CR-2023-001772

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

IN THE MATTER OF WEALTHTEK LLP (IN SPECIAL ADMINISTRATION)

AND IN THE MATTER OF THE INVESTMENT BANK SPECIAL ADMINISTRATION REGULATIONS 2011

WRITTEN SUBMISSIONS OF THE APPLICANTS

For the Consequential Hearing on 14 November 2024

A. INTRODUCTION

1. These written submissions are filed on behalf of the administrators of WealthTek LLP (in special administration) (respectively, the "**Administrators**" and "**WealthTek**") for the consequential hearing listed in relation to the Judgment handed down on 4 October 2024 (the "**Judgment**" and the "**Consequential Hearing**"). Defined terms from the previous skeletons filed by the Administrators are adopted for convenience.

2. In addition to these Written Submissions the Court is asked to pre-read Crooks9 [CHB/5/33] and the letter sent by Mr Enright of the FSCS at [CHB/6/60].

3. The issues for the Consequential Hearing are based on those set out in Norton Rose Fulbright's Letter to the Court dated 30 October 2024 (the "**NRF Letter**") [CH/2/20]. The Court confirmed by email dated 6 November 2024 that each of these issues should be considered at the Consequential Hearing. The first two Issues as set out in the NRF Letter are:

   (1) In light of the Judgment at [54], should the Administrators seek to put before the Court any updated proposal as to how the estimated future costs of investigations into, and potential litigation to recover some of, the shortfall in assets from third parties ("**Potential Investigations and Litigation**" or "**Potential Litigation**", as the case may be) might be met, such proposals to include the creation of a reserve by way of the Costs Contribution (as defined in the Distribution Plan) (the "**Potential Investigations and Litigation Reserve**" or "**Potential Litigation Reserve**", as the case may be).

   (2) If the answer to Issue 1 is "no", whether relief should be granted that:

(a) in light of the Judgment at [49], the Administrators are not required to take any further steps to "return" or otherwise transfer any claims that may fall within the scope of the Potential Investigations and Litigation to the relevant clients (or, for reasons set out below, any third party subrogated or otherwise entitled to enforce the rights of such clients); and/or

(b) the Administrators are under no obligation as part of achieving Objective 1 of the special administration or otherwise to take any further steps in relation to any Potential Investigations and Litigation and shall be discharged from any liability for not taking any further steps.

4. Issue 3 as articulated in the NRF Letter sought confirmation "*[w]hether certain costs included as part of the costs reserve (as referred to at [41] of the Judgment) which have been incurred in investigations and recoveries-related work… should continue to be included within the costs contribution to be paid as part of the Distribution Plan, in full or at all*". Section C(ii) of Crooks9 lists the categories of incurred costs. The Administrators wish to draw these costs relating to investigations and recoveries-related work specifically to the Court's attention to ensure that this should not be revisited in light of the Judgment.

5. In addition, as articulated in Crooks9, there are two further points which are adjacent to Issue 3. They had not been identified at the time the NRF Letter was sent. On reflection, however, the Administrators consider that they should be raised with the Court now.

(1) First, the level of costs incurred in the process of returning Client Assets has been higher than envisaged by the Administrators previously (but still within the overall costs reserve which the Administrators had originally proposed in the Distribution Plan). This is addressed in Section C(iv) of Crooks9.

(2) Second, the position in respect of estimated <u>future</u> costs which the Administrators intend to incur in providing assistance to the FCA in their investigations. This is addressed in Section C(iii) of Crooks9.

6. In the case of both sets of costs relating to these two additional issues, it should be made clear that the inclusion (or continuation) of these costs as part of the costs reserve does not mean there will be no oversight and scrutiny of costs in the future, nor would this increase the costs reserve from the figure originally proposed by the Administrators in the Distribution Plan (which are not anticipated in any circumstances to exceed a maximum of £23,000 per client as

per the Distribution Plan). Whether these costs should actually be paid will be a matter primarily for the Committee (which has approved some of these costs to date, with approval not yet having been sought for the remainder). The issue for the Court is whether those costs can be included in the costs reserve – permitting the Administrators in the future to recover those costs (primarily by drawing down on the funding facility provided by the FSCS) including where they are approved by the Committee. If they are approved, they will then be paid by drawing down on the funding facility provided by the FSCS.

