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

SKELETON ARGUMENT OF THE APPLICANTS

For the hearing on 7 June 2024

Time estimate for hearing:	½ day
Time estimate for pre-reading:	½ to 1 day
Suggested pre-reading:	(1) The second witness statement of Shane Michael Crooks dated 9 May 2024 ("**Crooks2**") [3/12]; (2) The third witness statement of Shane Michael Crooks dated 4 June 2024 ("**Crooks3**") [7/459]; (3) The Explanatory Statement [5/140]; (4) The Distribution Plan [4/77]; and (5) The draft order [2/9].

A. INTRODUCTION

1. This skeleton argument is filed on behalf of the administrators of WealthTek LLP (in special administration) (the "**Administrators**" and "**WealthTek**" respectively). The Administrators apply for the approval by the Court of a distribution plan in respect of the client assets held by WealthTek (the "**Distribution Plan**"). The Distribution Plan was approved by WealthTek's committee of creditors and clients (the "**Committee**") on 2 May 2024, having been developed in consultation with the FCA and FSCS.

2. The application for the Court to approve the Distribution Plan is made pursuant to Regulation 11 of the Investment Bank Special Administration Regulations 2011 (the "**Regulations**") and Rule 146 of the Investment Bank Special Administration (England and Wales) Rules 2011 (the "**Rules**"). The Distribution Plan concerns the client assets held by WealthTek which at the time of the Administrators' appointment had an indicative value of £148m. The client assets are held for approximately 1,320 clients, however, there is a shortfall in WealthTek's holdings

of client assets of £70.6m (alongside a shortfall in relation to client money of approximately £10m).

3. The details of the Distribution Plan are set out in the Distribution Plan itself and the Explanatory Statement (both of which have been made available to clients) and are summarised below. In broad summary (subject to the payment of costs and the discharge of any security interests) the Distribution Plan will enable clients to access their "**Client Assets**" via either a transfer to a nominated broker or by an alternative mode of distribution (a transfer to a different broker, the liquidation of the Client Assets or the actual return of physical share certificates). In the usual way, save for the "fruits" of assets which were Client Assets as at the appointment of the Administrators, which have accrued since that time, the Distribution Plan does not deal with a clients' "**Client Money**". Client Money will be returned by the Administrators in accordance with the relevant rules of the FCA's Client Asset Sourcebook (or CASS) in a process that will run in parallel to the return of Client Assets.

4. There are two additional elements to the substantive relief sought by the Administrators on this Application (which are considered in section G below):

   (1) A direction that the Administrators pay the proceeds of unclaimed client assets into the Insolvency Services Account and that the fees charged by the Insolvency Service rank as an expense of the special administration (the "**Unclaimed Assets Application**"); and

   (2) An order varying the order of priority for the payment of the expenses of the special administration so that the liability of the Administrators to make up a shortfall in Client Money from the general estate ranks after the other expenses (the "**Priority Application**").

5. Clients of WealthTek have been given notice of the Application and access to the related documents, including Crooks2 which was posted on the Website (as that term is defined below).[1] In particular:

   (1) The Administrators have been communicating with clients through email, hard copy documents (when so requested or where the Administrators do not have an email address for the relevant client), a dedicated publicly-accessible website set up when they were appointed in April 2023 (the "**Website**") and a client portal set up in December 2023 (the

[1] Crooks3 will also be made available on the Website as soon as is reasonably practicable.

"**Portal**"). The Website is publicly available and includes documents relevant to clients generally; the Portal is specific to each client and is used to send clients documents specific to them.

(2) The intended use of a distribution plan was first notified to clients in a letter dated 21 December 2023[2] (and the potential for the use of a distribution plan was referred to in the Administrators' proposals).[3] The Administrators then issued a bar date notice in respect of client assets pursuant to Regulation 11 of the Regulations on 12 February 2024, which was published in the Gazette, posted on the Portal and the Website and advertised in two newspapers.[4]

(3) The Distribution Plan was approved by the Committee on 2 May 2024.[5] The Committee comprises four client members (Antony Ingham, Christopher Pegram, Dominic Knights and Jonathan Gain) and the FSCS.[6] The FSCS plays a key role in special administrations of this type and administrators are, in investment bank special administrations, under a statutory duty to work with the FSCS in relation to matters pertinent to FSCS coverage (see Regulation 10A(1)).

(4) The Distribution Plan, alongside the Explanatory Statement which accompanies it, was posted to the Website on 10 May 2024 and notice of the Application was sent to all clients either by post or by email (as to which, see paragraph 5(1) above) between 10 May 2024 and 13 May 2024.[7] This satisfied the requirements under Rule 146(3)(a) and (b) of the Rules.[8]

(5) Notice of the hearing was given at the same time as the Distribution Plan was sent to clients and the Application notified to them.[9]

(6) The specific attention of clients was drawn to the Unclaimed Assets Application and the Priority Application on 24 May 2024 by way of a post on the Website.[10]

---

[2] Crooks2, Appendix A ¶6(r) [3/74].
[3] [6/360].
[4] Crooks2, ¶160 [3/70].
[5] [8/477].
[6] Crooks2, ¶93 [3/44].
[7] Crooks3, ¶10 [7/461].
[8] Which require a copy of the Distribution Plan to be sent to: (a) all persons who have submitted a claim to ownership of client assets or claims in relation to a security interest over, or other entitlement to, client assets; and (b) those who are eligible to make such a claim but who have not submitted one.
[9] Crooks3, ¶10 [7/461].
[10] [8/471].

6. One client (Mr Pluck) has indicated opposition to the Distribution Plan. It is presently unclear whether he intends to attend the hearing. Mr Pluck's position is dealt with in Crooks3, ¶18-25 [7/463] and below at paragraphs 49-50.

7. The Distribution Plan was sent, and this hearing notified, to the FCA in accordance with Rule 146(3)(d) of the Rules on 9 May 2024.[11] WealthTek is not regulated by the Prudential Regulation Authority, which has therefore not been notified. The FSCS was also notified of the Application for approval of the Distribution Plan on 9 May 2024.[12]

8. Due notice has therefore been given to all relevant persons of the Distribution Plan itself and of the hearing.

9. The remainder of this skeleton argument is structured as follows:

   (1) ***Section B*** – sets out the relevant background to WealthTek, the special administration and the Application.

   (2) ***Section C*** – explains the reconciliation exercise which the Administrators have conducted given the shortfalls in Client Assets and Client Money and the issues they have experienced with the books and records of WealthTek.

   (3) ***Section D*** – explains the key terms of the Distribution Plan and how the process is proposed to work for clients.

   (4) ***Section E*** – sets out the relevant legal principles under the Regulations and the Rules, as well as the approach which the Court has adopted to previous applications to approve distribution plans.

   (5) ***Section F*** – contains the Administrators' submissions as to why the Court should approve the Distribution Plan proposed in this case.

   (6) ***Section G*** – contains the background to, and submissions on, the Unclaimed Assets Application and the Priority Application.

B. BACKGROUND

[11] Crooks3, ¶15 [7/463].
[12] Crooks3, ¶15 [7/463].

WealthTek and FCA Action

10. WealthTek operated as an independent wealth management firm offering discretionary management, advisory and execution-only services both to retail clients and intermediaries.[13] The majority of WealthTek's clients were individuals classified as retail clients (98%) and have an average age of 68, the claims of retail clients are (in aggregate) to approximately £143m of Client Assets and approximately £10.4m of Client Money.[14] The other clients are corporate clients and have claims (in aggregate) to approximately £73m of Client Assets and £2.1m of Client Money.[15]

11. The designated members of WealthTek were: (i) Mr John Dance ("**Mr Dance**"), and (ii) WealthTek Capital Limited (in which Mr Dance holds 72% of the shares).[16]

12. By April 2023, the FCA had formed the view that it was necessary for insolvency practitioners to be appointed to WealthTek: (i) in order to protect Client Assets and Client Money from being dissipated and to protect customers; and (ii) due to concerns that the firm and Mr Dance may have been involved in financial crime.[17] Subsequently:[18]

    (1) The FCA applied to place WealthTek into special administration on 3 April 2023. On 4 April 2023, Roth J appointed the Administrators as Joint Interim Managers.[19] At an adjourned hearing on 6 April 2023, Zacaroli J made an investment bank special administration order and appointed the Administrators.[20]

    (2) On 4 April 2023, the FCA issued a First Supervisory Notice requiring WealthTek immediately to cease carrying out all regulated activity. On that date, the FCA also applied for, and obtained, an *ex parte* worldwide freezing order against Mr Dance up to the value of £40m, which has subsequently been extended.

