Neutral Citation Number: [2024] EWHC 3050 (Ch)

Case No: CR-2023-001772

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

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

Date: 28 November 2024

Before :

MR JUSTICE RAJAH

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IN THE MATTER OF WEALTHTEK LLP (IN SPECIAL ADMINISTRATION)

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

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Thomas Fletcher and **Paul Fradley** (instructed by **Norton Rose Fulbright LLP**) for the **Applicant**

Hearing date: 14 November 2024

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APPROVED JUDGMENT

Mr Justice Rajah :

Introduction

1. I handed down judgment on 4 October 2024 in this case; *Re WealthTek LLP* [2024] EWHC 2520 ("**the 4 October judgment**"). This is a further judgment following a consequentials hearing dealing with issues arising from that judgment. Reference should be made to the 4 October judgment for the background.

Recap

2. By way of recapitulation:

    a. WealthTek LLP ("**WealthTek**") is an investment bank. On 4 April 2023, joint interim managers were appointed by the Court and on 6 April 2023 an investment bank special administration order was made by the Court under the Investment Bank Special Administration Regulations 2011 ("**the IBSA Regulations**"). There were significant shortfalls in the assets and money which should have been held by WealthTek for its clients when it went into special administration. The Financial Conduct Authority ("**the FCA**") is conducting a regulatory and criminal investigation into WealthTek and its principal member, Mr John Dance.

    b. Shane Crooks, Mark Shaw and Emma Sayers of BDO LLP applied in their capacity as the joint special administrators of WealthTek LLP ("**the Administrators**") for approval by the Court of a distribution plan in respect of approximately £148m of stocks and shares or other client assets ("**Client Assets**") held for approximately 1320 clients by WealthTek ("**the Distribution Plan**"). 98% of those clients are individual retail clients with an average age of 68. There is a shortfall of approximately £70.6m in these holdings between what is there and what should be there. There is also cash of approximately £2.7m held on accounts for clients ("**Client Money**"). There is a shortfall of approximately £10m in this client money between what is under the control of the Administrators and what should be there. There is a proposed retention of £18.4 million for the costs of returning Client Assets and a retention of just under 2% of Client Money for the costs relating to the return of client money. The proposed retention includes a proposed reserve of £7,168,218 ("**the Potential Litigation Reserve**") representing the estimated costs of potential litigation to recover some of the shortfall in assets from third parties. These costs amount to £23000 per client.

    c. The Financial Services Compensation Scheme Ltd ("**the FSCS**") believes that almost all of the clients will be eligible for compensation under the scheme it operates ("**the FSCS scheme**") up to a cap of £85000. It estimates its exposure at approximately £40m in meeting all of the proposed £18.4m of costs of administering and returning Client Money and Client Assets and approximately £22m in respect of the shortfalls in assets available to be returned. Nevertheless some 21% of clients have shortfalls so large that with their share of the costs of returning assets, the cap of £85000 will be exceeded and they will be out of pocket, some significantly so. The FSCS calculates that 4% of clients have

shortfalls between £62000 and £85000 while 17% have shortfalls in excess of £85000. These clients will see the amount they receive (by the return of Client Assets and FSCS compensation) increase by up to £9,500 per client if the Potential Litigation Reserve is not created. These clients have not been consulted on or asked to agree to the Potential Litigation Reserve.

d. Under the IBSA Regulations a special administrator has three special administration objectives. Objective 1 is "*to ensure the return of client assets as soon as is reasonably practicable*". Objective 2 is to ensure timely engagement with market infrastructure bodies and the Bank of England, HM Treasury, the FCA and the Prudential Regulatory Authority. Objective 3 is to either rescue the investment bank as a going concern or wind it up in the best interests of its creditors.

e. The administrators costs of Objective 1 only are to be paid from Client Assets and Client Money. The Administrators costs of Objectives 2 and 3, and indeed all other costs, are to be borne from WealthTek's own assets. WealthTek has no meaningful assets left.

f. The Distribution Plan was only concerned with Objective 1.

g. At the first hearing of the application to approve the Distribution Plan I refused to do so because I considered the approach I was being invited to take to "wave it through" was wrong. I approved the Distribution Plan on 23 July 2024, except in relation to the Potential Litigation Reserve. I received written submissions after the hearing on 23 July 2024 on whether the Court has jurisdiction to and should approve the Potential Litigation Reserve. I did not approve the Potential Litigation Reserve. The 4 October judgment sets out my reasons why the original approach I was invited to take was wrong, and my reasons for approving the Distribution Plan but not the Potential Litigation Reserve after the second hearing.

h. Paragraphs 49 to 54 of the 4 October 2024 judgment said:

"49. The Administrators contend that the Potential Litigation Reserve is necessary to achieve Objective 1. "Client Assets" they submit include not just assets under their control, but also assets which should have been held by the investment bank at the date of administration. I think the right analysis is that in the situation that there are missing assets from a client's account there will likely be a claim against third parties which is a chose in action and is itself an asset. If it vests in the trustee in that capacity it is held for the benefit of the relevant client. The chose in action represents (and is equivalent to) the missing assets which the institution had undertaken to hold for the client and is therefore itself a client asset for the purposes of Objective 1; see Regulation 10B(13). Objective 1 requires the Administrators to return that chose in action to the client "as soon as is reasonably practicable". The starting point must be that the return of the chose in action "as soon as is reasonably practicable" is to take the steps necessary to empower the client to bring a claim in the client's own name against the third parties. This may not require any action by the

Administrators - in a bare trust the beneficial owner of the trust fund will have a concurrent right with the trustee to bring certain types of claim in relation to the trust property, joining the trustee as defendant if necessary to make good the beneficiary's title. Each beneficiary can choose whether to commit further monies in the hope of obtaining a recovery. Those who do can, if they wish, act together to bring a group claim, perhaps with the benefit of litigation funding and ATE insurance.