B. ISSUE 1: SHOULD REVISED PROPOSALS BE PUT BEFORE THE COURT?

7. The Court in the Judgment determined that the Potential Litigation Reserve should not be approved on the basis of the information provided. In light of that decision, by Issue 1, the Administrators wish to understand from the Court whether they can or should be formulating revised proposals in relation to the Potential Investigations and Litigation Reserve.

8. If the answer is "no", Issue 2 arises. If the answer is "yes", Issue 2 falls away at least to some extent. The focus will then become how any revised proposals should be formulated.

9. The Administrators appreciate what any revised proposals should be is for them to determine. Equally, however, it may assist the Administrators to explore with the Court what sort of information should be provided as part of any revised proposals to ensure that (i) what is provided accords with the Court's expectations and (ii) the Administrators do not incur costs in providing information which is unnecessary. This is important in circumstances where there is limited guidance by way of precedent on what should be provided in this context. The analogy with the *Beddoe* jurisdiction is not entirely apt because that jurisdiction will invariably be invoked in respect of a specific piece of litigation and the evidential requirements are focused accordingly: see eg, *Lewin on Trusts* (20th Edn), 48-147. By contrast, what the Administrators here would be seeking to do would be first to continue to investigate whether any Potential Litigation should be pursued. The better analogy may be with the *Berkeley Applegate* jurisdiction: see eg, *Lewin*, 27-024 (including First Supplement).

10. Whatever the position is, however, the Administrators do not wish to incur (and have not incurred) any costs in preparing a new proposal for the Court's consideration if that would in any way conflict the Court's decision. Any costs incurred in preparing such a proposal would increase the level of costs incurred which would need to be paid from the Costs Contributions.

The paramount concern for the Administrators in raising Issue 1 (and 2) is to achieve certainty as to their duties going forward following the Judgment.

i. Position of WealthTek's clients

11. One of the reasons why the Court withheld approval for the Potential Litigation Reserve was the position of WealthTek's clients, in particular the absence of consent from those clients who would be affected by the Potential Litigation Reserve. By way of background, the Court may recall that:

(1) Approximately 77% of clients (with balances over £1,000) would be unaffected by any Potential Investigations and Litigation Reserve as they are compensated in full for their shortfall and costs contribution even with the reserve being included (the "**Lower Claim Clients**"). Whether the Potential Investigations and Litigation Reserve is approved will have no bearing on the returns of the Lower Claim Clients.

(2) Approximately 1% of clients (with balances over £1,000) (approximately 8 in number) would be compensated in full for their shortfall and costs contribution if no Potential Investigations and Litigation Reserve is created, but not be compensated in full if the Potential Investigations and Litigation Reserve is created (the "**Intermediate Claim Clients**").

(3) Approximately 22% of clients (with balances over £1,000) (approximately 200 in number) will not be compensated in full even if no Potential Investigations and Litigation Reserve is created (the "**Higher Claim Clients**").

12. Pausing there, two points should be made:

(1) First, the practical effect is that whether the Potential Investigations and Litigation Reserve is created (as part of the costs reserve) will have no bearing on what monies are returned to the Lower Claim Clients who are c. 77% of the total clients (with balances over £1,000).

(2) Second, the Intermediate and Higher Clients, like the Lower Claim Clients, are entitled to receive compensation from the FSCS. That raises the connected question of whether and in what respects the FSCS's position should be taken into account.

ii. Relevance of the FSCS's position

13. As the Court may recall, one of the primary functions of the FSCS is the payment of compensation in circumstances such as these. The payment of compensation has certain consequences as described in the Compensation Sourcebook within the FCA Handbook ("**COMP**"). COMP 7 is headed "*Assignment, subrogation, variation or creation of rights*" and, in effect, contains rules which enable the FSCS to take an assignment of, or be subrogated to, claims against the failed firm and third parties. In Financial Services Compensation Scheme Ltd v Abbey National Treasury Services plc [2009] Bus LR 465 (Ch), the Court considered the validity of earlier iterations of (what is now) COMP 7 and held that (at [57]):

> "There is a clear connection between the payment of compensation where defendant A is unable to meet the claim and the assignment to the scheme manager [i.e. the FSCS] not only of the claim against defendant A but also of claims for the same or largely the same loss against defendant B. It is, I would suggest, a provision which any reasonable person would regard as an obvious way in which the scheme could seek to recoup some or all of the compensation which it had been required to pay."

14. How that is to be achieved is described in the following parts of COMP 7:

(1) COMP 7.1.3 provides that "*[t]he FSCS may (and in some cases must) make an offer of compensation conditional on the assignment of rights to be by a claimant. The FSCS may also be subrogated automatically to the claimant's rights*".

(2) COMP 7.3.8R entitles the FSCS to determine that the "*payment of compensation by the FSCS*" shall have various effects including that (emphasis added):

> "(3) the FSCS shall immediately and automatically be subrogated, subject to such conditions as the FSCS determines are appropriate, to all or any part (as determined by the FSCS) of the rights and claims in the United Kingdom and elsewhere of the claimant against the relevant person (or, where applicable, a successor) and/or any third party (whether such rights are legal, equitable or of any other nature whatsoever and in whatever capacity the relevant person(or, where applicable, a successor) or third party is acting) in respect of or arising out of the claim in respect of which the payment of or on account of compensation was made;
>
> (4) the FSCS may claim and take legal or any other proceedings or steps in the United Kingdom or elsewhere to enforce such rights in its own name or in the name of, and on behalf of, the claimant, or in both names against the relevant person (or, where applicable, a successor) and/or any third party;
>
> (5) the subrogated rights and claims conferred on the FSCS shall be rights of recovery and claims against the relevant person (or, where applicable, a successor) and/or any third party which are equivalent (including as to amount and priority and whether or not the relevant person (or, where applicable, a successor) is insolvent) to and do not exceed the rights and claims that the claimant would have had…"

(3) If the FSCS makes a determination under COMP 7.3:

(a) the FSCS is subject to a duty to "*pursue all and only such recoveries as it considers are likely to be both reasonably possible and cost effective to pursue*" (COMP 7.4.1); and

(b) if the FSCS decides not to pursue such recoveries a claimant to whose rights the FSCS has been subrogated makes a request in writing, "*the FSCS must comply with that request and assign the rights back to the claimant*" (COMP 7.4.2).

(4) If the FSCS does pursue such recoveries, the proceeds of any recovery by the FSCS may be paid over to claimants in accordance with COMP 7.6 (subject to deduction of the FSCS's reasonable costs). That is to reflect the dual purpose in trying to recoup some or all of the compensation paid, namely to benefit (i) the levy-payers who fund the FSCS and (ii) customers who still have uncompensated losses.[1]

15. On 2 November 2023, the FSCS made a determination under COMP 7.3 **[HB1/6/303]**. The effect of this was *inter alia* that COMP 7.3.8R(3)-(5) will apply when any WealthTek client receives compensation. As a result, the FSCS has been subrogated to the entirety of the rights of any client who has received compensation to date and will be subrogated upon payment of compensation to or for the account of any client in the future. Those rights extend to the right to enforce claims against WealthTek or a third party.[2] It is acknowledged that those rights remain with the clients until payment of compensation.

16. It follows that the FSCS will be entitled to bring claims (following payment of compensation) that previously could have been brought by clients. The right to bring claims will only revert back to the clients in a situation where (by virtue of COMP 7.4.2) the FSCS decides not to pursue claims and a request is made in writing by a client for an assignment of the right to bring the claim(s).

17. So far as any recoveries from claims are concerned, the clients' positions are different:

(1) In respect of the Lower Claim Clients, the only party who has an economic interest in any recoveries from third parties is the FSCS. In respect of those clients, any recoveries will redound entirely to the FSCS.

[1] See https://www.fscs.org.uk/about-us/funding/recoveries.
[2] COMP 7.3.2R confirms that the FSCS's powers in COMP 7.3 may be used "*in relation to all or any part of a protected claim or class of protected claim made with respect to the relevant person (or, where applicable, a successor*)."

(2) In respect of the Intermediate and Higher Claim Clients, the FSCS has an economic interest in any recoveries. These clients may also have residual interest in any recoveries if the amount recovered exceeds the compensation paid to the FSCS such that COMP 7.6.2R(1) applies (with any recoveries being applied by the FSCS first against clients' uncompensated losses).