    (3) The FCA has commenced proceedings against Mr Dance and WealthTek under sections 380 and 382 of the Financial Services and Markets Act 2000. Those proceedings are stayed as against WealthTek.

[13] Crooks2, ¶12 [3/16].
[14] Crooks2, ¶23.a [3/18].
[15] Crooks2, ¶23.b [3/18].
[16] Crooks2, ¶16 [3/16].
[17] Crooks2, ¶25 [3/18].
[18] Crooks2, ¶24-27 [3/18].
[19] [6/191].
[20] [6/201].

(4) On 8 November 2023, the FCA obtained a restraint order against Mr Dance under Part 2 of the Proceeds of Crime Act 2002

(5) On 4 March 2024, HHJ Baumgartner made an order staying the FCA's civil proceedings against Mr Dance (i.e. as well as WealthTek) to enable the FCA to consider whether to bring criminal charges.

Position on Appointment

13. As at the date of the Administrators' appointment, WealthTek's books and records indicated that it should have held Client Assets and Client Money with an aggregate value of approximately £229m, made up of £216m in Client Assets and £12.5m in Client Money.[21] However, the Administrators have identified Client Assets of £148m and Client Money of £2.7m actually held by WealthTek.[22] There is therefore a significant shortfall of approximately £70.6m in Client Assets and £10m in Client Money.[23]

14. The existence of these shortfalls (together with the regulatory action taken by the FCA) highlighted a number of issues in relation to the books and records of WealthTek, on which the Administrators would normally expect to rely for the purpose of returning Client Assets.[24] The Administrators have therefore had to carry out a significant reconciliation exercise (with the benefit of extensive legal advice) to ensure that a fair and proper distribution of Client Assets is made. The details of this exercise are explained in section C below.

Actions since the Administrators' Appointment

15. Since their appointment, the Administrators have been working towards the achievement of the objectives of the special administration set out in Regulation 10 of the Regulations. For present purposes, Objective 1 is key: to ensure the return of Client Assets as soon as is reasonably practicable (as to which, see paragraph 25 below). To that end, the Administrators have developed the Distribution Plan.

16. The Administrators have liaised extensively with key stakeholders:

[21] Crooks2, ¶20 [3/17].
[22] Crooks2, ¶21-22 [3/17]. £148m of Client Assets includes surplus assets of £2.7m i.e. where WealthTek holds more of an asset than there are client claims to that asset type.
[23] Crooks2, ¶33 [3/21].
[24] Crooks2, ¶34 [3/21].

(1) ***The FCA***: the Administrators have been in regular contact with the FCA since their appointment.[25] The FCA have been updated, for example, on material queries raised by clients, progress made on finding a broker to take a transfer of the Client Assets, and the development of the Distribution Plan. The Joint Administrators remain in discussions with the FCA to ensure they will: (a) remove regulatory requirements which currently prevent dealings by WealthTek with Client Assets and Client Money; and (b) modify the CASS Rules to allow the proceeds of unclaimed Client Assets to be paid into the Insolvency Services Account (see paragraphs 54-55 below). Mr Crooks explains the current status of discussions with the FCA at Crooks3, ¶27-28 [7/466]. The Court will be further updated on progress at the hearing.

(2) ***The FSCS***: the Administrators have liaised with the FSCS in developing the Distribution Plan. The FSCS has confirmed that for each eligible client, the FSCS will cover (up to the compensation limit of £85,000): (a) the client's costs contribution (see paragraph 21 below); and (b) any shortfall claim.[26] The Administrators believe that a substantial majority of WealthTek's clients are eligible for FSCS Compensation.[27] The Administrators and the FSCS entered into the "FSCS Compensation Deed" on 3 June 2024 which governs the process by which compensation will be paid to the Administrators to compensate eligible clients.[28]

(3) ***The Committee***: the Committee was first constituted on 14 June 2023. Since then, the Administrators have liaised with it regularly, culminating in the Committee unanimously approving the Distribution Plan on 2 May 2024.[29]

17. Mr Crooks has provided details of the consultation and communications with clients in Crooks2, ¶148-158 [3/67] and in Appendix A to Crooks2 [3/72].

C. RECONCILATION EXERCISE CONDUCTED BY THE ADMINISTRATORS

18. As Mr Crooks explains at Crooks2, ¶34 [3/21] the existence of shortfalls highlighted issues in relation to the reliability of WealthTek's books and records. The Administrators have therefore had to conduct a considerable reconciliation exercise with the benefit of legal advice to arrive

[25] Crooks2, ¶78-81 [3/39].
[26] Crooks2, ¶83 [3/40].
[27] Crooks2, ¶87 [3/41].
[28] Crooks3, ¶29 [7/466].
[29] Crooks2, ¶88 [3/41].

at a reconciliation which can determine client entitlements in a way which is legally sound, practicable for the Administrators to implement and fair as between the clients.

19. In doing so the Administrators have identified certain indicative scenarios which recur in relation to multiple clients. While the position of each client has been considered individually, the indicative scenarios have enabled the Administrators, with the benefit of advice, to arrive at what they consider to be the most appropriate resolution of issues arising out of action or inaction taken by WealthTek prior to its entry into special administration. The results of the Administrators' consideration are explained at Crooks2, ¶40-69 [3/23]. As the Court will see, the Administrators, with the benefit of legal advice, have spent a considerable amount of time to determine the appropriate way to proceed, relying on their experience in past insolvency cases and in financial services matters generally. It is important to point out that the alternative to the Administrators taking this robust, commercial approach would have been for them to seek the determination of numerous issues by the Court with the benefit of assumed fact patterns and representative clients. That would have been an expensive and time-consuming process, with scope for appeals, reducing the value of the Client Assets which will be returned (because the costs would have been payable out of the Client Assets) and delaying the return of the Client Assets available for return. It follows that the Court is not being asked to consider the correctness of the approach to the following scenarios and it is appreciated that, where contrary positions are arguable, there will be winners and losers. The Administrators considered (and the Committee agreed) that the approach now being taken was in the interests of clients generally and the better approach. What follows is a summary of each of the scenarios identified by the Administrators:

(1) ***Transfer of Certificated Shares***: at the time of the Administrators' appointment, WealthTek was holding a number of physical share certificates in the name of clients which were due to be dematerialised and sold, and the net sale proceeds credited to the client's cash account with WealthTek and held as client money. Following their investigations and advice, the Administrators have determined that they should proceed as follows:

(a) No valid *legal* transfers of the shares have taken place from the clients to WealthTek.

(b) In cases where the relevant transfers were effective to pass beneficial title to WealthTek, the Distribution Plan will require the relevant clients to take the necessary

steps to perfect WealthTek's title to the shares.[30] The relevant client will then be entitled to retain any increased client money entitlement ("**CME**")they have received, any client money actually withdrawn based on the increased CME, and/or any new Client Assets purchased with the increased CME. The shares will be sold by the Administrators, and the proceeds distributed to those clients entitled to a share of the client money pool (on the basis that the 'proceeds' of the sales benefiting the relevant clients were effectively generated from the client money account).

(c) In cases where the relevant transfers were not effective to pass beneficial title (i.e. they were entirely invalid), the relevant clients will retain their rights to the shares, which will be returned to them as part of the Distribution Plan. The relevant clients will have no right to an increased CME or to any client money withdrawn in reliance on the increased CME (which will need to be repaid as part of the Distribution Plan), or to any Client Assets purportedly purchased using proceeds of the increased CME.

(2) *Consolidating accounts*:

(a) The Administrators have discovered that there are significant discrepancies between WealthTek's holdings of Client Assets for a client as recorded in: (i) accounts within WealthTek's books and records, and (ii) WealthTek's accounts held with a third-party custodian. In effect there are mismatches between account designations recorded in the books and records of WealthTek and the custodian's records; there are also discrepancies in the amount of Client Assets recorded as being held in particular accounts.

(b) As Mr Crooks explains at Crooks2, ¶51 [3/28] these discrepancies have arisen from inconsistent entries being made in WealthTek's systems and not from any decision of the relevant clients. The Administrators have determined that it is appropriate and fair to consolidate accounts of particular asset types across different account designations.

