Neutral Citation Number: **[2020] EWHC 1685 (Ch)**

Case Number 006478 of 2019

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

IN THE MATTER OF SUPERCAPITAL LTD

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 29/06/2020

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE AGNELLO QC

- -

Mr James Mather (instructed by Gowling WLG (UK) LLP) on behalf of the Applicants
Ms Natalie Zorzella on behalf of the FCA

Hearing date: 18 April 2020

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APPROVED JUDGMENT

Introduction

1. On 20 April 2020, I heard the application issued by Kevin Goldfarb, one of the Joint Administrators of Supercapital Limited ('the Company'). The application sought directions and approval of the proposed distribution plan in relation to sums held by the Company on what the Applicant considers is a statutory trust for clients arising under the Payment Services Regulations 2017 ('the PSRs'). The application seeks directions for approval of the proposed distribution plan as well as approving the Administrators' remuneration, costs and expenses.

2. I am grateful to Mr Mather for a detailed skeleton and for his helpful submissions. After having considered the terms of the PSRs and the relevant legal authorities, I made the order sought, with some modifications. I set out here my written reasons for making the order.

3. As Mr Mather submitted, there are three issues which I need to deal with in relation to grating the application sought. Firstly, the legal characterisation of the funds held in the accounts. Secondly, the court's jurisdiction to give directions on the basis of the status of the client funds and thirdly considering the proposed distribution plan itself. There is a fourth issue relating to the costs and remuneration. This last issue does not form part of this judgment as I adjourned it to be heard on another date with directions relating to notifying the creditors/clients of the Company. I will set out a brief background and then consider the three questions raised.

Background

3. The Company was a provider of international payments services which included currency exchange services. Many of these services were offered through brokers. The Company was and is regulated by the FCA as an Authorised Payments Institution and at all times subject to the PSRs. On 27 September 2019, the Applicant and his colleague Stephen Hunt were appointed as Joint Administrators pursuant to the paragraph 22 of Schedule B1. Previously, the Company had suspended trading on 12 September 2019 following on from a request from the

FCA for an undertaking from the Company to voluntarily refrain from conducting its business activity.

4. As part of its business operation and to be able to effect international payment services, the Company received funds advanced by its clients as well as proceeds of transactions executed on behalf of clients under the terms of the PSRs. Under the PSRs, those funds received from clients were required to be segregated from the

Company's general assets. As is set out in the evidence, the Company holds the sum of approximately £12.6 million. This has been calculated as being a shortfall of approximately £585,000 to the clients, excluding the costs of the work carried out by the Joint Administrators. According to Mr Goldfarb, the shortfall appears to arise from a number of duplicate payments which had been made and which to date have not been recovered from the recipients. The prospect of recovery of these sums is uncertain.

5. The Joint Administrators have ascertained through the work carried out by them that the client balances are held by the Company with two banks, ClearBank Limited (within this jurisdiction) and FidorFactory GmbH (based in Germany). The deposited funds according to the Administrators are held on behalf of the individual clients and are segregated from the general funds of the Company. Three other entities received client funds for the purposes of effecting currency conversions, namely Currencycloud, ONPEX and Interactive Brokers LLC . The funds held by two of the three entities have been secured by the Administrators, but in respect to the funds held by ONPEX, this is subject to a deduction of fees which the Administrators consider it would be uneconomical to contest. The sum held by ONPEX is approximately £126,000.

6. As is set out in the witness statement of Mr Goldfarb dated 9 April 2020, the

Administrators have carried out considerable work to obtain a clear picture of the clients' entitlements. Mr Goldfarb states that the company books and records did not themselves provide a clear picture. According to Mr Goldfarb, he has been able to obtain with some confidence an accurate picture of the sums owing allowing him to reconcile the Company's records. This will allow him to be in a position to distribute under the terms of Distribution Plan.