18. As a result, the FSCS's position is relevant to whether the Administrators should seek to formulate any revised proposals, and what weight should be given to the FSCS's views in relation to any revised proposals if approval was sought from the Court. It is also relevant in considering Issue 2 if the Administrators should not seek to formulate any revised proposals.

iii. FSCS's position on the Potential Investigations and Litigation Reserve

19. The FSCS has confirmed its view in their letter dated 11 November 2024 at [CHB/6/60]. The Court is respectfully invited to read that letter in full, if time permits. Without detracting from the contents, two points of practical importance are made:

(1) first, the FSCS consider that they have been subrogated to the relevant rights of clients to whom they have paid compensation; and

(2) second, the FSCS are content to fund the Potential Investigations and Litigation Reserve in principle (through drawdowns of the funding facility) but only if the sum representing the Potential Investigations and Litigation Reserve is classified as compensation to clients within the terms of the Distribution Plan, which will therefore require the approval of the Court.

iv. Determination of Issue 1

20. The short point raised by Issue 1 is to confirm the effect of the Judgment. The 23 July Order approved the Distribution Plan subject to determining whether the costs reserve should include the Potential Litigation Reserve. The Judgment refused approval for the Potential Litigation Reserve to be included within the costs reserve on the basis of the (then) proposals with the benefit of the information (then) provided to the Court. The 23 July Order obviously stands. There are two possibilities arising from the Judgment:

(1) first, the Court has approved the Distribution Plan but not the Potential Litigation Reserve, such that there should be no Potential Litigation Reserve at all and the Distribution Plan

should therefore be implemented in full as annexed to the 23 July Order subject to a reduction in the amount of the Costs Contribution;

(2) second, the Court has approved the Distribution Plan but not the Potential Litigation Reserve, such that there should be no Potential Litigation Reserve as proposed on the basis of the information provided.

21. The difference is that the second possibility admits of the opportunity to formulate a revised proposal for the Potential Investigations and Litigation Reserve which addresses the Court's concerns identified in the Judgment. The first possibility does not.

22. There are indications in the Judgment at [54] (through the references to the "*current form*") which suggest the second possibility may be accurate, but the first possibility equally arises from the Judgment. That is why the Administrators seek confirmation either way. Their paramount concern is to achieve certainty that they have met the Court's expectations and complied with their duties. That is especially important in circumstances where:

(1) Formulating a revised proposal will take time and incur costs, including consultation with the FSCS, the Committee, the FCA and potentially individual clients. The Administrators do not intend to take any steps to incur those costs (which the Administrators would then meet through the costs reserve) if that would be contrary to the Court's wishes.

(2) The Administrators are conscious of the Court's concerns in the Judgment regarding the amount of information to be provided in respect of any Potential Investigations and Litigation Reserve. If the Administrators are to prepare a revised proposal, they wish to make sure it accords in every respect with the Court's wishes.

23. In terms of formulating any revised proposal, the Administrators have identified at least two points arising from the Judgment which would need to be addressed:

(1) First, any revised proposal would factor in both the costs of investigating Potential Litigation and the costs of pursuing any such Potential Litigation. The latter may arise due to claims which the Administrators could bring, but it could equally arise in relation to claims which a third party (most obviously, the FSCS) could bring, with that third party having the benefit of the work done by the Administrators to investigate those claims. The issue of what claims should be brought and by whom is something which would need to

be addressed at a later stage if the Potential Investigations and Litigation Reserve is approved.

(2) Second, the Administrators recognise that it may be appropriate as part of any revised proposal to cater for the particular situation of the Intermediate and Higher Claim Clients and whether such a proposal should require the consent of the Intermediate and Higher Claim Clients to opt-in.

24. Any revised proposal may require the Court to vary its order of 23 July 2024 approving the Distribution Plan so as to approve it in a modified form. As a matter of jurisdiction, Rules 275 of the Rules gives the Court a broad power to "*review, rescind or vary any order made by it in the exercise of its jurisdiction under the Regulations or the Rules*". This provision is the equivalent of rule 12.59(1) of the Insolvency (England and Wales) Rules 2016 which is applicable in other insolvency proceedings.[3] The Administrators recognise that such a jurisdiction must be exercised extremely cautiously, but consider that a revised proposal which was acceptable to the Court would constitute a sufficient change of circumstances to make it appropriate to exercise the jurisdiction.[4] Equally, the Administrators recognise that the nature of that jurisdiction is relevant to determining the effect of the Judgment.