(c) The alternative (taking a per-account approach) would result in artificial surpluses in WealthTek's favour and artificial shortfalls for clients. The example which Mr Crooks gives at Crooks2, ¶51 [3/28] show that the alternative approach would result in

[30] Clause 5.4(a)(iii) of the Distribution Plan [4/94] requires a client, as a condition of a transfer of Client Assets, to take all steps requested by the Administrators to perfect and/or remedy any defect in the formalities of a transfer of physically-held share certificates from the client to WealthTek. The same provision applies as a condition of other forms of distribution: see clauses 6.1(d)(iv) [4/96] and 7.1(d)(iv) [4/98].

WealthTek's general estate being entitled to assets, in circumstances where clients have significant shortfalls in relation to that particular asset type. It would also result in certain clients being materially disadvantaged or preferred as a result simply of WealthTek's inconsistent bookkeeping.

(d) The Administrators have, therefore, determined that a consolidated approach is the fair approach to take.

(3) ***Unrecorded Payments***: in this scenario gratuitous payments have been made to a client from the client money account but have not been reflected in a client's CME. The Administrators have identified two such payments, totalling £35,000, which have been taken into account in the reconciliation process. The Administrators have determined that in their view it would not be proportionate to conduct a search for further such transactions. There are approximately 51,000 transactions across WealthTek's accounts and 785,000 across the client account ledgers. In those circumstances, and given that only two such payments have been identified to date, the Administrators did not consider that it would be reasonable or proportionate to conduct a historical reconciliation exercise to ascertain whether each and every such payment was reflected by a corresponding ledger adjustment to the recipient client's CME.

(4) ***Client Assets sold without client knowledge***: in this scenario, WealthTek had sold a Client Asset (paying the actual proceeds into the client money account) but had not recorded this in the books and records and continued to pay manufactured dividends etc. to the client. The approach the Administrators have adopted is that: (i) the proceeds of the sale of the assets form part of the client money pool; (ii) the relevant client is entitled to a proportionate share of the Client Assets of the same description and has an unsecured claim for any shortfall; and (iii) the relevant client is entitled to retain their increased CME in respect of "manufactured" dividends (i.e. notional amounts credited to a client's account to replicate the effect of a receipt of a dividend had the underlying Client Assets not been sold).

(5) ***Purchase of a Replacement Client Asset***:

(a) This scenario follows on from the scenario above, but applies where the client subsequently instructed WealthTek to sell the original asset (which had in fact already been sold) and purchase a new one.

(b) The Administrators' conclusion, based on advice, is that the relevant client is entitled to trace into the client money account (into which the proceeds of the sale of the original asset were paid) and that the new asset should be regarded as being attributable to the client's share of the client money account (i.e. the client's CME) (despite the fact that the new asset was purchased from the mixed fund of the client money account).

(c) In relation to the purchase of the new asset, the Administrators have had to deal with the evidential uncertainty in relation to purchases from a mixed fund (often encountered in the context of a tracing exercise following a breach of trust). In resolving these issues, the Administrators have adopted an 'earmarking approach' i.e. the purchase of the new asset is attributed entirely to the relevant client's share of the client money account (i.e. the client's CME). The Administrators consider this approach to be both practicable and also to reflect the intention of WealthTek at the time and the way in which the transaction was recorded in WealthTek's books and records.

(6) *Non-Processed Sale Instruction*:

(a) In this scenario, a client instructed WealthTek to sell a Client Asset, WealthTek failed to do so but then credited the client with an increased CME.

(b) The Administrators have concluded that WealthTek's retention of the original asset was a breach of trust – in an ordinary case the beneficiary could elect to retain their rights to the original asset or to take the proceeds they were provided (i.e. an increased CME).

(c) However, the Administrators have formed the view that the approach of providing for elections would not be workable on the facts of this case. In particular: (i) many clients lack sufficient information to make an informed election (in view of the demographic profile of WealthTek's retail clients, who constitute 98% of total clients); (ii) the process would be costly (the costs being ultimately borne by the clients and/or the FSCS); (iii) the process would delay the return of Client Assets further; and (iv) there would be a 'moveable feast', such that one client's election would affect other client's elections and the likely economic consequences of the elections.

(d) In light of this, the Administrators have determined that the appropriate approach to adopt is to treat the relevant clients as having elected to retain their increased CME or

any Client Asset purchased with that increased CME. This will reflect the books and records of WealthTek and the respective clients are in the position which they intended to be in and which the books and records of WealthTek indicate they are in.

D. THE DISTRIBUTION PLAN

20. The Court is respectfully invited to pre-read the description of the Distribution Plan in the Explanatory Statement and the Distribution Plan itself. What follows is a summary of its operative terms and the process which is proposed:

(1) Other than client money (which is dealt with separately), the Distribution Plan applies to all Client Assets held by WealthTek for its clients, which includes client money and assets received by the Administrators after the commencement of the special administration which are referable to and/or derive from Client Assets (clause 3.1).

(2) Each client is sent a "Client Assets Statement" by the Administrators setting out the Client Assets which WealthTek should hold for that client and also the Client Assets the Administrators expect to be able to return to clients.[31] (The Administrators sent Client Assets Statements to clients in February 2024). Clients then have two options:

(a) To agree with the "Client Assets Statement" by indicating this in their "Client Assets Claim Form". In this case, following approval of the Distribution Plan, the Administrators will issue the relevant client with a "Client Assets Confirmation Statement", which confirms the type and quantity of Client Assets held by WealthTek for the client; or

(b) To disagree with the "Client Assets Statement" by indicating this in their "Client Assets Claim Form". In this case the Administrators will work with the relevant client to resolve the disagreement. If the Administrators are unable to resolve the disagreement, following the approval of the Distribution Plan, they will send the client a "Non-Admitted Claim Statement", which will set out the respects in which the Administrators have not agreed to the claim (as to which, see paragraph (9)20(9) below).

(3) Any shortfall in the amount available for distribution of securities of a particular description held by WealthTek as Client Assets in a client omnibus account, following the

[31] See [6/309].

Administrators' reconciliation exercise, will be borne pro rata by all clients with an entitlement to those securities (clause 4.1), which reflects Regulation 12(2) of the Regulations. The resulting shortfalls will rank as claims against the general estate of WealthTek (clause 4.2) and will be calculated based on the market price for securities as at the date of the administration. Such shortfall claims are, however, expected to be worthless in the sense that there is not anticipated to be any dividend paid to WealthTek's creditors out of the "house" estate.

(4) Clause 5 of the Distribution Plan provides for the transfer of Client Assets to the "Nominated Broker" (as to which see paragraph 22 below). At least 15 business days prior to any transfer, the Administrators will update the "Client Assets Confirmation Statement" with details of the proposed transfer and the date of the proposed transfer instruction (clause 5.3). A client is able to opt-out of their Client Assets being subject to a transfer to the "Nominated Broker" at least ten business days prior to the date of a proposed transfer instruction (clause 5.7). They can do so by sending a "Client Assets Return Method Form" in which they indicate that they want a distribution of their assets and select an option for distribution (see paragraph 20(5) below).

(5) The alternative for a client to a transfer to the "Nominated Broker" is to ask for a distribution under clause 6. There are three options for a distribution: (a) a transfer to a different custodian / broker chosen by the client (in accordance with the procedure in Schedule 4); (b) the liquidation of the client's Client Assets with the proceeds paid to the client; or (c) the return of physically-held share certificates (in accordance with Schedule 4).

(6) Clause 7 applies to the distribution of "Encumbered Client Assets" i.e. Client Assets which are subject to security held by WealthTek or a third party. In essence a client will be required to settle amounts owing to the holder of the security interest before they receive a distribution of the relevant Client Assets. This is done through the calculation of a "Net Assets Claim". As matter stand the Administrators are not aware of there being any "Encumbered Client Assets",[32] however, the Distribution Plan caters for the possibility that there are.

[32] Crooks2, ¶135 [3/65].

(7) A number of conditions apply to a client being entitled either to a transfer or a distribution in respect of Client Assets (clauses 5.4(a), 6.1(d), and 7.1(d)) including: the client: (a) completing the necessary documentation to agree their Client Asset claim; (b) providing for the payment of their costs contribution (see paragraph 21 below); (c) taking steps to remedy or perfect any share transfer purportedly made to WealthTek prior to the special administration; (d) completing customer due diligence in case of a transfer to the "Nominated Broker" or a distribution to a different custodian; and (e) in the case of "Encumbered Client Assets", paying any amounts due to the holder of security. In practical terms, therefore, a client will need to engage with the Nominated Broker before a transfer can take place.

(8) Clause 8 of the Distribution Plan concerns clients who have not submitted a claim to Client Assets but who appear from WealthTek's books and records to have valid Client Asset claims. If the Administrators are satisfied of the validity of such a claim based solely on the books and records, Client Assets held for a "Potential Claimant" will be retained and not subject to return to other clients under the Distribution Plan. If they remain unclaimed by the time of the "Long-Stop Date" (which is two months after the Administrators notify clients that they have achieved the objective of returning Client Assets to the extent reasonably practicable), the Administrators will be entitled to liquidate such Client Assets and pay the proceeds to the client (subject to deducting the client's costs contribution and other applicable deductions) or, if that is not possible, pay the proceeds into the Insolvency Services Account.

(9) Clause 9 of the Distribution Plan deals with "Non-Admitted Assets" i.e. claims by clients which the Administrators are unable to agree with. If a client receives a "Non-Admitted Claim Statement" (see paragraph 20(2) above), the Administrators will provide a statement of reasons and the client will have 21 days (which may be extended by the Administrators or the Court) to apply to the Court to challenge the Administrators' decision. While a dispute is ongoing the Administrators will not be required to make a transfer or distribution of any disputed Client Assets. If the client is successful in any challenge then the Administrators will be required to make the Client Assets available for a transfer or distribution.

(10) Clause 10 of the Distribution Plan deals with categories of "Non-Returnable Assets". These are: (a) assets not currently under the Administrators' control; and (b) assets which need to be excluded from a transfer or distribution for legal or practical reasons. A client

with a claim to a "Non-Returnable Asset" may at any time elect to release their claim to the asset, in which case they will be deemed to have submitted a proof of debt in respect of the shortfall. If the asset still cannot be returned at the "Long-Stop Date", the client's claim will be released and they will be deemed to have submitted a proof of debt in respect of the shortfall. Mr Crooks explains the limited category of assets which are considered by the Administrators to be "Non-Returnable Assets" in Crooks2, ¶97(j)(i) [3/47].

(11) Clause 11 of the Distribution Plan deals with "Tainted Assets", being assets which the Administrators are prevented from dealing with due to criminal conduct or a restrictive court order. If the assets cease to be tainted before the "Long-Stop Date", they will become eligible for a transfer or distribution. If the assets remain tainted at the "Long Stop Date", the claims to those assets will be released.

(12) Clause 12 of the Distribution Plan deals with "Corporate Actions Assets", being assets which are received by WealthTek as a result of any corporate action, such as dividends or interest received in respect of Client Assets. Such assets will be returned to clients in the same manner as other Client Assets (as to which, see paragraph 20(4)-20(8) above).

(13) Clauses 13-18 of the Distribution Plan deal with the costs of distributing Client Assets and are discussed at paragraph 21 below.

(14) Clause 20 of the Distribution Plan deals with "Late Claimants", being clients who submit a claim after a distribution or transfer has taken place. If the assets to which they have a valid claim are still available and not subject to another client's claim, they will be returned to the Late Claimant. If the assets are no longer available, then the client will have an unsecured claim for the value of those assets and a proof of debt will be deemed to have been submitted in respect of that claim.

(15) Clause 21 of the Distribution Plan deals with recoveries the Administrators or WealthTek may make (whether directly or from a third party) which relate to a client shortfall after a distribution or transfer has been made e.g. proceeds of any court action. The Administrators will hold such proceeds on trust for the relevant clients (or the FSCS where they have been subrogated to a client's claim) and will return them to the relevant individuals.

(16) Clause 22 of the Distribution Plan provides releases to the Administrators and various third-party advisors. Similar provisions have been contained in previous distribution plans

approved by the Court and have been specifically brought to the attention of clients in the Explanatory Statement in Section 12 [5/180].

21. The Distribution Plan provides for the payment of the costs of returning Client Assets by clients as a condition of them being entitled to a transfer or distribution. The essential structure of the costs allocation and payment is as follows:

(1) The Administrators have calculated a costs reserve to be held in respect of incurred costs and a conservative estimate of future costs. This comes to £18.2m. The details of those costs are explained in Crooks2, ¶126 [3/62].

(2) The Administrators have determined that the costs should be allocated per capita, with each client being charged the same costs contribution. As Mr Crooks explains, this is because the costs of the Administrators are largely driven by the number of clients (rather than the value of the Client Assets held) and a valuation-based methodology would lead to further costs and delays (in particular due to valuation disputes).[33] The Administrators' consideration of this issue is discussed further at paragraph 52 below. This means that each client will be charged £23,000, subject to a cap of the value of the client's Client Assets claim if it is below that figure and also subject to rebates if the actual costs are ultimately less than the estimated costs (see further paragraph 52(4) below).

(3) A client who has a claim to physically-held share certificates will not be required to pay a costs contribution solely for the return of such a certificate (clause 17.7).

(4) The vast majority of clients will have their costs contribution paid by the FSCS (up to the limit of £85,000) (clause 17.1(c)). For clients who are eligible for FSCS compensation they are able to indicate that they wish to receive such compensation in their "Client Assets Claim Form". If they have so indicated then the FSCS will meet their costs contribution and will be subrogated to the client's rights in respect of the costs contributions they meet. The FSCS has indicated that eligible clients will receive compensation from the FSCS only in circumstances where they have expressly indicated they wish to do so.[34]

(5) For other clients (i.e. those not eligible for FSCS compensation or who have chosen not to take such compensation) there are three options open to them to pay their costs contribution (clause 17.1(d)-(f)): (a) a "Cash Option" (in which the client pays cash); (ii) a

[33] Crooks2, ¶116-121 [3/59].
[34] Crooks2, ¶83 [3/40].

"Client Money Option" (in which the client directs the Administrators to use part or all of the client's CME); (iii) a "Liquidation Option" (in which the Administrators are directed to liquidate some or all of the client's assets to meet the costs).

(6) Clients who will not be receiving FSCS compensation will need to utilise the "Payment Options Form" (set out in Schedule 4) to select which payment option they wish to use; the completion of the form and the payment of the costs are conditions of an entitlement to a distribution or transfer (clauses 15.3-15.4). If by the "Long-Stop Date" a client has not completed the "Payment Options Form", the Administrators may liquidate that client's Client Assets and return the proceeds to the client after deducting the client's costs liability (clause 15.5). Moreover, prior to the "Long-Stop Date", the Administrators may deem a client to have selected the "Liquidation Option" if they consider it appropriate and consistent with Objective 1 to do so and they have given the client at least three weeks' written notice that they intend to do so (and the client has not selected a different option) (clause 15.6).

(7) The amount of costs paid by the clients or by the FSCS will rank as an unsecured claim in the special administration (clause 18), although there is not expected to be any or any material dividends to unsecured creditors.

(8) Provision is made in clause 13.2 of the Distribution Plan for the Administrators to calculate whether the costs reserve should be reduced. In the event the costs reserve is reduced, provision is made in clause 14 of the Distribution Plan for the Administrators to pay a rebate to the relevant clients or the FSCS (as appropriate).

22. The Administrators have taken steps to identify one or more nominated brokers to which Client Assets (alongside Client Money) could be transferred.[35] The Administrators have identified one broker which represents the most suitable candidate for WealthTek's clients.[36] In doing so the Administrators have liaised with the FCA and the FCA has conducted a site visit at the proposed nominated broker's premises. The Administrators are in advanced discussions with the proposed nominated broker and intend to execute an agreement with them.[37] Mr Crooks sets out the current status of those discussions at Crooks3, ¶30-32. The Administrators will update the Court on any further progress at the hearing.

[35] Crooks2, ¶104 [3/54].
[36] Crooks2, ¶105 [3/55].
[37] Crooks2, ¶106-107 [3/55].

E. LEGAL PRINCIPLES

The Regulations

23. The Regulations set out the framework under which the administrators are required to conduct the special administration of an investment bank and are supplemented by the Rules. The Regulations created a special administration regime for investment banks: see Regulation 3(1). It was (in 2011) a new procedure enacted in the wake of the collapse of Lehman Brothers.

24. Regulation 10 provides that an administrator has three special administration objectives:

    (1) "**Objective 1**" is to ensure the return of client assets as soon as is reasonably practicable;

    (2) "**Objective 2**" is 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); and

    (3) "**Objective 3**" is to either rescue the investment bank as a going concern, or wind it up in the best interests of its creditors.

