IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY
COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
[2019] EWHC 1449 (Ch)

No. CR-2017-003691

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 2 April 2019

Before:

MR JUSTICE HENRY CARR

IN THE MATTER OF STRAND CAPITAL LIMITED
AND IN THE MATTER OF THE INVESTMENT BANK SPECIAL ADMINISTRATION REGULATIONS 2011

MS G. PETER appeared on behalf of SCL (Instructed by Foot Anstey LLP)

J U D G M E N T

MR JUSTICE HENRY CARR:

1 This is an application by the Administrators of Strand Capital Limited ("SCL"), for an order approving a Distribution Plan for the return of client assets. I have read and considered a first witness statement of Adam Henry Stevens, an insolvency partner of Smith & Williamson LLP; an explanatory statement to the Distribution Plan; the Distribution Plan itself; its schedules; and in addition I have had a very helpful skeleton argument from Ms Peters of counsel together with an oral presentation.

2 The Distribution Plan has been formulated and proposed in accordance with Chapter 3 of Part 5 of the Investment Bank Special Administration (England and Wales) Rules 2011, ("the IBSA r]Rules"). SCL is an investment bank within the meaning of s.232 of the Banking Act 2009, which is authorised by the Financial Conduct Authority ("the FCA"). SCL is in special administration under the Investment Bank Special Administration Regulations 2011 ("the IBSA Regulations"). It was put into special administration pursuant to an order of Asplin J (as she then was) dated the 17th May 2017. Prior to this, SCL operated principally as a discretionary investment fund manager, in the course of which it held client assets and client money. The Distribution Plan has been proposed as a procedure pursuant to which client assets, having an indicative aggregate value of approximately £248 million, can be returned to clients who are entitled to them.

3 The IBSA regime prescribes three special administration objectives which an Administrator is required to pursue pursuant to Regulation 10(1). The present application is concerned with the Administrator's pursuit of Objective 1, which is to ensure the return of client assets "as soon as reasonably practicable". By Regulation 10(5) "return of client assets" means, in summary, that the bank relinquishes full control over the assets for the benefit of the client to the extent of the client's beneficial entitlement or other ownership rights to those assets, having taken into account any entitlement the bank or a third party might have in respect of those assets.

4 My attention has been drawn to three previous applications of approval of distribution plans in cases involving *MF Global*, *Hume*, and *Beaufort Asset Clearing Services Limited*. I shall refer primarily to the most recent case, namely *In the Matter of Beaufort Asset Clearing Services Limited* [2018] EWHC 2287.

5 In that case, Arnold J set out the background and statutory scheme, in particular referring, as I have done, to Objective 1 of the Regulations. He then referred at [7] of the judgment to the machinery under the Regulations and the Rules, which provide for the setting of what is known as "a soft bar date", and then for the return of client assets no earlier than three months after the soft bar date. He explained at [8] that the procedure for an application of this nature is set out in Rule 146 of the Rules, and the key provision is Rule 146(5) :

> "On hearing the application under paragraph (2) the court may:
> (a) make an order approving the distribution plan with or without modification if satisfied that:
> (i) where r.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."

6 Arnold J also referred to the two previous applications for approval of distribution plans under the Regulations and Rules. In particular he referred to the judgment of David Richards J, as he then was, in the case of *MF Global UK Limited* [2012] EWHC 3789. At [22] – [24] David Richards J said:

> "22. Sub-paragraphs (iii) and (v) of the definition refer to 'any trustee, administrator, receiver or liquidator or analogous officer'. As earlier noted, under para.10(a)(vi) an event of default occurs where, first, there is an Act of Insolvency and secondly, the non-Defaulting Party serves a Default Notice on the Defaulting Party, except where the Act of Insolvency is 'the presentation of a petition for winding-up or any analogous proceeding or the appointment of a liquidator or analogous officer of the Defaulting Party'.
> "23. The issue on this application is whether the administrators are analogous officers to a liquidator. The second and related issue is whether the application made by the directors of MFG UK for an investment bank special administration order was analogous to a petition for winding up.
> "24. It is conceded by Inc that the appointment of the SIPA Trustee was an appointment of an officer analogous to a liquidator. It follows that unless there was a prior event of default, that appointment constituted an event of default in which MFG UK was the non-Defaulting Party. It is Inc's submission that the earlier appointment of the administrators under the Regulations also constituted the appointment of officers analogous to a liquidator with the result that an event of default occurred at that time, with Inc as the non-Defaulting Party for the appointment of the administrators. The urgency of the application was such that no application notice had been issued before the hearing before Morgan J. In the usual way the applicants by counsel undertook to the court to issue the application notice. In those circumstances, for the purposes of the relevant provisions of the GMRA, the application should be taken to have been made or filed at the start of the hearing. It makes no practical difference in this case because, as the parties agree, the hearing and the appointment were made before the application had been filed in New York for the appointment of the SIPA Trustee."

7 Arnold J also referred to the judgment of His Honour Judge Keyser QC sitting as a Judge of the High Court in *Hume Capital Securities Plc* [2015] EWHC 3717 at [11]:

> "None of those factors can be conclusive. If they were, the rules would say so or the approval of the court would not be required. But all are to be given proper weight. In particular, as it seems to me, if the court is satisfied that all relevant interests and persons have been given the proper opportunity to make representations on the proposals and have either specifically agreed to them or at least not objected to them and that the plan proposed by the administrators has been approved by the creditors' committee, the court is very likely to be slow to withhold approval or to substitute its own assessment of what is just and reasonable for that of the persons whose interests are affected."