50. That said, in appropriate circumstances, a fair and reasonable plan for the return of client assets could include a plan for the chose in action to be converted into money or assets by the pursuit of proceedings by the administrator, or by the trustee which is controlled by the administrator. This may be because for practical, procedural or legal reasons if a claim is to be brought, it has to be brought by the administrator or trustee.

51. The first difficulty I have is that the Administrators have proposed a Potential Litigation Reserve but provided the Court with no information about what claims might be brought and against whom and as if it is their entitlement to bring proceedings for the benefit of some clients at the expense of all clients. Without information as to what claims are being contemplated it is impossible to assess whether the Potential Litigation comprise of claims which must be brought by the Administrators rather than by the clients. A bare trust is one in which the trustee holds the trust fund for a beneficiary absolutely. The beneficiary is the beneficial owner of the trust fund and has the right to wind up the trust and call for the transfer of the trust fund to the beneficiary. The trustee has no discretion as to whether to retain or return the trust fund if it is demanded - it is the trustee's duty to return the trust fund. As a matter of trust law, the trustee of a bare trust is simply not entitled to arrogate the right to bring proceedings to himself against the wishes of the beneficiary, or to refuse to distribute the trust fund to the beneficiary because the trustee wishes to bring such proceedings against the wishes of the beneficiary. Imposing a retention in the Distribution Plan of over £7 million for the Potential Litigation, as the Administrators propose, overrides the clients' rights to terminate the bare trust in respect of their money and to require its return. The overriding of clients' rights is even more egregious if it is proposed that there should be a retention of a client's funds or compensation for Potential Litigation from which that client will not benefit. As discussed above in relation to the reconciliation exercise, I accept that there is jurisdiction to authorise a Distribution Plan which does not give effect to the strict rights of the clients, but it is subject to the safeguard of requiring the Court's approval. That approval will not be given unless the court is satisfied that what is proposed is fair and reasonable.

52. There has been no consultation with the clients beyond the Committee on the Potential Litigation and the Potential Litigation Reserve. The Committee comprises 4 clients (out of 1320) and the FSCS. I have not been told whether any of the 4 clients on the Committee are in the 21% who will receive a smaller distribution and compensation package if the Potential Litigation Reserve is made, but it would make little difference if one or more were. Each client will have their own view depending on their circumstances as to whether or not they wish litigation against third parties to be explored by the Administrators for their benefit and their funds reserved for the costs of that exercise. It may take years to prosecute the Potential Litigation and obtain a recovery. Some of the 21% of clients who have not been made whole may not wish to have their

> funds retained for that purpose and may prefer to forego any right of recovery for a greater distribution now. Some of these clients may be more concerned about their present financial position and their age and may not wish to wager some of the financial pot for a future return when they need money now, or where the future return might not be received while they are still alive. I have been given no explanation as to why it is fair and reasonable to impose on these clients a retention of their clients' funds against their wishes.
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> 53. In the absence of information as to the Potential Litigation, it is not possible to say that there is some compelling legal or procedural reason why the litigation should be brought by the Administrators rather than by the clients as a class. Even if that were so, I doubt that it would be fair and reasonable to force any individual client who would rather have an enhanced compensation and distribution package now, and to forego the prospect of future recovery against a third party, to nevertheless "pay" a share of the Potential Litigation costs. These are separate trusts for each client. There are some decisions which have to be made on behalf of all clients, such as whether costs should be apportioned *pro rata* or *per capita* or whether the reconciliation exercise should be approved. There are winners and losers on those issues and a fair way of approaching those issues is to have regard to whether the unfairness to the losers can be justified by having regard to what is best for the clients as a whole. However, a decision whether there should be a Potential Litigation Reserve does not appear (at least on the sparse information I have) to be a decision which must be made on behalf of all clients. I do not presently see why those of the affected 21% of clients who did not wish to participate could not simply be excised from the arrangement. I do not see that this is an issue on which the interests of the minority may have to give way to the interests of the class as a whole. That is also a reason why the views of the Committee that the Potential Litigation Reserve is in the interests of clients generally does not carry much weight with me.
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> 54. I am therefore not satisfied that the proposals for the retention of the Potential Litigation Reserve have been informed by the right principles. In its current form, whereby the Potential Litigation Reserve would be held indefinitely by the Administrators, with no timetable for reporting to clients or the Court on the Potential Litigation or obtaining the periodic consent of the 21% who are financially affected by the Potential Litigation Reserve to the continued retention of their funds or compensation, the proposals seems to me to be positively contrary to Objective 1. I am not satisfied that the Distribution Plan would be fair and reasonable if it included the Potential Litigation Reserve. I will not approve that element of the Plan in its current form."

Issues for consequentials hearing

3. The consequentials hearing was convened to consider three issues set out in a letter from Norton Rose Fulbright to the Court dated 30 October 2024 ("*the NRF Letter*").
    a. Firstly, whether the Administrators should seek to put before the Court an updated proposal in relation to the Potential Litigation Reserve in light of the comments made in the 4 October judgment ("**Issue 1**")
    b. Secondly, if the answer was no whether some sort of declaratory relief should be made to protect the Administrators ("**Issue 2**").

c. Thirdly, whether costs which had already been incurred in relation to investigations and potential litigation should "*continue to be included within the costs contribution to be paid under the Distribution Plan as approved*" ("**Issue 3**").

4. Two further issues have since been raised.
   a. Firstly, the costs of returning client assets are now likely to be higher than previously estimated and the Administrators would like a costs reserve to cover the increase ("**Issue 4**").
   b. Secondly, whether the costs reserve should include some £900,000 as estimated future costs of the Administrators providing assistance to the FCA ("**Issue 5**").

