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

SUPPLEMENTAL SKELETON ARGUMENT OF THE APPLICANTS

For the hearing on 23 July 2024

A. INTRODUCTION

1. This supplemental skeleton argument ("**Supplemental Skeleton**") is filed on behalf of the administrators of WealthTek LLP (in special administration) (the "**Administrators**" and "**WealthTek**"). 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**").

2. The Administrators' Application came before the Court on 7 June 2024 (the "**First Hearing**"), on which occasion the Application was adjourned. The Court is respectfully asked to read this Supplemental Skeleton in conjunction with the Skeleton filed for the First Hearing and the pre-reading list included with it. Defined terms from the First Hearing skeleton are adopted for convenience.

3. Since the First Hearing, the following additional documents have been filed which the Court is respectfully asked to pre-read:

   (1) The eighth witness statement of Shane Michael Crooks dated 16 July 2024 ("**Crooks8**") [B/6/141];[1]

   (2) The opinion produced by Mr Matthew Weaver KC ("**Mr Weaver**") dated 14 July 2024 (the "**Weaver Opinion**") [B/1/4]; and

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[1] References are in the form [Bundle/Tab/Page]. Bundle 'A' is the bundle from the First Hearing. Bundle 'B' is a supplemental bundle produced for this hearing.

(3) The witness statement of Guy Enright dated 16 July 2024 (a representative of the FSCS) ("**Enright1**") [B/2/57].

4. The purpose of this Supplemental Skeleton is to address:

   (1) Developments since the First Hearing, including the new evidence which has been filed by the Administrators; and

   (2) The concerns raised by the Court at the First Hearing, which related to the manner in which clients' claims to Client Assets have been determined by the Administrators.

B. DEVELOPMENTS SINCE THE FIRST HEARING

5. Mr Crooks explains the steps that have been taken since the First Hearing to deal with clients at Crooks8 ¶55-81 [B/6/159]:

   (1) The Administrators notified clients of the adjournment of the First Hearing and the relisting of this hearing.[2]

   (2) The Administrators have responded to several clients and one person writing on behalf of a number of clients who have contacted the Court since the First Hearing.[3] Those clients expressed concerns about the delay in distributing Client Assets and Client Money. The Administrators have sought to ensure that those clients understand the reason for the adjournment of the Application and that the Administrators are seeking to ensure that Client Assets and Client Money will be distributed as soon as reasonably possible.

   (3) The correspondence received from clients underscores the hardship faced by WealthTek's clients as a result of them being unable to access their Client Assets and Client Money, and the need for the Administrators to act with speed. The FSCS has made 22 hardship payments (totalling £949,000) to clients who could not meet essential living expenses or faced other critical financial hardships as a result of a lack of access to their funds.[4] In relation to particular points raised by these clients:

[2] Crooks8, ¶56 [B/6/159].
[3] Crooks8, ¶60-77 [B/6/160].
[4] Enright1, ¶19 [B/2/62].

(a) One client has queried the fairness of the costs allocation and why the allocation is not proportionate.[5] The Administrators deal with the fairness of the costs allocation in the First Hearing Skeleton, ¶50 and 52 and Crooks2, ¶116-121 [A/3/59]. In particular, the Administrators have determined that costs should be allocated per capita (as has been the case in previous distribution plans approved by the court) 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).

(b) A different client has queried the absence of tax advice being provided by the Administrators.[6] As Mr Crooks explains at Crooks8, ¶74-75 [B/6/163] the Administrators are unable to give advice to individual clients on their tax affairs, however, they are working with HMRC to see whether additional meaningful guidance can be given as to the general position.

(c) Certain clients have queried what is being done in relation to allegations of wrongdoing (both civil and criminal). The FCA's investigations remain ongoing in relation to this, and the Administrators are continuing to progress their own specific enquiries and investigations.[7] The Administrators are liaising with the Committee in this regard but, to avoid any commercial prejudice in relation to potential claims they may bring, they are not able to provide any specific information in relation to their inquiries and investigations.

(4) The Administrators have also received an email from Mr Jonathan Gain, the CEO of Stellar Asset Management Limited, an FCA regulated investment manager which represents approximately 400 WealthTek clients.[8] On behalf of these clients Mr Gain has indicated that they are "*fully supportive*" of the Distribution Plan and would welcome its approval.[9]

(5) No client has indicated any active opposition to the Distribution Plan since the First Hearing.[10] The Administrators have been notified that the FCA, the FSCS and various

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[5] [B/7/214].

[6] [B/7/274].

[7] Crooks8, ¶62 [B/6/161].

[8] [B/7/282].

[9] Crooks8, ¶77-78 [B/6/174].

[10] Crooks8, ¶60 [B/6/160].

other clients and intermediaries representing clients are intending to attend the hearing as observers.[11]

(6) A copy of Crooks8 and this skeleton will be uploaded to the Website for clients to be able to access.[12]

6. Since the First Hearing, the Administrators have concluded their negotiations with the Nominated Broker and agreement has been reached.[13] Clients will shortly be informed of the onboarding steps with the Nominated Broker and will be provided with the Nominated Broker's contact details, such that, if the Court is minded to approve the Distribution Plan, the transfer of Client Assets and Client Money can occur in relatively short order.[14]

7. The Administrators are in the process of submitting an application for a waiver of CASS 7A.2.4R and CASS 7A.2.7-AR (pursuant to section 138A of Financial Services and Markets Act 2000), such that any unclaimed Client Money held by WealthTek by the Long-Stop Date may be paid by WealthTek into the Insolvency Services Account.[15] They expect to have submitted that application before the hearing. This waiver is not required until the Long-Stop Date and, in any event, relates to Client Money, not Client Assets,[16] and is thus not critical for the purposes of the approval of the Distribution Plan.[17]

8. In addition:

(1) As explained more fully below, the Administrators instructed Mr Weaver to provide a formal, independent written opinion to the Court addressing whether the proposed distribution on the basis of the prior reconciliation exercise is one which the Court should approve as in the interests of the beneficial class as a whole;

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[11] Crooks8, ¶58 [B/6/160].

[12] Crooks8, ¶59 [B/6/160].

[13] Crooks8, ¶83 [B/6/165].

[14] Crooks8, ¶84 [B/6/166].

[15] Crooks8, ¶88 [B/6/166].

[16] An equivalent provision in relation to Client Assets is provided for in clause 8.3 of the Distribution Plan [A/4/100] and does not require any waivers.

[17] Crooks8, ¶88 [B/6/166].

(2) In Crooks8, ¶13-54 [B/6/144] the Administrators have filed evidence to provide further detail explaining the approach they have adopted to determining Client Asset (and Client Money) claims. This is considered further below; and

(3) In response to queries raised by the Court at the First Hearing about FSCS compensation and the extent of shortfalls, Enright1 has been filed:

(a) Mr Enright is the representative of the FSCS who sits on the creditors' committee. He has previously represented the FSCS on creditors' committees in other special administrations.[18]

(b) Mr Enright explains the overall scheme of FSCS compensation, including who is eligible for such compensation.[19] He also explains the approach the FSCS adopts in investment bank special administrations, in particular, in relation to the costs of pursuing Objective 1.[20]

(c) In WealthTek's case, Mr Enright confirms that 928 clients have been confirmed as eligible for FSCS compensation with 395 remaining to be assessed.[21] The FSCS expects the great majority of the remaining accounts to be eligible for FSCS compensation.[22]

(d) The FSCS, therefore, expects that it will cover close to 100% of the costs of transferring Client Money and Client Assets (£18.4m) and that it will pay compensation of £22m to clients to cover shortfall claims.[23] As a result, the maximum exposure of the FSCS (prior to any cost rebates by the Administrators) will be approximately £40m.

(e) In terms of the position of individual clients,[24] 79% have shortfalls of less than £62,000 (being the £85,000 FSCS compensation limit less the costs allocation per client in this case) and will therefore be compensated in full by the FSCS in respect of costs and their shortfall claim. 4% of clients have shortfalls of £62,000-£85,000 and will therefore have part of their shortfall claim not met by the FSCS due to the level of

[18] Enright1, ¶9 [B/2/59].
[19] Enright1, ¶3-8 [B/2/57].
[20] Enright1, ¶10-12 [B/2/59].
[21] Enright1, ¶20 and 23 [B/2/62].
[22] Enright1, ¶24 [B/2/63].
[23] Enright1, ¶25 [B/2/63].
[24] Enright1, ¶22 [B/2/62].

costs allocation. 17% of clients have shortfalls of greater than £85,000 and therefore will have part of their shortfall claim not met regardless of the costs allocation.