8 I agree with those observations, and I intend to apply that approach to the present case. There are certain key elements of the Distribution plan which in my view make it most

desirable that it should be allowed to proceed. First, SCL's creditors' committee has unanimously approved the Distribution Plan. The approval of this court is the final requirement to be satisfied for the plan to become effective. Secondly, the administrators currently anticipate that there will be no shortfall in SCL's client assets, such that each client will have its client assets returned in full subject to its discharging costs associated with the distribution as soon as reasonably practicable after the Distribution Plan is approved. Thirdly, in reality, only a very limited number of clients will be required personally to bear their share of the costs associated with the distribution of which the majority are corporate as opposed to individuals. This is because the vast majority of clients are eligible for compensation from the Financial Services Compensation Scheme which will cover the totality of such costs. In addition, the FSCS has agreed a mechanism with the Administrators which will enable such compensation to be paid directly by the FSCS to the Administrators, meaning that client assets can be returned to eligible clients without any initial deduction. Fourthly, for the small number of clients who are not eligible to receive FSCS compensation, the administrators have endeavoured to allocate the overall costs associated with client assets on a basis which is fair, which I consider below.

9 Sixthly, despite SCL having held client assets for 2,171 ultimate beneficiaries, 2,106 of those beneficiaries are represented by eleven pension scheme providers or trustees, and it is the pension scheme provider or trustee that is SCL's direct client. Accordingly, the Administrators have only had to deal with sixty-five direct clients, and eleven clients representing pension schemes. By the 31st October 2018, which is the expiry of the soft bar date, the claims of all but one client had been agreed with the Administrators, and this application is being made in circumstances where the position of virtually all SCL's clients has already been agreed, and remains subject only to their provision of instructions for distribution in accordance with the terms of the Distribution Plan if approved. SCL's clients were notified of the date and venue for this hearing by a letter on the 5th and 6th March 2019, and the letter explained that the draft distribution plan and explanatory note were available on a link to Smith & Williamson's website.

10 As to the costs, the expenses of the special administration required by r.144(2)(e) to be identified and addressed in the plan are those which are to be paid out of client assets. They are, in summary, the expenses properly incurred by the Administrators in pursuing Objective 1. Rule 137(1) expressly requires the plan to set out how such expenses are to be allocated between client assets. This rule leaves it to the discretion of the administrator as to the method by which the Objective 1 expenses are to be allocated. In deciding whether to approve the Distribution Plan under r.146(5) it is necessary to consider whether, as a matter of principle, the way in which the Objective 1 costs are to be shared is fair.

11 In this regard, I place reliance on the fact that both the creditors' committee and the FSCS have expressly approved the approach to costs, which is based upon a modest capped sum. In particular clauses 11.1 and 15.1 of the Distribution Plan have the effect of requiring the sum of £2,250 to be charged on each account held by a client with an accepted client asset claim. I should also add that the costs that have been estimated and already incurred by the Administrators are a maximum sum, and therefore it may be that there will be some additional return. This approach is, in my view, fair.

12 Turning then to the key question that I have to consider, in accordance with r.146(3) and (4) I take account that on the 5th and 6th March 2018, pursuant to r.146(3)(a), the Administrators notified all persons who have submitted a claim under Regulation 11(1) that this application had been made to the court, and as permitted by r.297 a copy of the

Distribution Plan and explanatory statement could be reviewed on the website, and also provided a notice of the date and venue of the Distribution Plan application hearing.

13 On 6th March 2018, pursuant to r.146(3)(b), a letter was sent to a company known as CTH which may be insolvent but which nonetheless has not yet made a claim. On the 21st March 2019, also pursuant to r.146(3)(b), the same letter was sent to all of the other potential claimants, and in particular third party custodians who had received a notice under r.143. Consequently, all claimants have had well over twenty-one clear days to read the Distribution Plan and explanatory statement, and have also had notice of the hearing. The remaining potential claimants have had eleven clear days to read the Distribution Plan and explanatory statement, as well as notice of the hearing. I consider that this period of time is sufficient.

14 On 5th March 2019, pursuant to r.146(3)(d), a letter was sent to the FCA enclosing a copy of the Distribution Plan and explanatory statement, giving the FCA notice of the hearing. On 28th March 2019 the FCA confirmed that it did not object to the terms of the Distribution Plan and did not intend to be represented at the hearing.

15 No objections have been raised by clients to the distribution plan. I should however mention two emails which have been drawn to my attention by Ms Peters where a request has been made for cash to be transferred. The position of the Administrators, which I regard as fair and reasonable, is that it is not necessary for them to return cash which would be wasteful of costs were they to try to do so. It is sufficient that they relinquish control.

16 In summary, I consider that the Distribution Plan facilitates a fair, reasonable and efficient means of returning client assets to SCL's clients in a manner which will result in their return as soon as is reasonably practicable, and satisfies the requirements of the IBSA Regulations and the IBSA Rules. , I consider that the allocation of Objective 1 costs is fair. Accordingly, I approve the Distribution Plan in the form annexed to the draft order, and I intend to make an order in terms of that draft.

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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge