory judge.

(v) The decision placed on the LBT website on 17 December 2012.

3.2 Pursuant to article 67 Bankruptcy Act, LBF lodged an appeal against the decision and requested the court to declare it to be inadmissible in its appeal because the decision is non-existent, or null and void, or to set aside the decision. It furthermore requested that the Court determine that it is not the CSM, but rather the Bankruptcy Act that applies to the manner in which the Noteholders can submit their claims in the bankruptcy, can provide instructions for the benefit of the vote about the composition, and can have themselves be represented at the first creditors' meeting. LBF especially based its appeal on the fact that the supervisory board bound the Noteholders to the CSM without there being any statutory basis in this respect, and that the decision affects the rights of the Noteholders in an unacceptable way.

3.3 The court declared LBF to be inadmissible in its appeal on the grounds that this appeal was not lodged within the valid appeal period pursuant to article 67 paragraph 1 Bankruptcy Act, and that this exceeding of the term is not excusable. In that context, the court considered as follows, briefly put.

(a) It is established that the decision was rendered on 6 December 2012 and that LBF did not lodge its appeal against it until 21 January

2013. This furthermore establishes that the term of five days for appeal provided by article 67 paragraph 1 Bankruptcy Act was considerably exceeded. Therefore, LBF is inadmissible in its appeal unless, due to a mistake of the court, it did not know or reasonably could not have known that the supervisory judge had rendered a decision, and that the decision was not sent to it until after the expiration of the term for lodging an appeal. However, this is not the case here. Indeed, on 6 December 2012 LBT knew that the supervisory judge had approved the CSM, or could have known this based on the following facts and circumstance (ground 4.2).

(b) LBT did not contest that it had received the Notice on 6 December 2012. The Composition Plan states in bold that **"Noteholders are requested to read carefully the Consent Solicitation Memorandum"** and that the supervisory judge agreed with the presentation of the claims and the voting procedure within the meaning of the CSM. The CSM is an annex to this Composition Plan. The first page of the CSM states in large letters that the supervisory judge approved the CSM. Although the Notice does not explicitly state that the supervisory judge has decided that the vote at the first creditors' meeting will take place subject to the CSM, but this clearly could have become obvious to a reasonably attentive creditor from the combination of the date mentioned in the Notice, the Composition Plan and the CSM. In view of a short appeal period, prompted by the aim for an expeditious settlement of bankruptcies, creditors can be expected to be alert. If it should be assumed that a creditor cannot start from the draft composition with

the annexed CSM, but should start from the final version, of which the posting on the website was announced in the Notice on 10 December 2012, LBF could in any case have been aware at that moment that the supervisory judge had approved the CSM. In short, on 6 December 2012, or at least on 10 December 2012, LBT knew or in all reasonableness could have known that the supervisory judge had approved the CSM. Therefore, the appeal period started on 6 December 2012, or on 10 December 2012 (ground 4.3).

(c) The fact that LBT did not have the exact text of the decision at its disposal on 6 December 2012 or on 10 December 2012, respectively, does not detract from this since it could have, and should have, inquired after this with the trustees or the supervisory judge. Furthermore, it was not required for lodging an appeal that LBT had the text of the decision at its disposal; the appeal would also have been allowable if LBF had declared it would lodge an appeal within the appeal period against the decision of the supervisory judge, concerning the approval of the CSM (ground 4.4) it became aware of on 6 or 10 December 2012, respectively (ground 4.4).

3.4.1 LBT and the trustees have argued that LBT does not have an interest in the appeal in cassation that was lodged against the decision of the court because LBF cannot rely on article 67 Bankruptcy Act in the present case, and it can only set forth its objections against the offered composition in the assessment of the court approval thereof. In this context, LBF set forth that although it is in itself

correct that it can raise its objections against the CSM in the context of the court approval procedure, this offers insufficient solace because the other creditors have voted, or could have voted, in favour of the composition based on incorrect or incomplete information. This defect cannot be remedied during the court approval procedure, because at that time the votes will already have been cast.

3.4.2 Since LBT has partly based its appeal against the decision of the supervisory judge on the fact that it provides a procedure for the vote about the composition that deviates from the law, that said procedure contains inaccuracies (for example that votes are cast on the basis of incomplete information) and that these inaccuracies cannot be adequately remedied in the approval proceedings, it cannot be accepted that LBF can set forth these objections solely during the court approval procedure, and not also based on article 67 Bankruptcy Act. Therefore, it could rely on article 67 Bankruptcy Act, so that it has an interest in its appeal in cassation.

3.5 Part 5 challenges the opinions of the court represented in 3.3 above as incorrect, or incomprehensible or insufficiently reasoned.

3.6.1 In the assessment of the part it is stated first and foremost that for the benefit of a proper administration of justice, especially in cases that have a short appeal period, there should be clarity about the moment that term commences (and ends) and that appeal periods

should therefore be strictly observed (Supreme Court 13 July 2001, LJN ZC3673, NJ 2001/513). The appeal period of five days that applies pursuant to article 67 Bankruptcy Act starts on the day after the day on which the supervisory judge pronounced the decision (cf. Supreme Court 10 January 1992, LJN ZC0473, NJ 1992/195). In connection with the fact that his appeal period is very short - such in view of the importance of a quick settlement of the bankruptcy - it is desirable that the decision immediately be brought to the attention of the (known) interested parties (cf. the aforementioned decision of the Supreme Court dated 20 January 1992, and Supreme Court 11 September 1998, LJN ZC2697, NJ 1998/829).

3.6.2 If the bankrupt has a very large number of creditors, a reasonable settlement of the bankruptcy, which takes into account the importance of a quick settlement of the bankruptcy and sufficiently satisfies the interests of the creditors, can entail that the communication with the creditors by the trustee or the supervisory judge takes place in a manner adjusted to the size of the bankruptcy. The posting of a notice from the trustee intended for the joint creditors, or a number of them, or of a decision of the supervisory judge on a website that is used for that purpose with the permission of the supervisory judge or that is used by instruction of the trustee, may be construed as such, provided that the creditors have been sufficiently made aware of the existence of this website, and of the importance of regularly consulting it. If in such a case a decision of the supervisory judge or a notice from the trustee, which unequivocally

shows such a decision, is placed on the website, the creditors may be expected, without prejudice to special circumstances, that they take cognisance of this decision and, if they want to lodge an appeal against it, that they do so within the term determined in article 67 Bankruptcy Act, also in case the decision was not communicated to them individually.

3.7.1 In the present case it was not contested in cassation that:

- the Notice sent by the curators on 6 December 2012 was received by LBF;
- this Notice announces that the final version of the composition (the Composition Plan) will be lodged with the court on 10 December 2012 and will be published on the LBT website.
- in this Notice the Noteholders are furthermore alerted to the procedure and the provisions with regard to the presenting of claims and the vote about the composition, as stated in the CSM, which document, according to the Notice, is an annex to the draft composition;
- the final version of the Composition Plan and the related CMS were posted on the LBT website on 10 December 2012;
- in the Composition Plan the Noteholders are expressly requested to carefully read the CSM; and
- it is clearly stated in the Composition Plan and in the CSM that the supervisory judge has approved the CSM.

3.7.2 In light of these facts and circumstances, and also given the considerations in 3.6.1 and 3.6.2, the opinion of the court that LBT in any case knew, or in all reasonableness could have known, on 10 December 2012 that the supervisory judge had approved the CSM does not show an incorrect legal conception. This opinion is not incomprehensible or insufficiently reasoned either. Starting from the foregoing, the opinion of the court that the appeal period of five days referred to in article 67 paragraph 1 Bankruptcy Act in any case started one day after 10 December 2012 is correct as well. The foregoing is not altered by the circumstance that the decision was not placed on the LBT website until 17 December 2012. After all, the court rightly ruled on proper grounds - as its decision should be understood - that the existence of the decision of the supervisory judge was in any case known to LBT on 10 December 2012, that alertness could be expected from it as a creditor in the bankruptcy of LBT and that LBT should therefore immediately have inquired after its contents with the trustees or the supervisory judge, or in any case could have lodged an appeal based on grounds to be further set out within the appeal period. Therefore ground for appeal is unsuccessful.

3.8 The other complaints of the ground for appeal cannot lead to cassation either. Given Article 81 paragraph 1 Judiciary (Organization) Act, this requires no further substantiation, since the complaints do not require the answering of questions of law in

the interest of unity of law or development of law.

4. Decision

The Supreme Court dismisses the appeal.

This decision was issued by the Vice President F.B. Bakels as chairman and justices A.M.J. van Buchem-Spapens, M.A. Loth, G. de Groot and M.V. Polak, and was pronounced in open court by justice M.A. Loth op **1 March 2013**.

A handwritten signature in black ink, appearing to be 'M.A. Loth', written in a cursive style.A handwritten signature in black ink, appearing to be 'F.B. Bakels', written in a cursive style.