Duty to the court

5. It seems to me to be obvious that the Administrators, who are officers of the court, have a duty of candour when they put forward a Distribution Plan which will affect and bind 1320 clients who are not parties or represented before the court. There is the same duty of candour on those who put forward a scheme of arrangement in relation to a company; see *Indah Kiat International Finance Company BV* [2016] EWHC 246 (Ch) per Snowden J at paragraph 40. They have a duty to make full and frank disclosure of all matters which may be relevant to any decision the court is asked to make.

Developments in relation to the FSCS

6. The Financial Services Compensation Scheme ("**the FSCS**") is the UK's statutory scheme of last resort for the clients of failed financial services firms and was set up by the Financial Services Authority (now known as the FCA) under section 213 of the Financial Services and Markets Act 2000 ("**FSMA**"). The compensation scheme established under s. 213 FSMA provides cover where a firm authorised by the FCA to carry on certain regulated activities is unable or likely to be unable to satisfy a claim made against it. The FSCS is obliged to administer this compensation scheme pursuant to rules made by the FCA under s.213(1) of FSMA, which are set out in the Compensation Sourcebook within the FCA Handbook ("**COMP**").

7. The FSCS expects to pay compensation to all but 5 clients (out of 1320) who have suffered loss. The FSCS estimated its exposure for costs of returning assets and client shortfall at £40m although this will reduce if the Potential Litigation Reserve remains unapproved. Its significant interest in the costs incurred and in making recoveries is reflected by its role as one of the five members of the Committee.

8. It now appears[1] that on 2 November 2023 the FSCS made a Determination in accordance with COMP 7.3.8. The effect of that Determination is that on payment of any FSCS compensation to a WealthTek client, the FSCS is immediately subrogated to all of each client's rights of recovery and claim against WealthTek and/or any third party (COMP 7.3.8 (3) and (5)). Under COMP 7.4, on becoming subrogated to a client's rights the FSCS is obligated to pursue all (and only) recoveries that meet a certain threshold as to their desirability. That threshold is that the FSCS considers that the recoveries are "likely

[1] The 2 page Determination was part of a voluminous exhibit to Crooks 2, but was wrongly described at paragraph 83 of Crooks 2 as an instrument relating to Client Asset Claim Forms. The Court was not referred to the Determination at earlier hearings.

to be both reasonably possible and cost effective to pursue" ("**the COMP 7.4 threshold")**. If it is satisfied proceedings should not be brought because the COMP 7.4 threshold is not met it is under an obligation pursuant to COMP 7.4.2 to assign the subrogated right back to the relevant client if that is requested.

9. COMP 7.6 provides that if the FSCS makes recoveries it may deduct part or all of its reasonable costs of recovery and distribution and must account to the clients for any recoveries above the compensation paid to them (COMP 7.6.2(1)). It is clear from COMP 7.4 and 7.6.1 that the recoveries the FSCS is obligated to pursue are to be pursued in the first instance at the expense of the FSCS, and not the client, and it is only if recoveries are made that it may deduct such costs from the recoveries. Moreover, (in summary and at the risk of oversimplifying the mechanics of COMP 7.6.2 (1) and (2)) apart from its costs of recovery, any balance recovered must be paid to compensate the client for uncompensated shortfall, before the FSCS recoups any compensation it has paid.

10. Mr Fletcher, who appeared at this hearing on behalf of the Administrators (but had not at previous hearings) agreed with this analysis of COMP 7. The FSCS is not a party to these proceedings and is not represented in it. Mr Enright of the FSCS who has prepared evidence filed by the Administrators in these proceedings, was present in court. At an early stage of the hearing I invited him to indicate if I or Mr Fletcher said anything which did not accord with his understanding of the FSCS scheme. He did not. I invited the FSCS to make submissions about the operation of the scheme, and my understanding of it as set out above, and I received a letter from the FSCS on Monday 18 November 2024 ("**the FSCS letter**"). I will refer to the points made in the FSCS letter as I go through the issues, but at this stage it will suffice to state that the FSCS did not disagree with the analysis set out above save to observe in relation to its COMP 7.4 obligations that the FSCS is also under a duty pursuant s.224ZA FSMA to ensure "*efficiency and effectiveness*" in discharging its functions.

11. The key elements of the scheme for recoveries in COMP 7 are therefore that (1) clients who have suffered loss are to be paid compensation (2) the FSCS can subrogate to their rights against the defaulting firm and third parties in respect of the clients' loss (3) if it does so it has a duty to bring appropriate proceedings if they meet the COMP 7.4 threshold to recover for itself and the clients (4) it is expected to do so at its own risk and expense (5) if successful it can recoup the costs from the recoveries it has made (6) it must apply any balance to compensate clients who have suffered uncompensated loss (7) only then may it recoup the compensation it has paid to clients and (8) if the COMP 7.4 threshold is not met the FSCS must assign back the subrogated rights to the relevant client if that is requested.

Issue 1 – a revised proposal for the Potential Litigation Reserve to be paid from Client Assets?

12. Once the FSCS subrogates to the rights of a WealthTek client, the client has no more interest in litigation against WealthTek or third parties. The client's rights are then those provided for by COMP 7. It is the FSCS which has the interest in future litigation, pursuant to its obligation pursuant to COMP 7.4 to pursue <u>all</u> and only recoveries that it considers meet the COMP 7.4 threshold, and subject to the requirements of COMP 7 in

relation to any recoveries. The starting point seems to me to be that if there are costs to be incurred in future litigation, they should be costs incurred at the expense of the FSCS.