25. Regulation 10(2) makes clear that the administrator is entitled to deal with and return client assets in whatever order he or she thinks best achieves Objective 1. Regulation 10(3)(a) also makes clear that the order in which the objectives are listed is not significant, and the administrator must commence work on each objective immediately after appointment, prioritising the order of work as he or she thinks fit, to achieve the best result overall for clients and creditors.

26. In relation to Objective 1:

    (1) The Regulations define "*client assets*" by reference to the meaning which the term has in section 232(4) of the Banking Act 2009 (Regulation 10B(13)), namely: "*assets which an institution has undertaken to hold for a client (whether or not on trust and whether or not that undertaking has been complied with)*". Section 232(5A) defines "*assets*" as including "*money*".

    (2) The term "*client*" is defined in Regulation 2(1) as "*a person for whom the investment bank has undertaken to receive or hold client assets (whether or not on trust and whether or not that undertaking has been complied with).*"

(3) "*Return*" in context has a broad meaning under Regulation 10(5): "*the investment bank relinquishes full control over the assets for the benefit of the client to the extent of … the client's beneficial entitlement to those assets (where the assets in question have been held on trust by the investment bank) … having taken into account any entitlement the investment bank may have, or a third party might have, in respect of those assets*." In addition, section 233(4) of the Banking Act 2009 makes clear that a reference to returning client assets includes a reference to *"(a) transferring assets to another institution, and (b) returning or transferring assets equivalent to those which an institution undertook to hold for clients*".

Transfer of Client Assets

27. Regulations 10B and 10C provide for total and partial property transfers under the distribution plan. These were introduced in 2017, following the recommendations in Mr Peter Bloxham's report published in January 2014.[38] Regulation 10B applies where:

> *"(a) the administrator, in pursuit of Objective 1 (whether or not also in pursuit of Objective 3) enters into a binding arrangement with another financial institution for the transfer to that institution ("the transferee") of all or some of the property, rights and liabilities of the investment bank; and*
>
> *(b) for the purposes of that transfer the arrangement includes provision for a transfer of client assets to the transferee or to a person who has undertaken to receive or hold any of the assets to the order of the transferee" (emphasis added)."*

28. Regulation 10B introduces specific provisions to override the normal impediments to a transfer of client assets and related contractual rights:

(1) There is an override of restrictions on assignment: Regulation 10B(3)(a).

(2) There is an override of any contractual requirements to give notice to, or to obtain consent from, a client in relation to a transfer: Regulation 10B(3)(b).

(3) There is an override of any entitlement to a return of assets other than by the transfer proposed: Regulation 10B(3)(c).

(4) "*To the extent that rights and liabilities under a client contract are transferred*" there is a deemed novation of that contract between the client and transferee: "*the contract* [i.e. the client

[38] https://www.gov.uk/government/publications/review-of-the-special-administration-Regulationime-sar-for-investment-banks-final-report

contract] *is to be treated for the purposes of the arrangement as if it had been made by the transferee rather than the investment bank*": Regulation 10B(5).

(5) The transferee is given a limited power to vary the terms of the client contract "*to the extent necessary for giving effect to the transfer and ensuring that the powers, rights and obligations of the transferee acting as a trustee are exercisable*": Regulation 10B(6).

(6) Related to the point above, the administrator is obliged to ensure that the terms of the transfer / the terms to be adopted by the transferee enable clients "*to exercise their rights in relation to the assets as soon as reasonably practicable after the transfer*": Regulation 10B(10).

(7) There are necessary (but limited) overrides in respect of confidentiality and data protection obligations as might otherwise prevent or impede an efficient transfer: Regulation 10B(7)-(9).

(8) Regulation 10C imposes additional restrictions on a "*partial property transfer*", which are applicable in this case because there will not be a transfer of all of WealthTek's assets to the Nominated Broker.[39] Regulation 10C(1) disapplies the override of any specific consent requirements under Regulation 10B(3)(b) and, relevantly, requires, in addition to the protections for clients in Regulation 10B, provision to be included in the arrangement to give effect to the "*reverse transfer*" right of a transferred client: see Regulation 10C(3) to 10(5). The disapplication in this case of the override of any specific consent requirements under Regulation 10B(3)(b) is of no moment because the Administrators are satisfied that there are no such notice or consent requirements to the transfer of Client Assets by WealthTek (see Crooks2 at paragraph 107(c)).

Distribution of Client Assets

29. Regulation 11 enables administrators to set a bar date before which claims must be submitted (a "**Soft Bar Date**"), giving clients a reasonable time to make such claims: Regulation 11(1)-(3). Rule 138(2) requires notice of a Soft Bar Date to be given to all clients of whom the administrators are aware.

[39] See the definition in Regulation 10B(13).

30. The Soft Bar Date process allows the administrators to establish the universe of claimants interested in the distribution of client assets. It is a procedure aimed at bringing about an orderly distribution of client assets to those who are properly entitled to them.

31. In this regard:

(1) The Soft Bar Date is: "*a bar date for the submission of – (a) claims to the beneficial ownership, or other form of ownership, of the client assets; or (b) claims of persons in relation to a security interest asserted over, or other entitlement to, those assets*" (Regulation 11). In other words, it requires claims to be submitted by clients for whom the investment bank held client assets, or those entitled to assert a security interest in respect of client assets held for the investment bank's clients (for example, third party custodians with whom the client assets may have been custodied).

(2) If the administrator exercises the power to set a Soft Bar Date, Regulation 11(4)(a) is triggered – which obliges the administrator to return client assets "*in accordance with the prescribed procedure*". It means that no client assets may be returned after the bar date has been set outside of the procedure to which the court has given its approval (Regulation 11(4)(b), subject to the exceptions contained in Regulation 11(4A)). The reference to a "*procedure*" is a reference to the provisions for a distribution plan contained in Part 5 (Objective 1), Chapter 3 (Distribution Plan) of the Rules.

(3) The term "*distribution plan*" is defined in Regulation 12B(13) as: "*the plan for the return of client assets which the administrator is required to draw up in accordance with insolvency Rules after setting a soft bar date*".

(4) There are certain protections built into the procedure for administrators, and clients, where late claims to client assets are submitted (Rule 147 of the Rules). There are also protections for potential claimants whom the administrators believe are eligible to make a claim but who fail to do so (Rules 143 and 144(4)).

(5) The precise terms of, and timeframe for, a "*distribution plan*", is left to the administrator's discretion, subject to compliance with Rule 144 of the Rules, and the Regulations.

(6) However, to become effective, the plan must:

(a) be put before the creditors' committee (where there is one) for its approval (Rule 145); and

(b) be approved by the Court (Rule 146), which may make modifications to the plan.

32. Rule 146(5) grants the Court jurisdiction to approve the distribution plan (taking into account whether or not it has received creditors' committee approval) or make any other order which the Court thinks appropriate.

Key Elements of the Distribution Plan Procedure

33. Claims submitted after the Soft Bar Date ("*late claims*") will not disturb or be permitted to impeach a return of client assets made pursuant to an approved distribution plan. Such a return confers good title save for circumstances amounting to bad faith on the part of the administrator in which the recipient was complicit: see Regulations 11(5)-(6). Rule 147 of the Rules makes further provision for the process by which client assets (to the extent remaining after distribution to clients who submitted claims in time) may be distributed to late claimants.

34. A shortfall in assets in an "*omnibus account*", i.e. an account of the firm in which multiple assets of the same kind are held for a number of clients, is to be borne rateably by all clients for whom such assets were held in that account: see Regulation 12(2). Any claim for the shortfall shall be based on the market price as at the date of the administration and shall rank as an unsecured claim: see Regulation 12(7)-(8).

35. Regulation 12B permits an administrator to apply to the Court, having set a soft bar date, for permission to set a hard bar date after which any late claims to client assets will be extinguished (save for an entitlement to certain residual assets) and the value of any such claims will rank instead as an unsecured claim in the administration estate.

36. The Rules deal with part of the process for dealing with client asset claims:

(1) Clients must submit a client asset proof in accordance with Rule 139(3). The form is similar to a proof of debt, but its content reflects the proprietary nature of the claim.

(2) Rule 140 is a special Rule relating to any claim to a security interest over a client's client assets, i.e. to a client asset which a client has charged, not to an asset held by the firm as security.