C. THE CLIENT ASSETS CLAIMS DETERMINATION EXERCISE

9. The substance of the Client Assets claims determination exercise is dealt with in Crooks2, ¶40-69 [A/3/23] and in the Skeleton for the First Hearing at ¶18-19. As the Administrators understand it, the Court wishes to be satisfied that:

   (1) It has jurisdiction to approve the Distribution Plan notwithstanding that the Administrators propose to proceed on a basis which is not in strict accordance with clients' beneficial entitlements in one particular respect. This relates to one scenario in which certain elections are deemed to have been made by clients rather than being open to clients to make – because otherwise the Administrators do not consider it would be practically possible to return Client Assets in a reasonable period of time; and

   (2) It should exercise its discretion to approve the Distribution Plan notwithstanding that clients' Client Assets claims have been determined (and "baked into" the Distribution Plan) on the basis of legal advice, in circumstances in which most of the clients do not have the wherewithal to take a view on the fairness or correctness of the approach.

(1) The Client Assets regime

10. The Regulations contain a number of instances where the statutory scheme overrides the rights of clients in relation to client assets and client money in order to permit administrators in a special administration to distribute client assets and client money in a way which is fair and efficient. For example:

    (1) Regulation 10B introduces specific provisions to override the normal impediments to a transfer of client assets and related contractual rights, including restrictions on assignment, requirements to give notice and entitlements to a return of client assets otherwise by a transfer. The transferee of client assets is also given a power to vary the terms of client contracts in order to give effect to the transfer. These provisions enable special administrators to make total and partial property transfers under a distribution plan.

    (2) Regulation 11 gives a special administrator the power to set a "**Soft Bar Date**". This gives clients a reasonable time in which to make a claim to assets, after which the special

administrators can distribute to other clients safe in the knowledge that (absent bad faith) recipients obtain good title. This procedure is discussed further below at paragraph 11.

(3) Regulation 12 provides that where there is a shortfall of securities held as client assets in a omnibus account, that shortfall is borne rateably by all clients for whom the investment bank holds securities of that description. In effect, the legislation treats securities of a particular description as pooled even though prior to the entry into special administration those securities may have been held for particular clients.

(4) Regulation 12A enables a special administrator to set a bar date for the return of client money. If client money is returned after the bar date has passed, then no payment or part of any payment made to any person under the distribution may be recovered for the purpose of meeting a late claim.

(5) 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.[25] The hard bar date, if set, has the effect of entirely extinguishing late claims. Regulation 12C contains a similar hard bar date mechanism for client money.

11. These provisions assist the Administrators in performing their duties to: (a) seek to achieve Objective 1 of the special administration (i.e. the return of Client Assets) as "*quickly and efficiently as is reasonably practicable*" (Regulation 10(4)); and (b) carry out a client money reconciliation "*immediately upon being appointed as the administrator*" (regulation 10H(1)) i.e. "*take all steps to achieve a reconciliation and thereafter carry out all necessary steps with all due expedition, with all reasonable speed, or without delay*": Re Strand Capital Limited [2017] EWHC 3561 (Ch), [12] per Asplin J (as she then was).

12. A key feature of the special administration regime is the Soft Bar Date:

[25] The Administrators have not yet determined whether to set a hard bar date in the case of WealthTek: Crooks2, ¶158 [A/3/70]. The effects of any such hard bar date would be mitigated in WealthTek's case because the Distribution Plan provides that at the "*Long-Stop Date*" the proceeds of unclaimed Client Assets in respect of "*Potential Claimants*" will be paid into the Insolvency Services Account: see clause 8 of the Distribution Plan [A/4/100]; Crooks2, ¶158 [A/4/69].

(1) The introduction of the Soft Bar Date mechanism arose in response to the difficulties faced by the administrators in the Lehman Brothers administration. In that case, the administrators were "*faced with the serious difficulty that, as things stand, they cannot be certain who is entitled to the trust property in their hands*": Re Lehman Brothers International Europe (No 2) [2010] Bus LR 489 (CA), [5]. In order to deal with the difficulties they faced, the administrators sought a direction from the Court permitting them to propose a scheme of arrangement under Part 26 of the Companies Act 2006. However, the Court of Appeal in Re Lehman Brothers International Europe (No 2) held that the scheme of arrangement procedure was not available in circumstances where the relevant claims were beneficial interests under a trust. A creditors' scheme of arrangement (under Part 26 of the Companies Act 2006) must be between the company and its creditors, varying the rights of creditors in their capacity as such.

(2) The Investment Bank Special Administration Regime ("**SAR**") was introduced in 2011. It was established in response to the fallout from Lehman Brothers, as the existing legislation exposed specific legal constraints for the resolution of large and complex investment firms. Under the Banking Act 2009 (the "**Act**") the Treasury was empowered to introduce detailed regulations with accompanying insolvency rules, and these together comprise the SAR.

(3) The Act also required the regulations to be reviewed within 2 years of coming into force. Accordingly, the Treasury appointed Peter Bloxham to evaluate the regime, and his review was published in January 2014 and laid before Parliament. The review recommended that the SAR should be retained and proposed 72 reforms to strengthen the regime.

(4) The Treasury's March 2016 Report (setting out the government's response to the review),[26] at para 3.3 recognised (in the context of clients who did not make a claim on time) that "*the* [existing Soft Bar Date] *mechanism could interfere with the property rights of an individual*". The safeguards in response to this included "*requiring court approval for distributions made during the bar date period*". The Report noted at para 6.4 that "[t]*he inability to create a scheme of arrangements has exposed difficulties where, for instance, the firm's records do not identify who the assets belonged to, or there are shortfalls in total assets and it is not clear how the assets should be distributed*".

[26] HM Treasury, 'Reforms to the investment bank special administration regime' (March 2016).

(5) Regulations 11(1)-(3) provide for the Soft Bar Date - enabling administrators to set a bar date before which claims must be submitted, giving clients a reasonable time to make such claims. Rule 138(2) requires notice of a Soft Bar Date to be given to all clients of whom the administrators are aware.

(6) 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(1)).

(7) Claims submitted after the Soft Bar Date 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. In this regard Regulations 11(5)-(6) provide that:

> *"(5) Where the administrator, after setting a bar date, has returned client assets, if the administrator then receives a late claim of a type described in paragraph (1) in respect of assets that have been returned—*
>
> > *(a)there shall be no disruption to those client assets that have already been returned;*
> >
> > *(b)the person to whom the assets have been returned acquires good title to them as against the late-claiming claimant,*
> >
> > *and insolvency rules shall prescribe how the late claim is to be treated by the administrator.*
>
> *(6) The restrictions in paragraph (5) shall not apply where—*
>
> > *(a)the client assets were returned to a person ("P") by the administrator in bad faith in which P was complicit; or*
> >
> > *(b) P is later found to have made a false claim to those assets."*

(8) In other words, where the Administrators distribute Client Assets to clients after the Soft Bar Date those clients, by operation of the Regulations, obtain good title to those Client Assets. The effect is therefore to interfere with the beneficial entitlements of any other client who may have a competing claim to the Client Assets distributed. The purpose of the mechanism is to "*to give certainty to clients who receive back their assets that they will not be challenged at a later date by a third party for the return of those assets*": Explanatory Memorandum to the Regulations, para 7.12.

(9) The clients are protected in relation to the Soft Bar Date, inter alia, by the fact that the Distribution Plan: (a) will be proposed by administrators, who are experienced officers of the court; (b) will be considered by the creditors' committee and made available to all of the clients of the investment bank, and (c) must be approved by the court.

13. The Client Assets regime under the Regulations is a commercial one which seeks to balance the proprietary rights of clients as regards Client Assets with the need to return Client Assets expeditiously in the event of the collapse of an investment bank. It does not, in every respect, treat proprietary rights as sacrosanct and it was introduced in the light of the difficulties faced in the LBIE administration when it came to administrators seeking safely (i.e. without exposing the estate or themselves to breach of trust claims and similar) to return Client Assets.

14. In this case, the Administrators identified six scenarios on which they took legal advice and then exercised their professional judgment as to how to proceed. In five of those scenarios, the approach which the Administrators are adopting is the application of legal advice as to what the beneficial interests of clients are. Those scenarios are:

(1) Unrecorded Payments – Crooks2, ¶40-45 [A/3/23]; Weaver Opinion, ¶44-50 [B/1/32];

(2) Transfers of Certified Shares – Crooks2, ¶46-50 [A/3/24]; Weaver Opinion, ¶51-58 [B/1/35];

(3) Consolidating Accounts – Crooks2, ¶51-54 [A/3/28]; Weaver Opinion, ¶59-66 [B/1/36];

(4) Client Assets sold without Client's Knowledge – Crooks2, ¶55-56 [A/3/31]; Weaver Opinion, ¶67-72 [B/1/32]; and

(5) Purchase of Replacement Client Asset - Crooks2, ¶57-61 [A/3/32]; Weaver Opinion, ¶73-79 [B/1/40].

15. In each of these scenarios, the approach which the Administrators are adopting is based on the way in which the proprietary rights of clients are to be established.

16. As explained further below and in Crooks8, ¶27-31 [B/6/149], the Administrators have adopted an approach in relation to the sixth and final scenario (the Non-Processed Sale Instruction scenario) which does not conform with the strict rights of clients because of the practical difficulties in adopting any different approach.

17. In the Non-Processed Sale Instruction scenario, a client instructed WealthTek to sell a client asset, WealthTek failed to do so but then credited the client with an increased client money entitlement (in some cases the client may then also have purchased another asset with this increased client money entitlement). The Administrators have concluded, on the basis of legal advice, that WealthTek's retention of the original asset (including not paying any actual proceeds into the client money account) was a breach of trust. As such the affected clients would ordinarily have a right to elect to retain their rights to the original asset or to claim the proceeds which should have been realised on the sale of the original asset pursuant to the clients' instructions.

18. However, in their determination of the clients' claims, the vast majority of which have been agreed (and none of the disagreements relate to the approach the Administrators are proposing to take to this scenario), the Administrators are proposing not to seek an election from the clients between the asset which was wrongfully retained and an increased client money entitlement (or any asset purchased with that increased client money entitlement): see Crooks2, ¶62-69 [A/3/33]; Weaver Opinion, ¶80-88 [B/1/42]. Instead, the Administrators have deemed clients to have elected to retain their increased client money entitlement (or any asset purchased with that increased client money entitlement). In this regard:

    (1) ***First***, the Administrators have adopted this approach because in their professional judgment the alternative approaches are impractical (or practically impossible):

        (a) As Mr Crooks explains, the Administrators have given careful consideration to whether it is possible for clients to be given an election (see Crooks8, ¶31-42 [B/6/151]). The Administrators have concluded that the only practicable option (which would enable them to distribute Client Assets to clients in a reasonable period of time and at a reasonable and proportionate cost to clients) is to deem clients to have elected to retain their increased client money entitlement (or any asset purchased with that increased client money entitlement).

        (b) Clients would not be in a position where they could know what would be in their commercial interests.

            (i) First, they would need to know what the value is of a wrongfully retained asset and to what extent WealthTek still holds assets of that type which would be

available to meet their claim. The Administrators would need to conduct a tracing exercise to identify each example of a wrongfully retained asset.

(ii) Secondly, they would need to know what the value is of their client money entitlement or of any asset purchased with that increased client money entitlement. The Administrators would also need to take into account any withdrawal of client money made by the clients in reliance on their increased client money entitlement.

(iii) Thirdly, they would need to know what elections others make because that might affect either or both of the first two factors, depending on the number of claimants and the extent of any shortfalls of client money and/or the relevant client assets.

(iv) Fourthly, asset values fluctuate over time, in accordance with macroeconomic and market factors, and the fortunes of particular issuers of securities.

(c) If all clients were free to make an election, as alluded to in the third point above, that would result in a 'moveable feast' in which the election of one client affects the entitlements of other clients to Client Assets and the existence of, or economic consequences of, any election those other clients may have.[27]

(d) It would be necessary for the Administrators to take a transaction-by-transaction approach over the entire course of WealthTek's trading history requiring clients to make elections at each stage.[28]

(e) The Administrators have investigated 30% of a single client's holding of one stock line in order to conduct a tracing exercise.[29] The process was incredibly complex; it took 17 hours for an experienced forensic accountant to complete.[30] It would therefore take several years to conduct a full tracing exercise (assuming that were possible), at great cost.[31] The Administrators are also unsure that it is in fact possible to arrive at a definitive conclusion in relation to this exercise.[32]

[27] Crooks8, ¶32.b [B/6/151].
[28] Crooks8, ¶38 [B/6/154].
[29] Crooks8, ¶36.a [B/6/152].
[30] Crooks8, ¶36.b [B/6/152].
[31] Crooks8, ¶39 [B/6/154].
[32] Crooks8, ¶36.f [B/6/154].