The status of the sums held by the Administrators

7. Regulation 23 of the PSRs contains material provisions as follows. The underlining is that suggested by Mr Mather which relates to the issue in question, namely the basis upon which the funds are held by the company:-

> *"23(1) - For the purposes of this regulation "relevant funds" comprise the following:*
>
> *(a) sums received from, or for the benefit of, a payment service user for the execution of a payment transaction; and*
>
> *(b) sums received from a payment service provider for the execution of a payment transaction on behalf of a payment service user.*
>
> *[…]*
>
> *23(5) - An authorised payment institution must keep relevant funds segregated from any other funds that it holds.*
>
> *[…]*
>
> *23(8) - No person other than the authorised payment institution may have any interest in or right over the relevant funds or relevant assets placed in an account in accordance with paragraph (6)(a) or (b) except as provided by this regulation.*
>
> *[…]*
>
> *23(11) - The authorised payment institution must keep a record of:*
>
> *(a) any relevant funds segregated in accordance with paragraph*
>
> *(5); … […]*
>
> *23(14) - Subject to paragraph (15), where there is an insolvency event:*
>
> *(a) the claims of payment service users are to be paid from the asset pool in priority to all other creditors; and*
>
> *(b) until all the claims of payment service users have been paid, no right of set-off or security right may be exercised in respect of the asset pool except*

to the extent that the right of set-off relates to fees and expenses in relation to operating an account held in accordance with paragraph (6)(a) or (b), (9) or (12)(b).

23(15) - The claims referred to in paragraph (14)(a) shall not be subject to the priority of expenses of an insolvency proceeding except in respect of the costs of distributing the asset pool.

[…]

23(17) - An authorised payment institution (and any small payment institution which voluntarily safeguards relevant funds) must maintain organisational arrangements sufficient to minimise the risk of the loss or diminution of relevant funds or relevant assets through fraud, misuse, negligence or poor administration."

8. Whether sums are held on a trust does not depend upon whether there is an express declaration of a trust. Whether a trust is created by statute requires consideration of the language and also consideration of the general law of trusts and ordinary equitable applicable principles. As stated by Lady Justice Arden (as she then was) in *Lehman Brother International (Europe) (in administration) v CRC Credit Fund Ltd [2010]EWCA Civ 917* (at paragraph 64 onwards),

'Role of trust law

64. My second set of preliminary observations relates to trust law.

65. In my judgment, the rules of trust law provide the analytical framework and the principal diagnostic tool for resolving the problems which require to be resolved on this appeal. There is no doubt that CASS 7 imposes a trust. The provisions of that trust are, however, rudimentary. The trust is created with little elaboration and so the court is thrown back on general trust law.

66. For the purposes of these observations it does not matter whether that trust arose at the time of receipt of client moneys or on their segregation into separate client accounts. CASS 7 simply declares a trust without providing all the rules that are necessary for working out that trust. Mr Snowden refers to the dictum of Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd [2009] Bus LR 1316* , para 17 in the context of implied terms, where Lord Hoffmann held:

"The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so."

67. In my judgment, that approach is out of place where a statute imposes a trust, and the question is whether some gap in the trust can be filled by reference to general trust law. This is because, once a trust is declared and attaches to assets, there are

a series of default rules and principles which apply irrespective of the intention of the parties setting up the trust or, indeed, the FSA. For instance, there is a fiduciary duty not to make a secret profit and a duty to account to the beneficiary in accordance with the terms of the trust. There are also rules applying in equity to the distribution of a common fund, such as hotchpot and the rule in Cherry v Boultbee (1839) 4 My & Cr
442 , which may be applicable. There are also the maxims of equity, such as “equality is equity”. This has frequently been applied by the courts to the distribution of assets upon the dissolution of a body or fund: see, for example, *In re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2) [1979] 1 WLR 936* (a friendly society).

68. For the same reason the judge was not, as suggested by Mr Snowden, impermissibly legislating when he relied on rules of trust law. Those rules apply by default whenever there is a trust for which the applicable rules have not been fully articulated. They supplement but do not supplant, or pre-define the meaning of, the provisions expressly laid down. In any event, statutory trusts do not always set out detailed rules about all the duties of the trustee: see, for example, section 105 of the Law of Property Act 1925 and section 981(9) of the Companies Act 2006 . Put another way, it is simply not an answer to the judge's conclusion that there was a trust on receipt to say that some particular aspect of the trust law was not provided for. If a provision is made, then the default rules of trust law will be displaced or varied. Trust law can be moulded to meet the requirements of the situation.

69. For the same reason, it is not possible to accept without qualification the submission of Mr Milligan that the rules in CASS 7 about pooling have to be construed in accordance with the normal rules of statutory interpretation, such as the rule that there is a presumption that Parliament did not intend to take away private property law rights and the presumption that where statute expressly permits one thing (the making of rules providing for the pooling of money in accounts), any further power of pooling is excluded. If the effect of the default rules of trust law is that private law property rights are clearly taken away, or that the pooling must necessarily extend to other property, those default rules displace the normal rules of statutory interpretation.

70. In connection with the role of general law, it is important to make it clear that this court has been asked not to deal with any individual tracing claim. Accordingly there has been no real argument on the rights of a client who pays money to a firm adopting the alternative approach under the general law. When the alternative approach is adopted, CASS 7 contemplates that client money should be paid into a running account of the firm. So it is implicit in the structure of CASS 7 that the firm will be able to use client moneys which it receives, but the implication may go no further than this so that the authority to do this would only be on the basis that the firm's account contained equivalent substitute assets, and so that the beneficiary obtained a beneficial interest in substitute assets. On this basis, it would be a breach of trust if the house account into which client moneys were paid was overdrawn or if it would not have enough moneys in it at any time relevant for the client to have a proprietary interest to the full extent of his moneys. (Any breach of trust claim would,

however, be only an unsecured claim against LBIE conferring no priority over other unsecured creditors such as trade creditors, and we were told that such a claim may raise issues as to double proof.) Those issues are left open by this appeal. It should also be borne in mind that a client need not, under CASS 7, know that his money is being paid into a house account. He may reasonably be under the impression that prior to segregation it is being paid into a general client account.

71. If and to the extent that (as the judge held) a client has an individual right of tracing, his right will clearly attach to interest and dividends earned on any investment into which he can trace. I leave aside for later consideration the question of manufactured interest and dividends.

72. We have not been asked to consider whether, if any client has a tracing claim in respect of client money paid into a firm's account, it is an individual claim or one belonging to clients in the same position collectively. If the right of clients to trace moneys into the firm account were a collective right, then it may be that the right to follow the moneys misapplied belongs not to any individual client but to the clients entitled to share in the house account collectively. If, however, the claim is an individual claim, there are, as I have indicated, a number of default rules of trust law, such as hotchpot and the rule in Cherry v Boultbee 4 My & Cr 442 , which are potentially applicable. We have not heard argument on these rules but the principle of hotchpot may offer the means of solving the problem, highlighted by Mr Snowden, of a client seeking to benefit from a share in the pool and not bringing into account the benefit of other claims which he has. On that basis, the client who happens to have an individual claim to follow trust property, because his moneys were misapplied, would have to bring that claim into account if he wishes to share in the house account pool.

73. The above analysis may provide the answer to the point made to us that section 139(1) of the 2000 Act does not give the FSA power to require the pooling of other forms of property, such as a yacht, purchased with client moneys misappropriated from a client or house account. Such property may have to be brought into account under the default rules of trust law applying to individual claims or they may in any event belong to clients collectively. This is, as the FSA point out in their written submissions, the sensible solution since no single client could ever easily identify that it was his particular moneys that were spent on the yacht. Cheques or cash received from a client do not present a like problem because these are clearly “money” as defined for the purposes of CASS 7 and they therefore fall within the definition of “client money” even if they have not been paid into the house accounts.

74. Needless to say, if a client were only to have a share in a collective claim as a result of the firm paying money into a house account, that would have provided an argument for the claims of those clients being added to the client money pool and those clients being included in those entitled to claim on the client money pool.