(3) The cost of proving is to be borne by the claimant: Rule 141.

(4) Claimants who have not submitted a claim by or following the bar date but who appear in the records of the firm as having such a claim shall be treated in accordance with Rule 143. This requires a special notification by the administrator to be sent to such clients' last known contact address. The notification shall state that the administrator shall treat the claim in accordance with the records of the firm unless he or she hears from the client within 14 days. Provision is then to be made for such clients in the distribution plan in accordance with the records the administrator has, if nothing is heard from the specially notified clients in that time: Rule 144(4).

37. Rule 144 of the IBSA Rules prescribes certain specific elements that the plan is required to include or address. These are:

(1) ***Timing***: a schedule of dates on which the client assets are to be returned, defined as a "*distribution*": Rule 144(2)(a). The earliest time that client assets may be returned is three months after the bar date: Rule 144(3).

(2) ***Identification of client assets***: details of the unencumbered assets and the encumbered assets which are to be returned to clients, and to which clients they are to be returned: Rule 144(2)(b) and (c).

(3) ***Net assets claim***: an explanation as to how the amount of client assets to be returned to a particular client is to be calculated (defined as the "*net assets claim*"), taking into account: (i) any liabilities owed by the client to the bank in respect of financial contracts;[40] (ii) any liabilities owed to the client by the bank in respect of financial contracts; and (iii) any "*shortfall claim*" of the client. In addition, the plan is required to set out, for the purpose of the net assets claim: (i) where any such liabilities are contingent, how the liability will be valued; and (ii) where any such liabilities are disputed, whether the administrator intends to make an assumption as to the outcome of the dispute – as well as the arrangements by which the administrator may revise such valuations or assumptions when further information is known: Rule 144(5).

(4) ***Means of returning assets subject to a net assets claim***: in respect of "*encumbered client assets*", Rule 144(2)(d) specifically requires that the plan should indicate whether, in the case of client assets where there is a net claim owned to the investment bank by the client, the

[40] Rule 4 of the Rules defines a "*financial contract*" as "*a bilateral or multilateral contract entered into with the investment bank before it entered special administration, relating to transactions or positions of a financial nature, including contracts for the delivery or custody of client assets (but not including contracts which are purely administrative or contracts for services*".

administrator intends to pay the client money in lieu of returning the client assets to the client (on the basis that the assets the value of which is equivalent to that paid out would be retained by the bank). Rule 144(6) defines "*encumbered client assets*" as assets over which a third party or the bank exerts a security interest.

(5) ***Costs***: the amount and identity of client assets that are to be retained by the administrator to pay the expenses of the special administration in accordance with Rules 135 and 137, and how the retention of these assets will affect the amount of client assets to be returned to clients: Rule 144(2)(e). The statutory requirements as to costs under Rules 135 and 137 are addressed below.

(6) ***Potential claimants***: provision for "*potential claimants*", who have failed to respond to the Rule 143(2) notice, to have client assets returned to them according to the information available to the administrator in respect of the amount of client assets held for them, or to take into account any security interest that it is believed they are entitled to exert over certain client assets: Rule 144(4)(a).

(7) ***Security interests***: in respect of encumbered client assets, the plan must make provision for any security interest asserted over those assets by another person, as well as the extent to which a proportion of securities is to be held back from the initial distributions and the reasons why: Rule 144(4)(b) and (c).

Objective 1 Costs

38. As mentioned above, Rule 144(2)(e) refers to how a particular client's share of the expenses of the special administration will be discharged. As to this:

(1) Regulation 15(4)(a) amends paragraph 99(3) of Schedule B1 to the Insolvency Act 1986, as it applies to an investment bank in special administration, such that the administration expenses which are incurred in respect of the pursuit of Objective 1 are payable out of the client assets.

(2) Rule 135 includes a list of the heads of expenses which can be said to have been incurred in pursuing Objective 1: Rule 135(1)(a) to (d) (i.e. the costs associated with returning client assets).

(3) Rule 137(1), entitled "*allocation of expenses to be paid from client assets*", specifically requires the plan to set out how the administrator proposes that the expenses to be paid out of the client assets will be allocated across the client assets.

(4) Further, should the expenses borne by a particular client result in a shortfall in the amount of client assets to be returned to them, Rule 137(2) provides that the shortfall should be treated as an unsecured debt against the investment bank's estate.

39. The role of the FSCS is integral to this process: it is, pursuant to the Financial Services and Markets Act 2000, the statutory compensation scheme of last resort for customers of authorised financial services firms which are unable to pay customer claims. In broad terms, the FSCS pays compensation to private individuals (alongside some charities, trustees and small businesses) up to a maximum of £85,000 where a firm authorised by the FCA or PRA was carrying out a regulated activity for that person.[41] In line with this, an administrator is subject to specific duties, under Regulation 10A(1), to work with the FSCS, in particular, to provide any assistance required by the FSCS necessary to enable it to administer the compensation scheme in relation to clients' entitlements.

Specific Notice Requirements

40. A number of notice requirements are stipulated:

(1) ***Soft Bar Date notice***: Rule 138(2) requires an administrator to give notice of a Soft Bar Date to all clients of whose claim under Regulation 11(1) the administrator is aware and has a means of contacting. The Soft Bar Date notice must also be given to, so far as relevant for present purposes, the FCA: Rule 138(3)(a). It must be gazetted and advertised in such other manner as the administrator thinks fit, aiming to ensure that it comes to the attention of as many of those persons who are eligible to submit a claim as the administrator considers practicable: Rule 138(4) and (5).

(2) ***Potential claimants***: a further notice is required to be given to potential claimants, referred to above as the Rule 143(2) notice, from whom no claim has been received after the soft bar date has passed. The content of the notice is prescribed by Rule 143(3) and (4) – and, in essence, is aimed at giving potential claimants an additional period of at least 14 days to

[41] [6/299].

submit a claim, and putting them on notice of the amount of client assets to be returned to them (so far as possible) on which basis the distribution plan will be premised.

(3) ***Notice of plan and hearing***: once an application has been made to the court, Rule 146(3) requires the administrator to send a copy of the plan to: (a) all clients who have submitted a claim to client assets; (b) all potential claimants notified under Rule 143(2); and (c) so far as relevant for present purposes, the FCA. The copy of the plan must be accompanied by details as to how to find out the venue for the hearing.

Approach to Approving a Distribution Plan

41. Rule 146(5) provides that on an application for the approval of a distribution plan, the Court "*may*":

> *"(a) make an order approving the distribution plan with or without modification if satisfied that—*
>
> > *(i) where Rule 143 applies, the administrator has made the necessary notifications in accordance with that Rule; and*
> >
> > *(ii) where there is a creditors' committee, either that the committee has approved the distribution plan with or without modification or where the committee has been unable to approve the plan, the court has heard from the members of the committee or has given them an opportunity to explain why the committee were unable to approve the plan;*
>
> *(b) dismiss the application;*
>
> *(c) adjourn the hearing (generally or to a specified date); or*
>
> *(d) make any other order which the court thinks appropriate."*

42. Subject to the necessary modifications under Rule 143 having been made and the approval of the creditors' committee, the Court therefore has a discretion.

43. In Re SVS Securities plc [2020] EWHC 1501 (Ch) Miles J summarised the principles that have been developed by the Court at [32]-[34]:[42]

> *"32… First, account must be taken of the purpose of the distribution plan under the Rules, which is to assist in the achievement of Objective 1 of returning client assets as early as possible. The court must be satisfied that the plan provides a fair and reasonable means of effecting the distribution of the client assets to which the plan relates.*
>
> *33. Secondly, the context in which the application is brought before the court is itself material. The distribution plan can only be approved if the creditors' committee has approved it or has had an opportunity*

[42] Miles J referred to the decisions in Re Beaufort Asset Clearing Services Ltd [2018] EWHC 2287 (Ch); Re Hume Capital Securities Plc [2015] EWHC 3717 (Ch); and Re MF Global UK Ltd [2012] EWHC 3789 (Ch).

to explain why it has not approved it and its role in relation to the distribution plan will be a particularly material factor in the court's decision. Individual clients will have been notified both of the plan before the hearing and are able to make representations against it so that their input, or the lack of it, will again be material. The FCA has to be notified of a hearing and its objections, or lack of them will be relevant. Finally, the making of the application will itself indicate the exercise of professional judgment on the part of the administrators as officers of the court and weight is to be given to their judgment. While none of those factors can be conclusive, and the court must exercise its own judgment, they are to be given particular weight.