(f) Until this tracing exercise concludes, the Administrators would be unable to distribute (at least) a substantial portion of Client Assets (given the knock-on effects of elections).[33] The Administrators would also need to investigate clients who received Client Assets or Client Money prior to the special administration to see whether, in light of the tracing exercise and elections, they were actually entitled to those assets or money.[34]

(g) The Administrators are also concerned as to whether (at least some) clients will have the market understanding and experience, or perhaps even the inclination or time, to engage in a meaningful way in making elections between particular outcomes.[35] The majority of WealthTek's clients were individuals classified as retail clients (98%) and have an average age of 68.[36] Many of them will be classified as 'vulnerable customers'. There would be significant difficulties in dealing with clients who are unable or unwilling to make elections.

(h) Only four of WealthTek's clients who have submitted claims to the Administrators have not agreed with their claims as computed by the Administrators. The reasons for disagreement provided by those four clients to date do not relate to how the Administrators propose to calculate underlying entitlements or the basis on which the Distribution Plan has been prepared.[37]

(2) ***Second***, the Administrators' proposed approach to the Non-Processed Sale Instruction scenario is simply and merely to deem clients to have elected to retain their increased client money entitlement (or any asset purchased with that increased client money entitlement):

(a) As explained at paragraphs 10-13 above, the Administrators consider that the regime for distributing Client Assets pursuant to a distribution plan is sufficiently flexible to permit the deemed election – which is commercially necessary and desirable.

(b) The Court's discretion as to whether or not to approve a distribution plan is unfettered. The SAR is a commercial regime which overrides clients' contractual and proprietary

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[33] Crooks8, ¶32.b [B/6/151].
[34] Crooks8, ¶40 [B/6/154].
[35] Crooks8, ¶32.a [B/6/151].
[36] Crooks2, ¶23.a [A/3/18].
[37] Crooks8, ¶50.c [B/6/158].

rights in the interests of achieving the statutory objective "*to ensure the return of client assets as soon as is reasonably practicable*". The discretion should be exercised in that light.

(c) However, consistent with this or to the extent that this is not sufficient, the Administrators would rely on the court's inherent jurisdiction "*to supervise and if appropriate intervene in the administration of a trust*": Schmidt v Rosewood Trust Ltd [2003] 2 AC 709 (PC), [25]. David Richards J (as he then was) considered and applied this jurisdiction in the context of the Regulations in Re MF Global UK Ltd (in special administration) (No 3) [2013] 1 WLR 3874 (Ch). At [26] he held that:

> *"The inherent jurisdiction of the court does not enable the court to vary beneficial interests in trust property but, as part of the jurisdiction to supervise and administer trusts, it permits the court to give directions to trustees to distribute trust property on particular bases when the court is satisfied it is just and expedient to do so. A well established example of the exercise of the jurisdiction in this respect is the making of In re Benjamin orders: In re Benjamin [1902] 1 Ch 723 . In those cases where the trustees are faced with a practical difficulty in establishing the existence of possible beneficiaries or other claimants, the court will give a direction to the trustees enabling them to distribute the trust property on an assumption of fact that there is no such beneficiary or claimant. As Nourse J explained in In re Green's Will Trust [1985] 3 All ER 455 , 462, an In re Benjamin order does not vary or destroy beneficial interests but merely enables trust property to be distributed according to the practical probabilities. It protects trustees but it equally preserves the right of any person who establishes a beneficial interest to pursue such remedies as may be available to them."*

(d) The Re Benjamin [1902] 1 Ch 723 jurisdiction enables the court to "*give the trustees liberty to distribute on a particular footing*" (rather than declaring the existence of a particular state of affairs): Lewin on Trusts (20th ed), 39-031. The court's power extends beyond questions of fact to distributing on the basis of a legal opinion as to whether assets are held on trust and what the beneficial interests are: Lewin, 39-035.[38]

(e) In this case, the Administrators seek to distribute on the basis of "*a presumed fact in circumstances where it is impossible or impracticable to establish the fact one way or the other*": MF Global, [29]. As explained above, the Administrators propose to deem clients to have elected to retain their increased client money entitlement (or any asset purchased with that increased client money entitlement) on the basis that it is impracticable (or practically impossible) to proceed otherwise. This is within the Re Benjamin

[38] By reference to the decision in Re Equilift Ltd [2010] BCC 860 – where a liquidator was permitted to distribute funds on the basis of an independent opinion as to the existence of beneficial interests.

jurisdiction and it is just and expedient to direct the Administrators to distribute on this basis.

(f) In any event, the "*fact that the proposed order does not in this respect neatly fit within the In re Benjamin line of cases does not mean that it falls outside the proper scope of the inherent jurisdiction of the court*": MF Global, [30]. In MF Global the Court directed the administrators to distribute on the basis that the only good or potentially good claims are those which have been agreed and those whose rejection is the subject of an appeal to the court. The Administrators submit that, in light of impracticality of other approaches, this would (if necessary) be an appropriate case for the Court to exercise its inherent jurisdiction to direct the Administrators to proceed on the basis that clients have elected to retain their increased client money entitlement (or any asset purchased with that increased client money entitlement).

(g) The Court should be aware, however, that whilst a Re Benjamin order does not of itself vary or destroy beneficial interests, the effect of the approval of the Distribution Plan will have the effect of preventing clients from: (i) seeking to establish claims to the Client Assets which they instructed WealthTek to sell on their behalf; and (ii) seeking to establish claims to Client Assets distributed to other clients in accordance with the Distribution Plan.

(h) The Court should also be aware that, in Re Hume Capital Securities Plc [2015] EWHC 3717 (Ch) HHJ Keyser QC stated at [9] that: "[t]*he purpose of the distribution plan is of course to make a distribution of assets in accordance with clients' proprietary rights and pursuant to Objective 1, not to interfere with or alter those rights*". However, the point was: (a) obiter (because there was no question of an interference with rights on the facts and the practical difficulties faced by the Administrators in this case did not arise); (b) not argued; and (c) not subject to any reasoning.

(i) In any event, the interference in this case is merely the deemed election between one of two remedies, in circumstances in which it is not practically possible or helpful to invite all affected clients to make an election themselves. In addition, clients' claims have been calculated by the Administrators, as stated on their Client Asset Statements, on the basis of elections having been made on their behalf, and no client has disputed the calculation having been made in this way.

(2) The Best Interests of Clients

19. Following the First Hearing, the Administrators have given considerable thought to how they can best satisfy the Court that the Distribution Plan (insofar as it "bakes in" the Administrators' determination of Client Assets claims) is in the best interests of the clients generally.

20. As part of this, in accordance with suggestions from the Court, the Administrators considered the approach which has been adopted in a number of related contexts, including: where a representative party decides not to oppose relief;[39] under the Variation of Trusts Act 1958 (where there is a beneficiary who is a minor or lacks capacity);[40] where the difficulty and expense of deciding questions of law in the administration of a trust is out of proportion to the value of the fund;[41] and where the Court is asked to approve a compromise for a child or protected person.[42] In each of those contexts the practice is for an independent opinion to be provided to the Court on the merits of a particular course of action.

21. The Administrators, therefore, instructed Mr Weaver to produce the Weaver Opinion. Mr Weaver was instructed on the basis that his overriding duty was to the Court (not to the Administrators) and that he was providing an opinion to the Court. Mr Weaver was asked to consider matters from the perspective of the clients. The Weaver Opinion addresses: (a) the legal and factual position in relation to the scenarios the Administrators identified giving rise to difficulties; and (b) whether the Distribution Plan is in the best interests of the clients as a whole.

22. A copy of the Weaver Opinion is at [B/1/4]. The Court will have the opportunity to discuss its contents with Mr Weaver at the hearing. In summary, Mr Weaver has concluded at Weaver Opinion, ¶90 [B/1/44] that the "*manner in which the Distribution Plan proposes to deal with discrepancies in WealthTek's books and records and approaches the reconciliation of client asserts represents (a) a fair and reasonable mechanism for returning client assets to clients as quickly and efficiently as is reasonably practicable and (b) a solution which is in the best interests of clients generally*."

23. The Administrators continue to consider that the Distribution Plan, as proposed, is in the best interests of WealthTek's clients generally:

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[39] See Lewin, 39-058; Unipart Group Ltd v UGC Pension Trustees Ltd [2018] Pens LR 18.

[40] See Lewin, 53-083.