13. It now appears that the Distribution Plan for WealthTek which contained provision for the costs of future litigation to be paid from Client Assets involved a costs shift. In respect of the 21% of clients who had shortfalls so large that they would not be compensated in full if the Potential Litigation Reserve had been created, the effect of approval of the Potential Litigation Reserve would have been to shift (a) the risk of litigation and (b) the upfront costs of litigation from the FSCS to the clients.

14. Such a costs shift is contrary to the scheme for recoveries envisaged by COMP 7. I discussed in paragraphs 49 to 54 of the 4 October judgment (quoted above) whether it is fair and reasonable to force any individual client who would rather have an enhanced compensation and distribution package now, and to forego the prospect of future recovery against a third party, to nevertheless "pay" a share of the Potential Litigation costs. Under the COMP 7 scheme for recoveries they should not have to pay and they should not have to choose between compensation now or future recovery.

15. Such a costs shift is not required by the IBSA Regulations and Rules. These were brought in to address problems encountered following the collapse of Lehman Brothers in 2008 (see the 4 October judgment at paragraphs 19 to 23). The IBSA Regulations and Rules are concerned with reuniting the customers of a failed bank with the money and investments in their accounts as speedily as possible, and overcoming some of the technical obstacles to this happening by reason of the fact that their assets and money are held on trust for them by the bank. Objective 1 is "*to ensure the return of client assets as soon as is reasonably practicable*". It is only the costs of giving effect to Objective 1 that may be paid from Client Assets and Client Money. All other costs of the administration must be borne by the company's assets. The IBSA Regulations and Rules make no reference to, and do not in my view require, the Administrators to pursue claims against third parties on behalf of the clients. The Administrators are being made administrators of a trustee, with sufficient powers to return assets belonging to the clients which are under the trustee's control. There may be proprietary claims to follow or trace the missing assets. There may be personal claims for money from a wrongdoer in connection with the loss of assets. As I set out at paragraph 49 of the judgment (quoted above) the Client Assets to be returned as soon as reasonably possible include the choses in action which represent any claims which could be brought on the clients' behalf by the trustee. A substantial and sustained retention of client funds as a reserve for litigating such claims without the clients' consent is in my judgment contrary to Objective 1.

16. Both the Administrators and the FSCS say that the Administrators are not just better placed than the FSCS to investigate the affairs of the company and the conduct of its directors, but are under a statutory duty to do so, and may use, for these purposes, the investigatory powers under sections 234-237 of the Insolvency Act 1986. The FSCS says that the Administrators may be able to bring claims that the FSCS cannot bring, notwithstanding its subrogation to the rights of clients. It points in particular to proceedings under the Insolvency Act 1986 such as pursuant to s.212 (summary remedy against delinquent directors etc), s.213 (fraudulent trading), s.214 (wrongful trading), s.238 (transactions at an undervalue) and s.239 (preferences).

17. The costs of such investigations are ordinarily borne by the company's assets, not assets which do not belong to it but are held on trust by it. Similarly the costs of proceedings under the Insolvency Act, which are directed at restoration of the company's assets (not the property it holds on trust) are ordinarily borne by the company's assets (and not the property it holds on trust). It is only the costs of Objective 1 (return of assets) which may be taken from those trust assets. What is proposed is therefore a costs shift from the house estate to the client estate.

18. The FSCS points out that the Administrators can bring proceedings, if funded from compensation, which do not meet the COMP 7.4 threshold. I do not regard this as an advantage to clients or a justification for the costs shift. Any proceedings which are brought by the Administrators on behalf of the clients ought to be proceedings which have a reasonable prospect of success and are cost effective. I do not see any material difference between that proposition and the COMP 7.4 threshold.

19. It is the FSCS' obligation after subrogation to pursue all recoveries that it considers are likely to be both reasonably possible and cost effective to pursue. It can do so in its own name or in the name of the client, or both; COMP 7.3.8(4). It may well be that the FSCS concludes, pursuant to its COMP 7.4 obligation, that litigation should be investigated and brought by the Administrators. If so, it should be funded by the FSCS and not by the clients or as part of compensation paid to clients. The FSCS letter accepts that it can fund such costs otherwise than from compensation but says that it does not usually do this. The FSCS letter says that it does not have a specific mandate in COMP 7 to incur money on investigating claims – only a mandate to bring claims if they meet the COMP 7.4 threshold. This is an anxiety the FSCS will have to resolve for itself. For my part I would have thought the FSCS' duty pursuant to s.224ZA FSMA to ensure "*efficiency and effectiveness*" in discharging its COMP 7.4 function requires the FSCS to take efficient and effective steps and investigations to establish whether there are recoveries which meet the COMP 7.4 threshold which it should pursue.

20. I have already declined to authorise the Potential Litigation Reserve. I do not authorise the Administrators to incur further costs in putting before the Court an updated proposal in relation to the Potential Litigation Reserve to be paid from Client Assets. The proposal that a Potential Litigation Reserve should be included in the Distribution Plan is now at end.

Breach of duty to the court

21. There was no substantive discussion of COMP 7, no explanation of how COMP 7.3.8 operated and no mention of COMP 7.4, at the hearings and in the submissions received before the 4 October 2024 judgment. At the time I wrote my judgment I assumed that the FSCS had the right to subrogate in respect of the compensation it had paid, but the 21% of clients who were not fully compensated continued to have rights in respect of their shortfall. This was consistent with the evidence and skeletons filed which did not make clear how COMP 7.3.8 operated. COMP 7 was not in the authorities bundles for any of the hearings until the consequentials hearing.