34. Third, if the court is satisfied that all relevant persons have been given a proper opportunity to make representations and have either specifically agreed to them or at least not objected to them, the court is very likely to be slow to withhold approval or substitute its own assessment of what is fair and reasonable as a means of effecting the distribution of client assets for the purposes of Objective 1."

44. This summary was approved and applied by Trower J in Re Reyker Securities plc [2020] EWHC 3286 (Ch) at [22]-[23] and by Rajah J in Re Blankstone Sington Limited [2024] EWHC 1111 (Ch) at [9].

F. REASONS TO APPROVE THE DISTRIBUTION PLAN

45. The Court is invited to approve the Distribution Plan for the following reasons.

46. ***First***, the Distribution Plan complies with the requirements of the Regulations and Rules:

(1) In relation to the notice requirements:

(a) ***Soft Bar Date Notice*** (see paragraph 40(1) above): this was sent to all clients whose claims the Administrators are aware of, the FCA, and the FSCS on 12 February 2024. It was also published in the London Gazette, posted on each client's portal, uploaded to the Website, and published in two local newspapers (The Chronicle (Newcastle) and the Hull Daily Mail).[43]

(b) ***Notice to Potential Claimants*** (see paragraph 40(2) above): the Administrators have contacted all non-responsive clients after the Soft Bar Date by telephone (if the claim is for more than £1,000) and by post or email for all clients.[44]

(c) ***Notice of Distribution Plan and this hearing*** (see paragraphs 5(4) above and 40(3) above): this was communicated to clients on 10 May 2024 by an upload to the Website

[43] Crooks 2, ¶70(c) [3/36]; [6/454]; [6/457].
[44] Crooks2, Appendix A ¶6(w) [3/75].

and also between 10 and 13 May 2024 by emails or letters (as appropriate) to each client notifying them of the upload.[45]

(2) In relation to the content of the Distribution Plan, the following table sets out the compliance with the requirements of Rule 144:[46]

Requirement	Explanation
Timing: **Rule 144(2)(a)**	The addendum to the Distribution Plan provides for the returns to be made as soon as reasonably practicable.[47]
Identification of client assets: **Rule 144(2)(b)**	The Administrators have uploaded an addendum to the Distribution Plan stating the Client Assets to be returned and to whom.[48] Due to the length of this addendum, only a sample has been exhibited.[49]
Net assets claim: **Rule 144(2)(c)**	This is set out in clause 7 of the Distribution Plan.[50] However, the Administrators are not aware of any encumbered assets to be returned.[51]
Means of returning client assets: **Rule 144(2)(d)**	This is dealt with in clause 17 of the Distribution Plan.[52] See further paragraph 21(5) above.
Costs: **Rule 144(2)(e)**	This is dealt with in clause 13 of the Distribution Plan.[53] See further paragraphs 21 above.

[45] Crooks3, ¶10 [7/461].
[46] See also Crooks2, ¶103 [3/51].
[47] Crooks2, ¶101-102 [3/50]; [6/337].
[48] Crooks2, ¶135 [3/65].
[49] [6/337].
[50] [4/97].
[51] Crooks2, ¶135 [3/165].
[52] [4/110].
[53] [4/106].

Potential claimants: **Rule 144(4)(a)**	This is dealt with in clause 8 of the Distribution Plan.[54] See further paragraph 20(8) above.
Security Interests: **Rule 144(4)(b)-(c)**	This is dealt with in clauses 7.11 and 7.12 of the Distribution Plan.[55] In short, the Administrators will take the same approach as provided for in Rule 106.

(3) The jurisdictional requirements in 146(5) are satisfied:

(a) The necessary notifications to Potential Claimants have been made in accordance with Rule 143;[56] and

(b) There is a creditors' committee, i.e. the Committee, and it approved the Distribution Plan on 2 May 2024.[57]

47. ***Second***, the Distribution Plan will be an effective and efficient means to return Client Assets to them. It will enable the Administrators to achieve Objective 1 of the special administration. The Distribution Plan enables clients to have their Client Assets transferred to the Nominated Broker, which the Administrators consider will be in the interests of clients generally. However, in the alternative, clients have the option of obtaining a distribution of Client Assets (see paragraph 20(5) above) and also of obtaining a reverse transfer of Client Assets back to WealthTek.[58] Subject to the payment of costs, discharge of any secured liabilities, and any legal or regulatory impediments, the clients themselves will ultimately determine how they receive their Client Assets.

48. ***Third***, the Distribution Plan has been approved by the Committee, as is required by the Rules. It has also been developed in consultation with both the FCA and the FSCS. Moreover, only one client has expressed any opposition (see paras 49-50 below), the other creditors and clients have not objected to the Distribution Plan. The Court should give significant weight to: (a) the Committee's and the clients' assessment of what is in their own best interests; (b) the lack of

[54] [4/100].
[55] [4/100].
[56] Crooks2, ¶103 [3/51].
[57] Crooks2, ¶95 [3/44]; [8/477].
[58] This is required by Regulation 10C(3). The Distribution Plan provides for a reverse transfer to be included in the relevant transfer documentation: see clause 5.4(b)(ii) [4/95]; Crooks2, ¶107.d [3/56].

objection from the FCA (with their mandate to protect the public) and from the FSCS (which is a significant and experienced stakeholder); and (c) the Administrators' judgment that the Distribution Plan is in the best interests of creditors and clients.

49. One client Mr Pluck wrote to the Administrators on 23 May 2024 to express objections to the Distribution Plan and asked that the Court be informed of his letter: [8/500-501]. It is currently unclear whether Mr Pluck intends to attend the hearing. The Administrators wrote to Mr Pluck on 31 May 2024 to set out their position on Mr Pluck's objections and to confirm details of the hearing: [8/503].

50. Mr Pluck says that the Distribution Plan is "*opaque, inconsistent and disproportionate*". As Mr Crooks explains in Crooks3, ¶23 [7/464], the Administrators do not accept the criticisms Mr Pluck makes of the Distribution Plan:

    (1) The Administrators do not understand in what sense the Distribution Plan does not reflect the "*proportions*" between retail and corporate clients. The Administrators read Mr Pluck's complaint as relating to the way in which costs have been allocated i.e. on a flat rate per client basis. As explained above at paragraph 21 and below at paragraph 52, the Administrators have given considerable thought to whether a different costs allocation would be fairer. However, they have concluded that a flat rate borne by each client is the most appropriate costs allocation and also results in a larger proportion of overall costs being met by the FSCS than other approaches the Administrators have considered.

    (2) The Administrators have received legal advice in relation to the formulation of the Distribution Plan (and also the reconciliation exercise). However, the Administrators are entitled to retain privilege in that advice, which was obtained for the benefit of all clients not any individual client.

    (3) The allocation of shortfalls in Client Assets and Client Money are provided for in the Regulations and the Rules. The Administrators recognise that there are increased percentage losses for clients with bigger investments. However, this is a consequence of the FSCS compensation limit being set at £85,000. It is not something the Administrators control.

51. ***Fourth***, as explained in section C above, the Administrators have faced difficulties relying on the books and records of WealthTek given the shortfalls in both Client Assets and Client Money, and the regulatory action taken by the FCA:

(1) The Administrators have arrived, with the benefit of legal advice and following an extensive reconciliation exercise, at a solution which in their professional opinion is fair, proportionate and workable.

(2) The Administrators recognise that alternative solutions may have had different results for particular individual clients, however, determining which clients are adversely affected by these decisions would be a disproportionately costly and time-consuming exercise.[59] The Administrators' considered view is that the solutions identified in section C above will enable them to achieve Objective 1 in a way that is fair and as expeditious as possible, and at proportionate cost.

(3) The Court should give significant weight to the Administrators' considered determination as to how to achieve Objective 1 in a way that is in the best interests of clients.

52. ***Fifth***, the allocation of costs as explained in paragraph 21 above is a fair and appropriate one:

(1) Costs have been allocated, broadly, on a per capita basis rather than pro rata in proportion to the value of assets held by clients. This is in recognition of the fact that the mode of return – via a transfer or distribution – involves an aggregation of costs that cannot fairly be apportioned by value because it involves no substantially lesser time or material costs to transfer assets of £1 than assets of £10,000. The vast majority of clients are individuals who will have their costs covered by the FSCS.