C. ISSUE 2: REQUEST FOR DECLARATORY RELIEF/ORDERS

25. Issue 2 arises if the Court concludes that, by virtue of the Judgment, no revised proposal for the Potential Investigations and Litigation Reserve should be formulated. In that scenario, the Administrators wish to have certainty that nothing further is required of them in two respects, namely (i) "returning" or otherwise transferring to clients (or the FSCS where relevant) the chose in action represented by claims falling within the scope of Potential Litigation and (ii) taking any steps to pursue any Potential Litigation.

26. The Administrators consider this to be important for the Administrators, the FSCS and clients to understand what the Administrators should and should not be doing in relation to the Potential Investigations and Litigation as a result of the Judgment. Moreover, the Administrators are under an obligation to wind-up WealthTek in the best interests of its creditors (i.e. Objective 3).[5] In order to be able to do so the Administrators require certainty

[3] "*Every court having jurisdiction for the purposes of Part A1 to 7 of the Act and the corresponding Parts of these Rules, may review, rescind or vary any order made by it in the exercise of that jurisdiction*."
[4] See Re Thirty-Eight Building Ltd [2000] BCC 422, 425. See further the authorities considered in MTA Personal Injury Solicitors v Wiseglass [2024] EWHC 2208 (Ch) at [46]-[47].
[5] See Regulation 10 of the Regulations.

as to the steps that are required to return Client Assets (i.e. Objective 1) and any obligations which WealthTek may have to take action as trustee.

i. Return of choses in action

27. On this issue, the Court observed in the Judgment at [49] that:

> "The starting point must be that the return of the chose in action "as soon as is reasonably practicable" is to take the steps necessary to empower the client to bring a claim in the client's own name against the third parties. This may not require any action by the Administrators – in a bare trust the beneficial owner of the trust fund will have a concurrent right with the trustee to bring certain types of claim in relation to the trust property, joining the trustee as defendant if necessary to make good the beneficiary's title."

28. Trustees are normally the proper claimants in proceedings against third parties in respect of claims arising in the course of administration of the trust: *Lewin*, 47-001. The position in the case of a bare trust is different to the extent that (i) the beneficiary can oblige the trustee to lend his name to assert the legal right of a beneficiary against the third party or (ii) if the trustee refuses to sue, the beneficiary may sue in his own name and join the trustee as defendant: *Lewin*, 47-003 to 47-004. The latter scenario would be a derivative action.

29. The Administrators do not understand there to be any further steps they need to (or could) take to "return" to clients any claims falling within the scope of Potential Litigation. The only possibility would be an assignment of any such claims to the clients, which would clearly be costly, time-consuming and potentially unnecessary given what has been said in the Judgment.

30. The position would appear to be the same vis-à-vis the FSCS. The Court's analysis in the Judgment at [49] would seem equally applicable to the FSCS to the extent of any subrogation to the clients' rights.

ii. Further steps in relation to the Potential Investigations and Litigation

31. The practical effect if there is no Potential Investigations and Litigation Reserve is that the Administrators will not have any assets available to investigate or pursue any Potential Investigations and Litigation in relation to Client Asset shortfalls. As a result, the Administrators consider it must follow that the Administrators are not obligated to pursue any such Potential Investigations and Litigation or take any steps relating to any Potential Investigations and Litigation. The Administrators are in precisely the same position as any trustee in this regard. As was explained in Shah v Shah [2020] EWHC 1840 (Ch) (including by reference to *Lewin*, 34-022):

> "In regard to trust resources, or the funding of activities required to protect, or get in, assets of a trust, I am not aware of any obligation upon trustees to use their own funds, or resources, to take steps to preserve, or get in, the assets of a trust. Lewin on Trusts (19th Ed.) at 34-022 states that where no funds are available, trustees are under no obligation to take proceedings at their own expense, unless the lack of funds arises out of the trustees' own breach of duty. In Hobday v Peters (No. 3) 28 Beav. 603, Sir John Romilly MR, in respect of an insurance policy assigned to trustees, decided that the trustees, who were without funds from the trust, were under no duty to pay the premiums."