[41] Re Equilift Ltd [2010] BCC 860.

[42] CPR r21.10(3)(h)).

(1) The court has emphasised on a number of occasions that it expects its officers to consider how best to proceed in the interests of clients or creditors (as the case may be) and will give considerable latitude to them in relation to their decisions. An "*administrator must be accorded a wide measure of latitude in the way he goes about the exercise of his powers so as to achieve the statutory purpose*": Four Private Investment Funds v Lomas [2008] EWHC 2869 (Ch), [48] per Blackburne J; see also the cases cited by Miles J in Re Sova Capital [2023] EWHC 452 (Ch), [171]-[179].

(2) In Re MF Global [2014] EWHC 2222 (Ch) David Richards J (as then was) held at [47]:

> *"In commercial matters, administrators are generally expected to exercise their own judgment rather than to rely on the approval or endorsement of then court to their proposed course of action: see In re T&D Industries plc [2000] 1 WLR 646. While the compromise of claims raising difficult legal issues may not be on all fours with a purely business decision, administrators commonly exercise the powers of compromise without recourse to the court and in general apply to the court for directions only if there are particular reasons for doing so: see In re Lehman Brothers International Europe [2014] BCC 132."*[43]

(3) 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 own experience in past insolvency cases and in financial services matters generally.[44] The Administrators have had in mind a series of objectives set out at Crooks8, ¶18 [B/6/145] when deciding how to proceed, in particular:

   (a) Ensuring the best outcome for clients as a whole;

   (b) Deferring to WealthTek's books and records as a readily available source of information, save where there are reasons to doubt the information contained therein;

   (c) Arriving at an approach which is legally robust and also fair between clients;

   (d) Giving effect, as far as possible, to the legitimate expectations of clients (primarily as evident from the information which was available to clients prior to WealthTek entering into special administration); and

[43] See also Re LB Holdings Intermediate 2 Ltd (In Administration [2018] 2 BCLC 541, [30] per Hildyard J: "*the Court's function is not to determine, and could not sensibly extend to determining, whether the settlement proposed is the best available, or might be improved in some way. The decision is and remains one for the administrators; and the Court's function is not to double-guess it*":

[44] Crooks8, ¶42 [B/6/145].

(e) Arriving at an approach which is capable of being implemented at a proportionate cost (i.e. which is administratively and operationally practicable and efficient) and in the shortest time reasonably practicable.

(4) The approach which the Administrators propose to take in relation to the reconciliation exercise is informed by those objectives. Further, as explained at paragraph 11 above, the Administrators are obliged under the Regulations to seek to return Client Assets as quickly and efficiently as is reasonably practicable and to carry out a reconciliation of Client Money immediately after their appointment. The Administrators' obligations to act with all reasonable speed in performing their reconciliation and as quickly and efficiently as reasonably possible in returning assets has informed their approach to the discrepancies in WealthTek's books and records. Those obligations militate against a lengthy or expensive tracing exercise or set of court applications.

(5) The Administrators have considered the alternative, which 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.[45] 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. They have also considered whether the dispute resolution mechanism could be expanded to allow clients to challenge the reconciliation exercise and concluded this is not practicable.[46]

(6) The approach which the Administrators have adopted has been supported by the Committee and not opposed (following consultation) by the FSCS and the FCA. Only four clients of WealthTek who have submitted their claims to the Administrators have not agreed their claims, which represents a very small percentage of the total client assets WelathTek holds.[47] The reasons for disagreement provided by those four clients to date do not relate to how the Administrators propose to calculate underlying entitlements or the basis on which the Distribution Plan has been prepared.[48]

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[45] Crooks8, ¶45-48 [B/6/156].
[46] Crooks8, ¶49-54 [B/6/157].
[47] Crooks8, ¶18.d [B/6/146].
[48] Crooks8, ¶50.c [B/6/158].

(7) The approach to the particular scenarios the Administrators have identified have now been supported by Mr Weaver in the Weaver Opinion as being in the best interests of clients.[49]

24. On this basis it is respectfully submitted that the Court should conclude that the reconciliation exercise has been conducted in a manner which is consistent with the best interests of clients generally – this is the Administrators' independent assessment (with the benefit of legal advice) and is supported by the Weaver Opinion provided to the Court.

D. CONCLUSION

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

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[49] See [B/1/44].