22. The FSCS scheme, the wholesale subrogation of the FSCS to all the rights of virtually all WealthTek clients, the obligations to pursue recoveries at FSCS cost, and the

favourable manner to clients in which recoveries are to be distributed by the FSCS, were plainly relevant to whether a Potential Litigation Reserve of over £7 million should be created out of Client Assets or not. When the FSCS has an obligation to pursue recoveries on terms which are more advantageous to clients, why would it be in those clients' interests for the Administrators to bring litigation?

23. This should have been taken into account in the formulation of the Distribution Plan. It was not. It should have been drawn to the Court's attention when it was asked to approve the Distribution Plan as fair and reasonable at the first hearing, and then again at the second hearing. It was not. It should have been drawn to the Court's attention in the written submissions made specifically as to whether the Potential Litigation Reserve should be approved. It was not. The written submissions were misleading and wrong. It has only emerged because I asked to be addressed on COMP 7.3, COMP 7.4 and COMP 7.6 at the consequentials hearing because of something said in a Norton Rose Fulbright letter to me dated 3 October 2024 and my consequent own researches. Even then, it needed me to point out to the Administrators' team at that hearing the significance of the FSCS scheme to the decision to be made in relation to the Potential Litigation Reserve.

24. Notwithstanding the array of insolvency and legal talent involved in this case, it is clear that something has gone seriously wrong. At the consequentials hearing I could not be given any explanation as to how this had come about.

25. In correspondence since this judgment was handed down in draft subject to the usual embargo, and at a hearing in private to consider the embargoed judgment, the Administrators and their legal team have accepted completely that they have made a serious mistake in failing to appreciate the significance of COMP 7.3.8 and COMP 7.4 for which they accept collective responsibility. They have accepted that this is information which could and should have been put by them before the court, but was not. I have been given a number of explanations, none of which amount to a reasonable excuse. I am told a *post mortem* is on foot so that this never happens again. The Administrators and their legal team have apologised wholeheartedly. I have been assured that no dishonesty or deliberate non-disclosure was involved on the part of the Administrators, Norton Rose Fulbright or counsel led by Mr Bayfield KC (I accept those assurances). It is not for me to decide where amongst the Administrators and their legal team fault lies (or does not lie) for this serious mistake and I do not do so.

26. I will however say this. There is clearly material relevant to the decisions the Court was being asked to make which could, and should, have been put before the Court by the Administrators and their legal team. The Administrators, Norton Rose Fulbright and Mr Bayfield KC on behalf of the counsel team accept that it was not. That is not just a serious mistake by them. It was a breach of their individual and collective duty to the Court. The Court relies on those who prepare and present a Distribution Plan to it, to have rigorously examined the Plan, identified all the issues thrown up and to have either resolved them or drawn them to the Court's attention. It should not be for the judge to identify a serious problem and to draw it to their attention.

27. I express the Court's profound disappointment at this breach of duty.

Issue 2: Declarations/Directions consequential on no Potential Litigation Reserve

First requested direction

28. I will make clear that the Administrators are under no obligation as part of achieving Objective 1 to take any further steps in relation to making recoveries unless they are placed in funds to do so. If the FSCS wishes the Administrators to bring claims it will have to fund them.

Second requested direction

29. At paragraph 49 of the Judgment I said:

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

30. On the basis of what I said in paragraph 49, the Administrators ask for a direction that they have nothing further to do in respect of returning the assets. They say an express assignment "*would clearly be costly, time-consuming and potentially unnecessary given what was said in the Judgment*".

31. This is not a direction which flows from the judgment. It is contrary to it. The Administrators have a duty to return the assets, including the choses in action representing claims, to the person entitled to them. I am in no position to decide whether anything further needs to be done to give effect to that, and I did not say otherwise in paragraph 49 as the emphasised words make clear. The Administrators have chosen not to put any information about their investigations, the claims they were considering, by whom, against whom, on behalf of whom or what for, before the court. I simply do not know what needs to be done and I will not, therefore direct that nothing needs to be done.

32. Any judicial sympathy for the Administrators on the application for this direction evaporated when it became clear that there are only 5 clients who are affected because the FSCS has subrogated to the rights of all other clients. Mr Fletcher readily accepted that the FSCS automatic subrogation under COMP7.3.8(4) suggests that nothing further needs to be done on behalf of any clients in respect of which the FSCS has subrogated. Which leaves just 5 clients out of 1320. I do not consider that an express assignment in respect of 5 clients should (if handled with a modicum of common sense) be costly or time-consuming, or justified the application for this direction. It is for the Administrators (who have the benefit of advice from Norton Rose Fulbright and specialist counsel) to decide if it is unnecessary.

Issue 3: Incurred Investigation Costs

33. The Administrators have incurred costs of £1,625,460.08 certain investigations-related work ("**Incurred Investigations Costs**"). They ask whether these costs should "*should continue to be included within the costs contribution to be paid as part of the Distribution plan, in full or in part*"; see the NRF letter. I directed that in relation to this issue "*the evidence will need to identify, quantify and explain the investigations and recovery related costs in respect of which the Joint Administrators want clarification*"; my clerk's email of 6 November 2024.

34. This sum of £1,625,460.08 was included in the Potential Litigation Reserve (I was told at the hearing - it is not in the evidence) – it is not included in the c. £11 million costs for the return of assets under the control of the Administrators ("**the Objective 1 costs**"). As such it has been disallowed pursuant to the 4 October judgment and is not part of the costs which may be paid from client assets pursuant to the Distribution Plan. It is not "*included within the costs contribution to be paid as part of the Distribution Plan*". It is not a question of confirming that these costs may remain in the costs contribution which was approved. It is a question of whether these costs should now be added to the costs contribution which was approved in the Distribution Plan. That is the starting point.

35. Mr Crooks' ninth witness statement was filed in purported compliance with my direction to *"identify, quantify and explain"* the costs which I was being asked to approve "*in full or in part"*. It states the amount of costs incurred in relation to potential litigation amounts to £1,625,460.08 and it breaks down the periods in which costs were incurred (essentially into pre and post 6 April 2024). Mr Crooks said that all these costs were allocated to a future recoveries workstream but that this was indicative only and an approximation. He said that different categories of costs tend to overlap and "bleed into" into each other. He said that some of this work, although carried out with future litigation in mind, was necessary for the purposes of the return of assets.

36. No schedules of work done were provided. No breakdown of what specific workstreams make up the £1,625,460.08 or how much is attributed to each workstream. There is more specific information in a costs schedule for summary assessment of costs in the sum of £50,000 than there is this witness statement seeking approval of £1,625,460.08. I do not consider this witness statement complied with my direction. As I said at the consequentials hearing to Mr Fletcher this appeared to be a deliberate tactical decision not to provide a detailed breakdown. Although the NRF letter envisaged that I might not allow all the costs, but only part, the decision to simply state a headline figure inferred an all or nothing strategy. That is not consistent with the Administrators' duty to put all relevant material before the court in respect of a decision it is asked to make. It is also a high risk strategy. Paragraph 48 of Mr Crooks' ninth witness statement said that details of the nature of the enquiries and investigations were not being disclosed for reasons of confidentiality and so as not to prejudice potential litigation against third parties. A breakdown of costs could have been worded in a way which did not disclose any confidential information and in any event the Court has a range of powers including reporting restrictions and sitting in private which could have been deployed to protect confidentiality if there was anything truly confidential. No request was made for such orders.

37. I accept that in principle special administrators should make investigations when they are appointed, to work out what client assets there are, what client assets should be there, and

what has become of them. They can do some work which identifies whether there are claims to be made on behalf of clients, against whom and by whom, and how such claims should be funded (such claims as I have said are capable of being Client Assets within Objective 1 which need to be returned). The costs of such work are in principle costs incurred in pursuing Objective 1 and can properly be paid from Client Assets. In light of the 4 October judgment and this judgment special administrators should not assume that they will be authorised to bring proceedings at the expense of clients. This is particularly so if it is likely that there will be substantial subrogation of rights to the FSCS. In a case where the FSCS is likely to subrogate to the rights of a substantial number of clients, the FSCS ought to be approached to agree that it will bear the costs properly categorised as costs incurred in relation to recoveries. The products of their inquiries and investigations ought to be passed on to the clients or the FSCS if it has subrogated to the rights of the clients, unless there is a very good reason not to.

38. In this case these steps have not happened but I would have been minded to apportion costs between costs relating to the return of assets and claims related costs before considering whether relief should be granted to the Administrators in respect of the costs which ought not to have been incurred. Also, the FSCS has supported the work and costs incurred by the Administrators and, it might consider it appropriate to pay the claim related costs if it chooses to fund the Administrators to bring proceedings for recoveries pursuant to its COMP 7 obligations.

39. The failure to provide a detailed breakdown, or indeed any breakdown, meant that I could not make a summary apportionment. When it became clear that I was not minded to approve the headline figure of £1,625,460.08 expenditure, Mr Fletcher said that a breakdown could be provided in short order (all considerations of confidentiality apparently having disappeared). This was followed up after the hearing with an email from Norton Rose Fulbright offering to provide a further breakdown (no mention being made of any need for confidentiality) and that the costs of that exercise would not be charged to the client estate or the company estate. I came very close to refusing to accept any further evidence. The consequentials hearing was the hearing to deal with the issue of what if any part of the Incurred Investigations Costs were to be included in the Distribution Plan. The Administrators were expected to make full and frank disclosure when they presented the issue to the Court, not test the water on their most self-serving case. Nevertheless, and some may say with too much leniency, I allowed Mr Crooks to file his tenth witness statement which runs to some 21 pages and provides a more detailed breakdown. That witness statement states, at my request, that the Administrators, and all who act for them, are aware of their duty to be entirely candid and make full and frank disclosure to the Court. I observe that there is nothing confidential in the contents of the tenth witness statement.

40. The FSCS letter says that the FSCS were not aware that the Incurred Investigations Costs amounted to £1.625 million, although Mr Crooks says this must be read in light of the fact that some of these costs have been approved by the Committee.

41. Mr Crooks' tenth witness statement set out a breakdown of the costs incurred in a table.

		Funds Flow	s236	Assistance to the FCA	Potential claims	Statutory	VAT	Total
To 5 April 2024	Joint Administrators	516,496.23	14,469.35	22,677.97	40,506.62	2,625.82	119,355.20	716,131.19
	Legal	-	128,159.75	-	84,216.83	-	42,475.32	254,851.90
6 April – 23 July 2024	Joint Administrators	12,262.22	108,638.01	97.16	2,982.70	97.16	24,815.45	148,892.69
	Legal	-	140,648.80	-	-	-	28,129.76	168,778.56
24 July 2024 – 5 October 2024	Joint Administrators	2,007.39	126,402.50	6,170.33	1,680.49	-	27,252.14	163,512.85
	Legal	-	87,668.25	56,742.50	-	-	28,882.15	173,292.90
Total		530,765.83	605,986.66	85,687.96	129,386.64	2,722.98	270,910.01	1,625,460.08

Funds flow

42. The first category of costs sought to be recategorized as Objective 1 costs are the costs attributable to a "funds flow" analysis which was carried out. Although this will prove valuable and useful to those bringing future litigation the Administrators say, and I accept, that this was necessary to conduct the Client Asset reconciliation exercise which is part of the Objective 1 costs. I will include the identified costs under this head in the Distribution Plan.