9. In Lehman, the Court of Appeal considered the provisions under CASS 7 which made an express declaration of trust, but did not, as set out by Lady Justice Arden, thereafter provide any further provision as to the operation of the trust. Trust law will be used to enable such trusts to be operated for the benefit of the beneficiaries. In relation to the

PSR, Mr Mather informed me that to date, there has been no case which has considered the rules in relation to the PSRs and whether the provisions, the relevant extracts of which I have set out above, create a statutory trust. There are in my judgment, many similarities as between the PSRs and CASS 7, save that CASS 7 makes an express declaration of trust. That in in itself of course is not determinative, merely an indication that many of the provisions set out in the PSRs are those one would expect to see in the event that a statutory trust is created. The consideration of the relevant provisions is as follows :-

(1) In regulation 23, the focus of the 'relevant funds' in its definition in 23(1)(a) is about identifying funds received for the benefit of third parties, in particular those who have an interest in such funds, whether received from a 'payment service user', or from a 'payment service provider' for the execution of a payment on behalf of a payment service user.

(2) Regulation 23(5) states that such funds must be kept segregated from any other funds held by the authorised payment institution. Such an obligation is inconsistent, as Mr Mather submits, with a creditor debtor relationship which would enable such funds to be used by the company as part of its business. I agree.

(3) Regulation 23(11) requires the authorised payment institution to keep a record of any relevant funds segregated. This alongside regulation 23(5) demonstrates that such funds are not to be treated as company funds. Additionally, this segregation is to occur immediately upon the receipt of the funds.

(4) Regulation 23(8) prohibits any persons other than the authorised payment institution from having an interest over the relevant funds or relevant assets placed in an account in accordance with paragraph (6)(a) or (b). Those latter provisions relate to the position when sums are received at a time when it is not possible to place them into the segregated fund. This again indicates that the funds are to be treated at all times as separate, from the moment of receipt, from sums which belong to the company.

(5) Regulation 23(14) deals with the position upon the occurrence of an insolvency event and states that all the claims of payment service users 'are to be paid from the asset pool in priority to all other creditors'. Although the potential beneficiaries of a trust seem to be referred to as 'creditors' their position, in my judgment, is distinguishable from creditors in general because of the entitlement to claim in relation to the pooled assets. This in many respects goes somewhat further in the content of the regulations than those found in CASS 7.

10. In my judgment, taking all the regulations I have set out above into account, I am satisfied that the PSRs create a statutory trust. All the characteristic for such a trust being in existence are present. The segregation of funds received right from the inception as well as ensuring that they are identifiable is equally important. The fact that the company cannot use the funds in its own business and the position is made clear that the funds are only available to those beneficiaries in the event of an insolvency event are also important. In the circumstances, the Administrators are correct in their approach to treat the funds as being held by way of a statutory trust. Their application seeks directions in relation to the proposed distribution plan. I turn to the issue of jurisdiction in relation to the ability of this court to give such directions.

Jurisdiction of the Court

11. The Administrators seek directions from the Court pursuant to paragraph 63 of Schedule B1 of the Insolvency Act 1986 and/or under its inherent jurisdiction.

12. As Mr Mather points out in his skeleton, it is perhaps more an issue for inherent jurisdiction rather than paragraph 63. Mr Mather also referred to authorities and in particular *Re Allanfield Property Insurance Services Ltd* [2015] EWHC 3721 (Ch) at [47-56] per HHJ Keyser QC and *Hunt (Liquidator of Total Debt Relief Ltd) v Financial Conduct Authority* [2019] EWHC 2018 (Ch) at [10] per HHJ Monty QC.

These are two cases where the Judges considered the exercise of the 'directions' jurisdiction as well as accepting in both cases that the court also had the ability to utilise its inherent jurisdiction. Both of these cases related to applications seeking directions relating to a distribution plan proposed in relation to the sums held on trust and in the hands of the office holder.