32. Further, and in any event, the Court concluded in the Judgment at [49] that Objective 1 did not extend to assets which should have been held by the investment bank at the date of administration, but instead that it is the choses in action against third parties which the Administrators are required to return as soon as reasonably practicable under Objective 1. The Administrators do not understand there to be any further steps which they are required to take to return these choses in action in light of the explanation above.

iii. Relief sought

33. With the above points in mind, in the event that Administrators should not be formulating new proposals for the Potential Investigations and Litigation Reserve, the Administrators respectfully seek confirmatory orders and/or declaratory relief that they are not required to take any steps (i) to enable any other third party, including any clients and the FSCS, to pursue any Potential Investigations and Litigation or (ii) to investigate or pursue any Potential Investigations and Litigation. The Administrators acknowledge that this relief is potentially relevant to third parties – indeed, one of the reasons why it is sought is so that the Administrators can explain the position to third parties. If it would provide the Court with greater comfort, any relief could be provided to take effect subject to complying with directions to notify relevant third parties (in practice, this will include the FSCS and clients with an economic interest) of the terms of any order.

D. ISSUE 3: COSTS

i. Incurred Investigation Costs

34. The Administrators wish to obtain clarity in relation to certain costs which have been incurred which relate to work which the Administrators have recorded as investigations and recoveries-related work (the "**Incurred Investigation Costs**"), which often has a dual purpose in also supporting the return of Client Assets. Approximately 60% of these Incurred Investigation

Costs were included in the 'Incurred Costs' figure which the Court referred to at [41] of the Judgment (as being those costs incurred prior to 6 April 2024).

35. In particular, the Administrators wish to obtain clarity that, in light of the Judgment and assuming there is no Potential Investigations and Litigation Reserve, these costs can remain as part of the Costs Contribution. The Court is not being asked to approve whether in fact the Incurred Investigation Costs should be approved and paid (whether in the amount sought or at all). This is a matter primarily for the Committee (or the Court at a later date on a challenge).

36. The effect of including these Incurred Investigation Costs would be to impact the total Costs Contribution by £1,625,460.08. Mr Crooks explains the position at Crooks9, ¶30-48 [CHB/5/41]:

    (1) From their appointment the Administrators assumed, consistent with their duties, that they were required to investigate the reasons for WealthTek's failure and the circumstances relating to the very substantial shortfalls of Client Assets and Client Money contributing to the misfortune that has been suffered by WealthTek's clients. That assumption was consistent with the expectations of the Committee, and indeed clients, as understood by the Administrators throughout the special administration.

    (2) The Incurred Investigation Costs have consisted of:

        (a) Costs associated with undertaking a funds flow analysis required to understand how Client Assets had been misappropriated prior to WealthTek's entry into special administration (as described in Crooks9, ¶27 [CHB/5/40]) and crucially to conduct the Client Asset reconciliation exercise.

        (b) Costs associated with assisting the FCA in their investigations.

        (c) Costs associated with applications brought by the Administrators under section 236 of the Insolvency Act 1986 (the "**Section 236 Application Costs**"). The Section 236 Applications were heard in private, as a result of which very little can be said about the subject matter.

    (3) The Administrators have therefore incurred approximately £1,625,460.08 (including VAT) in investigations (comprising £857,114 in time costs and £497,436 in legal fees each excluding VAT). These are broken down as follows (the:

(a) £970,984 (including VAT) (comprising £596,776 in time costs and £212,377 in legal fees each excluding VAT) were incurred before 6 April 2024 and therefore were included as 'Incurred Costs' in the Distribution Plan. Those costs have been approved by the Committee; and

(b) £654,476 (including VAT) (comprising £260,337 in time costs and £285,059 in legal fees each excluding VAT) were incurred after 6 April 2024 and therefore were included within the Potential Investigations and Litigation Reserve in the Distribution Plan. These costs have not yet been put before the Committee for approval and remain subject to the Committee's approval before they can be charged by the Administrators.