(2) The approach adopted by the Administrators (with per capita allocation and provision for a costs rebate) has been adopted in other distributions plans: for example, SVS Securities at [38] and Re Beaufort Asset Clearing Services Limited [2018] EWHC 2287 (Ch) at [12]-[13].

(3) Costs have been fairly accrued on a time cost basis in respect of reasonable and necessary tasks, of which there is a full description in the evidence in support at Crooks2, ¶132 [3/63]. The actual costs incurred to date are approximately £6.5m and the costs reserve has been set conservatively at £18.2 million.[60] The costs reserve was discussed with the FSCS and the Committee before the Committee approved the Distribution Plan on 2 May 2024.

[59] Crooks2, ¶116-121 [3/59].
[60] Crooks2, ¶126 [3/62].

(4) There is provision in the Distribution Plan for costs rebates to be paid to clients and/or the FSCS (as appropriate) based on periodic reviews of the level of the costs reserve by the Administrators. 40% of the costs reserve relates to the potential costs of legal proceedings to recover Client Assets. If those proceedings are not ultimately pursued (something which has not yet been determined by the Administrators) then a substantial rebate can be expected to be paid to clients and the FSCS.[61]

(5) The FSCS has been consulted on the approach which the Administrators intend to take in this regard, as have the Committee.[62] The FSCS is supportive of the Administrators' proposed approach, which is likely to lead to a larger proportion of the overall costs of returning Client Assets being compensated by the FSCS than other approaches considered.[63] As Rajah J observed in Blankstone Sington at [25] (when approving a costs reserve of £17m) "*the FSCS is a suitable body to police the costs incurred by the Administrators and it has a clear financial interest in doing so*".

53. For completeness, the fact that the fruits of Client Assets which have been received since the commencement of the special administration will, under the Distribution Plan, be transferred or distributed as if they were Client Assets, notwithstanding that, strictly speaking, they are post-special administration Client Money gives rise to no jurisdictional or other concern (see SVS Securities at [45]-[46]).

G. ADDITIONAL APPLICATIONS

Unclaimed Assets Application

54. The Unclaimed Assets Application deals with a situation where the Administrators are unable to contact Potential Claimants or the Potential Claimants do not engage with the Administrators:

(1) Clause 8.3 of the Distribution Plan [4/101] provides that if by a "*Long-Stop Date*" the Administrators continue to hold Client Assets they will be entitled to liquidate such assets and pay the proceeds to the relevant client or, if this is not possible, pay the proceeds into the Insolvency Services Account.

[61] Crooks2, ¶129-130 [3/62].
[62] Crooks2, ¶116, 121 and 127 [3/59].
[63] Crooka2, ¶116.c [3/59].

(2) The "Long-Stop Date" is when the Administrators have sent a notice stating that they have determined, acting reasonably, that they have achieved Objective 1 to the extent reasonably practicable.[64]

(3) As part of the distribution of Client Money (taking place alongside but separate from the Distribution Plan), the Administrators also plan to pay unclaimed Client Money as at the Long-Stop Date into the Insolvency Services Account.[65]

55. The Insolvency Service requires an order on the terms of the draft before it is willing to accept payments into the Insolvency Services Account (which also confirms that WealthTek will pay the fees associated with the use of the account).[66] The Court is accordingly asked to make such an order, which will be in the interests of any Potential Claimants who have not engaged with the Administrators or who the Administrators cannot locate taking reasonable measures by preserving the proceeds of their Client Assets and Client Money. Materially the same order was made in Re Beaufort Asset Clearing Services Limited [2020] EWHC 2309 (Ch) at [82]-[87] (albeit in relation only to client money, and not also client assets), where Miles J described the proposal as "*a convenient and practical way of preserving the claims of clients with outstanding client money entitlement where it has not been practicable for the administrators to return such money to them*". The decision by the Administrators to extend this solution to the proceeds of Client Assets as well as Client Money in WealthTek's case was made following consultation with the FCA.

Priority Application

56. The Priority Application seeks an order pursuant to Rule 134(3) of the Rules, which provides that: "*The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the expenses incurred in the administration in such order of priority as the court thinks just.*"

57. The background to the Priority Application is as follows:

(1) Regulation 10H(1) of the Regulations requires the Administrators, immediately after being appointed, to carry out a client money reconciliation. This client money reconciliation must be conducted in accordance with Regulation 10H(2).

[64] [4/86].
[65] Crooks2, ¶158 [3/69].
[66] Crooks2, ¶158 [3/69].

(2) Regulation 10H(3) provides for a situation where "*the total amount of client money which the investment bank, according to its own records and accounts, is required to hold in accordance with client money Rules*" is greater than "*the total amount of client money which the investment bank holds in client money accounts*" – in other words, where there is a shortfall in the bank's holding of client money. In those circumstances, Regulation 10H(3) states that "*the administrator must transfer an amount equal to the difference from the investment bank's own bank accounts to any client money account other than a client transaction account*".

(3) As explained above, Regulation 10H(3) is engaged on the facts of WealthTek's case. There is a client money shortfall of £10.4m. The Regulations therefore oblige the Administrators to transfer this amount from WealthTek's own account to make up the shortfall.

(4) The obligation imposed by Regulation 10H(3) would rank as an expense of the special administration within Rule 143(1)(h) of the Rules, being a "*necessary disbursement*[ ] *by the administrator in the course of the special administration*". It is a liability "*imposed by a statute whose terms render it clear that the liability to make the disbursement falls on an administrator as part of the administration—either because of the nature of the liability or because of the terms of the statute*": Re Nortel [2014] AC 209 (SC) at [100] per Lord Neuberger.

(5) Rule 134(1) sets out a list of priority for the payment of expenses from the general estate. Importantly for present purposes, "*necessary disbursements*" rank ahead of both: "*the remuneration or emoluments of any person who has been employed by the administrator to perform any services for the investment bank*" and the Administrators' remuneration for the pursuit of Objectives 2 and 3 of the special administration.[67]

58. As Mr Crooks explains at Crooks2, ¶147 [3/67] the size of the liability under Regulation 10H(3), approximately £10.4m, means that there would be no funds available in the estate to provide for the Administrators' remuneration in relation to Objectives 2 and 3.

59. As the assets available in the general estate are insufficient to satisfy all expense liabilities, the Court has the power ("*may*") under Rule 134(3) of the Rules to "*make an order as to the payment out of the assets of the expenses incurred in the administration in such order of priority as the court thinks just*".

[67] Regulation 10 provides that Objective 2 is to "*ensure timely engagement with market infrastructure bodies and the Authorities*", whilst Objective 3 is to either rescue the investment bank as a going concern or wind it up in the best interests of creditors.

In the Priority Application, the Administrators seek an order that their liability under Regulation 10H(3) ranks after other expenses of the estate.

60. The Court will require a "*good or sufficient reason to vary the priority*": Irish Reel Productions Ltd v Capitol Films Ltd [2010] Bus LR 854 at [10].[68] The decision of the Outer House of the Court of Session in Joint Liquidators of Doonin Plant Ltd, Noters [2019] BCC 217 is a useful reference point for the Court.[69] In that case the company had incurred a liability under an environmental notice which ranked as an expense. Lord Doherty made an order that the other expenses of the administrators be paid in priority to the environmental notice liability in circumstances where there were insufficient assets to pay the environmental notice liability (which would have resulted in no funds being available to pay remuneration). Similar considerations apply in this case.

61. In the circumstances, it is respectfully submitted that the Court should make the order sought varying the priority of expenses. The alternative is that the Administrators will have no funds to meet their properly approved remuneration in engaging with the FCA and winding up WealthTek (i.e. complying with Objectives 2 and 3).

62. As referred to above, notice of the Priority Application was given to the creditors and clients of WealthTek and specifically brought to clients' attention on 10 May 2024.[70]

H. CONCLUSION

63. In conclusion, the Court is respectfully asked to make an order on the terms of the draft at [2/9].

DANIEL BAYFIELD KC

PAUL FRADLEY

South Square

danielbayfield@southsquare.com

paulfradley@southsquare.com

[68] Concerned with the equivalent power in the Insolvency Rules 1986 for administration, which is now Rule 3.51 of the Insolvency Rules 2016.

[69] The order was made under section 157 of the Insolvency Act 1986 which applies in a Scottish a liquidation, but which is identical to Rule 134(3) of the Rules.

[70] Crooks3, ¶10 [7/461].

4 June 2024