S. 236 applications

43. The largest category of costs (£605,966.66 plus VAT) relate to applications under section 236 Insolvency Act to obtain bank statements from three bank accounts which had received funds from WealthTek accounts ("**the s. 236 applications**"). Orders were made by ICC Judge Greenwood on 1 July 2024 and bank statements were received on 5, 11 and 17 July 2024. The costs of those applications were ordered to be paid as an expense of the special administration by ICC Judge Greenwood. I observe that the orders do not direct that those costs should be paid from client assets rather than company assets and leaves the incidence of those costs as between the client estate and the house estate at large.

44. The Administrators say that this work is (in hindsight) mixed Objective 1 costs and future litigation costs. They say it helped verify the funds flow analysis by "joining the dots" but was also advancing potential future litigation by following where the missing assets and money had gone. They propose that such costs should be recoverable up to 23 July 2024 (when the Court raised concerns in relation to the costs of potential litigation-related work), on the basis that, up to that point, the Joint Administrators had pursued this strategy in good faith, in the belief that it was in the interests of clients and that these were properly recoverable costs. The costs thereafter they propose should not be recoverable – this is roughly one third of the costs incurred under this head.

45. The justification for the proposed apportionment seems to me to be based on the submission that that the Court should be slow to deprive an officeholder of a right to recoup expenses incurred in the conduct of the insolvency process. I deal with that submission later in the judgment. It does not help with an apportionment of how much

should properly be regarded as Objective 1 costs before addressing that submission in relation to the rest.

46. I am not satisfied that any of these costs are properly attributable to Objective 1 costs. The funds flow analysis was largely done and dusted by April 2024. The Distribution Plan had been prepared, and I had already held the first hearing seeking its approval on 7 June 2024, before ICC Judge Greenwood made his order on 1 July 2024, and before the bank statements were received later that month. The costs incurred in relation to the funds flow analysis in "joining the dots" or otherwise after the bank statements were received appears from the table to be minimal. These points on timing are not considered or explained in Mr Crooks' tenth witness statement, notwithstanding the duty to be candid. The time has come to draw a line under the issue of the Incurred Investigation Costs. I will treat all the costs of the section 236 applications as costs relating to potential litigation and not Objective 1 costs.

FCA

47. The Administrators identify £85,687.96 as costs of assisting the FCA. I deal with those costs later as part of the bigger question of how costs of assisting FCA investigations should be borne.

Potential claims

48. The Administrators say the work done in identifying potential claims has been limited, preliminary and high-level in nature, and that much of it was incurred around the time of the first clients' and creditors' meetings in June 2023. It mainly consisted of correspondence with individuals who wanted to provide the Administrators with information relevant to what claims might lie and against whom. It was then substantially revisited in March 2024. The Administrators propose that these costs should not be included, but it seems to me the initial work, immediately upon taking up their appointment, to work out how the land lay in relation to Client Assets and Client Money, falls within the investigations I described in paragraph 35 above. I will allow the costs incurred in 2023, which I am told are £79,179.99, under this head.

Statutory

49. This relates to the Administrators' statutory reporting on the conduct of WeathTek's officers and represents an apportionment between the client and house estates. The Administrators acknowledge that these are not Objective 1 costs.

Excusal of officeholder/trustee

50. That leaves Mr Fletcher's submission that the Court should not act to deprive an officeholder of a right to recoup expenses incurred in the conduct of the insolvency process. He relies on Re Capitol Films [2010] EWHC 3223 (Ch) where Richard Snowden QC (sitting as a Deputy High Court judge) considered at [101] that depriving an officeholder of a right of recoupment (in the context of litigation pursued by them as officeholders) included: "*cases in which the office-holder has been guilty of misconduct…; where he has made a "blunder" or serious mistake…; or where it would be unjust for other reasons to permit such recoupment*…"

51. The Administrators are officeholders in relation to WealthTek. As such, the Court has the jurisdiction over them envisaged in *Re Capitol Films*. They have not been deprived of recoupment from WealthTek's assets. It is just that WealthTek no longer has any assets. This is why they wish to take fees out of Client Assets which WealthTek does not own, but holds on trust. Their only authority to do so is to be found in the IBSA Regulations that the costs of returning Client Assets in accordance with Objective 1 are costs which are to be borne by the Client Assets. All other costs of the administration are to be borne from WealthTek's assets. If the determination is that these costs are not costs of Objective 1 then what is the jurisdiction the Court is exercising to impose "other" costs on these third party clients? If there is any jurisdiction I suspect it lies in s. 61 of the Trustee Act 1925 which allows a court to relieve a trustee from personal liability for a breach of trust (which could include payment of remuneration and expenses out of trust assets which should not have been so paid) if the trustee has acted "*honestly and reasonably and ought fairly to be excused*". WealthTek is the trustee but it acts through the Administrators and I think any further distinction is overtechnical; see also *In re Berkeley Applegate Ltd* [1989] Ch 32 at 52D-F. Mr Fletcher says the principles are much the same whether it is section 61 or the principles in *Re Capitol Hill* and I agree.