13. In *Re Pritchard Stockbrokers Ltd (in special administration)* [2019] EWHC 137 (Ch), a case concerned with determining interests under statutory trusts where the company in question was in special administration, Norris J held as follows at [25]: "An application for directions under paragraph 63 of Schedule B1 is the appropriate vehicle. Where an insolvent company is a trustee, how the company should discharge its duties as trustee and execute the trusts upon which it holds property, and how it should avoid the generation of claims for breach of trust which would lie against its assets, are key questions to be addressed by the administrator: and he or she can properly seek directions as to how to perform their function in that regard…"

Again this was a case seeking a process for determining the interests in the trust and the proposed distribution. In relation to the inherent jurisdiction also relied upon by Mr Mather, there is a useful passage in the judgment of Mr Justice David Richards (as he then was) in the case *Re MF Global UK Ltd (in special administration) (No 3) [2013] EWHC 1655 (Ch)*. These were relied upon by HH Judge Keyser in *Re Allanfield Properties* and I set out the discussion and relevant passages from *MF Global* therein,

'52.The inherent equitable jurisdiction was considered by David Richards J in *In re MF Global UK Ltd (in special administration) (No. 3) [2013] EWHC 1655 (Ch), [2013] 1 WLR 3874* . The company was a failed investment bank and held client moneys on statutory trusts pursuant to CASS 7 and CASS 7A. The special administrators applied for directions to enable them to distribute in circumstances where there was uncertainty as to the extent of valid claims against the trust pool. Very considerable difficulties would have attended an attempt to defer distribution until the extent of all valid individual claims was known: see in particular [9] and [13]. David Richards J referred to the comment of Lord Neuberger of Abbotsbury MR in *In re Lehman Bros International (Europe) (No. 2) [2010] Bus LR 489* at [86]:

"I hope, indeed I would expect, that, if the administrators decide to make an application under the Trustee Acts or pursuant to the court's inherent equitable jurisdiction, in relation to dealing with beneficiaries' rights, the court will provide effective assistance, by arriving at a practical and fair outcome, while ensuring that delay and costs are kept to a minimum."

David Richards J summarised the scheme proposed for his approval as set out in a draft order and said at [21]:

"The order does not purport to vary the beneficial interests of any clients and, accordingly, provides that the exclusion of any claimant from such a distribution is without prejudice to their right to participate in any subsequent distribution from the client money trust, if they duly establish their claim, and is also without prejudice to any tracing or similar remedy that might be available to them."

Having indicated that the proposed scheme gave all potential claimants a proper opportunity to make their claims before distribution, the judge considered the scope of the inherent equitable jurisdiction in relation to trusts. At [26] he said:

"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."

53. The judge held that an In re Benjamin order was appropriate on the facts of that case and observed that it would provide protection to the administrators in respect of all possible claimants of whom they were unaware. However, the cases concerning such orders were concerned with "circumstances where it is impossible or impracticable to establish the facts one way or another"; an In re Benjamin order would not therefore provide protection in respect of known claims that had been rejected but not subjected to judicial determination. Nonetheless, David Richards J held that the inherent jurisdiction was wide enough to enable the court to give directions for distribution even though there were known claims by persons claiming to be beneficiaries. In such a case distribution would not destroy any proprietary claim but would provide protection to the trustees or administrators against claims by those claiming to be entitled: see [30] – [31].'

14. In my judgment, there is clear authority set out in these cases establishing that the Court does have jurisdiction. Mr Justice Norris was of the firm view in Re Prichard Stockbrokers that the jurisdiction is based upon paragraph 63, although I confess a slight preference to considering it under the Court's inherent jurisdiction. For current purposes, there is clear jurisdiction and I turn to consider the directions being sought.

The proposed directions

15. The proposed distribution plan effectively seeks to treat all those who claim to be beneficiaries in the same way, namely on a pari passu basis. The Plan provides detailed rules in relation to proving of claims, appeals therefrom and being able to make interim distributions as well as dealing with retentions pending resolution of any issues. Mr Mather makes the point that the proposed Plan is similar to the one approved in the case of Worldspreads limited [2015] EWHC 1719 (Ch) and MF Global. Having considered the terms of the Plan and directed a few amendments so that it is clear to the beneficiaries that all their claims are to be distributed on a pari passu basis, I will make the directions sought. As stated above the issue as to remuneration is adjourned to another hearing date.

Dated