37. The Administrators consider that the Incurred Investigation Costs are costs of pursuing Objective 1.[6] Insofar as the costs relate to the funds flow analysis the Administrators have conducted, they were essential to the process of returning Client Assets. As the Court will recall, this analysis was necessary to conduct the reconciliation exercise which determined what Client Assets were being held by WealthTek for each client. The other Incurred Investigation Costs were incurred as part of investigations into the misappropriation of Client Assets. They do not relate to Objective 2[7] or to Objective 3.[8] At [50] of the Judgment the Court accepted that in principle costs associated with investigation of potential claims would be recoverable as part of Objective 1 in an appropriate case. In other words, these costs have been incurred in relation to the client asset estate and not in relation to the house estate.

38. The question then becomes whether the Court should act to effectively disallow recovery of the Incurred Investigation Costs as costs of achieving Objective 1 by not permitting their inclusion in the Costs Contribution. The Administrators do not consider that it should:

(1) The issue is whether it would be appropriate to deprive an officeholder of a right to recoup from the relevant estate (i.e. house or client) expenses incurred in the conduct of the insolvency process. In Re Capitol Films [2010] EWHC 3223 (Ch) Richard Snowdon QC (as he then was) considered at [101] that depriving an officeholder of a right of recoupment (in the context of litigation pursued by them as officeholders) included: "*cases in which the*

[6] Objective 1 costs are payable out of Client Assets, whereas Objectives 2 and 3 costs are payable from the house estate: see Rules 134-135 and 196.
[7] Being to ensure timely engagement with market infrastructure bodies and the "*Authorities*" (being the Bank of England, the Treasury, the FCA and the Prudential Regulation Authority).
[8] Being to either rescue the investment bank as a going concern, or wind it up in the best interests of its creditors.

office-holder has been guilty of misconduct…; where he has made a "blunder" or serious mistake…; or where it would be unjust for other reasons to permit such recoupment…"[9]

(2) In relation to the Section 236 Applications Costs, ICC Judge Greenwood has ordered that such costs should be expenses of the special administration.[10] It is respectfully submitted that to disallow recovery of those costs as part of the Costs Contribution would conflict with that determination by ICC Judge Greenwood.

(3) In relation to the remainder of the Incurred Investigation Costs, the Administrators do not consider that their conduct in pursuing investigations can be regarded as unreasonable or a blunder or misconduct or not properly incurred:

(a) The Administrators work on the funds flow analysis investigations was essential to the return of Client Assets. The Administrators needed to complete those investigations in order to be able to conduct the reconciliation exercise (which the Court will recall) and to determine Clients' entitlements.

(b) The Administrators incurred the Incurred Investigation Costs in good faith considering that they were duty-bound to investigate wrongdoing in relation to the Client Asset estate with the aim of exploring potential recoveries for clients. The Court did not conclude in the Judgment that such investigations fall outside the scope of the duties of officeholders such as the Administrators.

(c) At all times the Committee (including the FSCS) was aware of, and approved of, the Administrators taking steps to investigate wrongdoing in relation to the Client Asset estate. The Committee and Clients wanted the Administrators to advance such investigations. In relation to costs incurred before 6 April 2024, the Committee has approved the costs insofar as required. In relation to costs incurred after 6 April 2024, the payment of those costs will remain subject to the approval of the Committee and they will not be paid without that approval.

(d) When the Administrators became aware that there were concerns about the Potential Litigation Reserve (at the hearing on 23 July 2024), they acted to minimise any ongoing

[9] To similar effect, "*disallowance of the right of recoupment should, absent special circumstances, only occur when there has been some degree of unreasonableness on the part of the administrators*": Re Wedgwood Museum Trust Ltd [2012] EWHC 1974 (Ch), [27]. See also "*a trustee in bankruptcy is only to be required to bear costs and expenses personally if he or she has fallen below the standard of a reasonable insolvency practitioner acting reasonably*": Nutting v Khaliq [2012] EWCA Civ 1726, [32].
[10] The Order of ICC Judge Greenwood did not specify which estate the costs are to be payable from.

expenditure in relation to investigations and restricted it to that which was necessary to preserve the position (in particular in relation to the Section 236 Applications).