52. One of the things that has gone wrong here is that the Administrators have assumed that they are entitled to bring litigation to make recoveries, funded from client assets, if they so decide and without requiring the consent of clients or the court. Mr Fletcher says the Administrators were acting reasonably in believing they were so entitled until the 4 October judgment was handed down saying that this was wrong. I do not agree. There seems to have been a failure from the outset to appreciate the difference between being appointed an administrator of a trustee to administer trust property and being appointed an administrator of an insolvent company to deal with the company's assets. The IBSA Regulations provide a limited role for the Administrators in relation to Client Assets and a limited right to take costs from the trust fund. They make no express provision for litigation to be brought by special administrators. A long term retention is contrary to Objective 1. I find it hard to understand how or why this did not ring alarm bells amongst the Administrators and their legal team. The justification advanced by the Administrators for believing they were entitled to bring litigation funded from client assets is based on the definition of Client Assets to be returned to clients in Regulation 10B as assets which WealthTek had "undertaken" to hold for clients, the argument being that this definition therefore placed the Administrators under an obligation to find and return assets which should have been there but were not. That construction of Regulation 10B is not an obvious one, (and even less obvious if the COMP 7.4 duty on the FSCS had been taken into account) and is a very slim basis for forming the view that the Administrators were entitled to bring litigation funded from client assets. When the Distribution Plan was put before the Court, the Administrators nevertheless did not raise this question of construction, did not ask the Court to confirm their understanding of Regulation 10B and they did not ask for the Court's blessing of their decision to pursue litigation at the cost of Client Assets. The Administrators and their legal team are expert specialists who charge accordingly. It seems to me that they must be held to the highest standards of expertise when it comes to their area. Against those standards this is a serious blunder. It was not acting reasonably.

53. The more serious point can be put more shortly. The failure of the Administrators and their team to identify the intended subrogation of the FSCS to all of the rights of clients

who received any compensation (COMP 7.3.8) and the then arising duty to make recoveries for them on the part of the FSCS (COMP 7.4) and to identify even the *potential* relevance of these matters to the Distribution Plan and the Potential Litigation Reserve is a serious blunder, which they have acknowledged. I repeat my observations above at paragraphs 21 to 27. It was not acting reasonably.

54. I do not consider that the Administrators meet the criteria for relief. I do not consider that it would be fair and reasonable to grant relief.

Issue 4: Costs of returning assets

55. The projected Objective 1 costs have increased from £10,977,799. The Administrators now anticipate that the total costs in returning Client Assets will ultimately be a maximum of £11,577,779 in total (a maximum of £14,300 per client). The incremental impact on the cost of returning Client Assets is £600,000 in total.

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

57. I will approve an increase of £600,000 to the maximum Costs Contribution under the Distribution Plan.

Issue 5: FCA costs

58. Some of the Incurred Investigation Costs include costs incurred by the Administrators in providing assistance to the FCA in its criminal investigations into WealthTek and Mr Dance. The FCA is unable to share information in relation to its own investigations with WealthTek. However, the Administrators say that the FCA has indicated that any assets recovered from a confiscation order will ultimately be made available for WealthTek's clients (i.e. primarily the FSCS who has subrogated to the rights of almost all clients). The Administrators have incurred £85,687.96 in such costs and intend to continue providing assistance to the FCS. They would like a reserve of £900,000 for the costs of doing so.

59. Objective 2 of the Administrators in a special administration is to ensure the timely engagement with market infrastructure bodies, including the FCA. As Mr Fletcher readily accepted, IBSA Regulation 13 makes clear that the engagement envisaged is concerned with a different type of assistance aimed at avoiding market disruption. These are not Objective 2 costs which in any event have to be met from the company's property not the Client Assets.

60. Nor are these Objective 1 costs. The Administrators contend that the FCA proceedings could result in a successful prosecution, which might then result in a successful confiscation order. If that happens they are confident the FCA would return funds to them for distribution (to the FSCS save for 5 clients). The FSCS letter says it is still considering whether these are Objective 1 costs. Let me therefore be clear. These are not the costs of returning assets within the Administrators' control to the clients. These are not Objective 1 costs to be borne by Client Assets.

61. I accept, however, that appropriate cooperation by the Administrators with the FCA is in the public interest. I think it is also in the beneficiaries' interests that there is such cooperation with the regulator in bringing to book those who are responsible for their misfortune and possibly making recoveries for those beneficiaries. Even though these are not Objective 1 costs, a Distribution Plan which included a modest sum for such cooperation and assistance, when the house estate is bare, is in my judgment fair and reasonable. I note that I also have jurisdiction to direct the payment of a sum by way of remuneration to the Administrators from trust assets for such cooperation under the Court's inherent supervisory jurisdiction over trusts; see *In re Berkeley Applegate Ltd.* I will therefore allow the £85000 which has been incurred and allow a retention of a further £85,000 for future cooperation. In the scale of the costs being incurred by the Administrators (over £11 million), this is not significant.

62. I will not authorise a retention of £900,000 for assisting the FCA – no breakdown or explanation of the size of this figure has been given to me. To the extent that the FSCS considers that the FCA investigations are a proper cost of recovery in accordance with COMP 7.4 they can fund any future cooperation of the Administrators with the FCA beyond the £85000 authorised above.

Concluding remarks

63. I direct that the costs which have been incurred in relation to the Administrators' application for approval of the Distribution Plan since 23 July should not be charged to the client estate. In my judgment the Potential Litigation Reserve should never have formed part of the Distribution Plan and much costs have been wasted because it was. The order I propose to make seems to me to be a proportionate way of reflecting those wasted costs as well as marking the Court's disapproval of the breach of duty to the court referred to above.

64. An order will be submitted which identifies the maximum sum which may be retained to meet incurred and future costs of the Administrators in accordance with this judgment and if necessary amending the Distribution Plan. The inclusion of costs pursuant to this judgment in this maximum sum does not mean that the costs incurred or to be incurred are reasonable. As I observed in the 4 October judgment (paragraph 43) it is for the FSCS to monitor the costs incurred by the Administrators in this case.

65. At some point after 26 September 2024 the Administrators were told that three clients had died. This sombre fact ought to remind everyone involved of the reasons for and importance of Objective 1. It underlines the need for the Administrators to reunite the clients with what is left of their money and investments, and to do so as soon as possible.