ii. Costs of returning Client Assets

39. The Administrators wish to clarify the costs they have incurred, and anticipate incurring, in relation to the return of Client Assets. These costs are anticipated to be larger than the costs the Administrators had estimated at the time of filing the application for approval of the Distribution Plan (but still within the overall costs reserve which the Administrators had proposed):

(1) At the time of filing the Application the Administrators had estimated that the part of the Costs Contributions attributable to the total costs of returning Client Assets would be approximately £10,977.99 in total. As Crooks9, ¶25-26 [CHB/5/40] explains the allocation of costs between particular buckets was somewhat rudimentary in nature given the difficulties in predicting future costs and allocating costs to different workstreams or projects.

(2) The Administrators now anticipate that the total costs in returning Client Assets will ultimately be a maximum of £11,577,779 in total (a maximum of £14,300 per client). The incremental impact on the cost of returning Client Assets is £600,000 in total.

(3) Mr Crooks explains the reasons for this at Crooks9, ¶55 [CHB/5/46]. In summary: (i) the process of selecting a suitable nominated broker to take on WealthTek's clients was more protracted than expected; (ii) the Administrators were required to engage with clients more deeply (given the complexities encountered) and over a longer period than expected; (iii) a number of unforeseen tax issues have required in-depth interactions with financial intermediaries representing clients and parties previously connected with WealthTek; (iv) operational costs have been required to be incurred for a longer period than originally anticipated and it has been necessary to keep in place funding arrangements for more time than expected until FSCS compensation can be paid; and (iv) higher legal and time-costs have been incurred in the process of the approval of the Distribution Plan than the Administrators had anticipated.

40. In the Judgment the Court approved the Costs Contributions (but not the Potential Litigation Reserve as then presented). However, the Administrators consider that it is important to raise with the Court that the total Costs Contribution (less the Potential Investigations and

Litigation Reserve) may be larger than previously estimated. The Court is not being asked to specifically approve these costs. The costs have not yet been approved by the Committee and remain subject to their review. The point made by the Court at [44] of the Judgment about the role of the FSCS, given its position on the Committee and its role as the principal funder of the costs, in monitoring these costs remains good.

iii. Future costs of assisting the FCA

41. Finally, the Administrators wish to understand from the Court whether the costs they intend to continue to incur, and consider they are required to incur, in assisting the FCA going forward ("**Future Assistance Costs**") will form part of the Costs Contribution reserve. The Future Assistance Costs had been included as part of the Potential Investigations and Litigation Reserve on the basis that they were costs to be incurred. On reflection, these Future Assistance Costs are conceptually different in that they are concerned with investigations and other steps being taken by third parties (namely, the FCA) against other parties, rather than claims which might be brought against third parties.

42. The Administrators have estimated these costs would be no more than £900,000 in total. These are necessarily high-level conservative estimates in circumstances where the Administrators do not know what course the FCA's investigations may take, what other proceedings the FCA may commence or what assistance the FCA may require from the Administrators. The Court is not asked to approve these costs (or the level of them) – this is for the Committee. The Court is, however, asked to approve an allowance for such costs being included in the Costs Contribution so they can be paid if approved.

43. The nature of the Future Administration Costs is addressed in Crooks9 at Section C(iii). In essence, however, they would be limited to providing assistance to the FCA in relation to its investigation with the aim that the FCA will be able to obtain a confiscation order, the proceeds of which the Administrators hope would be paid to clients via clause 21 of the Distribution Plan. The FCA is dependent on the Administrators in particular to provide information on the consequences for WealthTek and the Clients as victims of the misfortune that has been suffered of the actions that led to WealthTek's failure, based on the findings the Administrators have made in the course of the special administration and the data which WealthTek holds.

44. If the Administrators are unable to retain funds to cover Future Assistance Costs, they will be hamstrung in their ability to assist the FCA. The Administrators consider that continuing to

provide assistance to the FCA where required, regardless of whether a Potential Investigations and Litigation Reserve is approved, is in the interests of clients and the FSCS generally and is consistent with their obligations as officeholders. As with all of the issues for this hearing, the Administrators would be keen to clarify the position so that they can inform stakeholders of what they can and cannot do going forward in these (uncommon) circumstances.

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