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IN THE HIGH COURT OF JUSTICE
IN THE BUSINESS AND PROPERTY
COURTS OF ENGLAND WALES
CHANCERY DIVISION
[2020] EWHC 3286 (Ch)

CR-2019-006671

The Rolls Building
7 Rolls Buildings
Fetter Lane
Holborn
London, EC4A 1NL

Friday, 16 October 2020

Before:

MR JUSTICE TROWER

IN THE MATTER OF:

REYKER SECURITIES PLC
(IN SPECIAL ADMINISTRATION)

Applicant

MR D. BAYFIELD QC, MS G. PETERS (instructed by Foot Anstey LLP) appeared on behalf of
the Applicant.

MS D. MARTIN appeared in Person as an Interested Party.

J U D G M E N T

MR JUSTICE TROWER:

- 1 Reyker Securities Plc (“Reyker”) is an investment bank within the meaning of section 232 of the Banking Act 2009 (the “Act”) and is regulated by the Financial Conduct Authority (“FCA”). It entered special administration under Regulation 5 of the Investment Bank Special Administration Regulations 2011 (the “Regulations”) on 8 October 2019. This application is for an order approving a distribution plan for the return of client assets.
- 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 “Rules”). The plan makes provision for a procedure pursuant to which client assets held by Reyker with an indicative aggregate value of approximately £919 million can be returned to the 9,392 clients who have claims to them, 90 per cent of which are retail clients entitled to FSCS compensation, the relevance of which I will come to shortly.
- 3 Reyker's creditors' committee has unanimously approved the distribution plan. Both the FCA and the Financial Services Compensation Scheme, (“the FSCS”) have been extensively consulted on its terms. The administrators anticipate that there will be no shortfall in the client assets held by Reyker. This means that all clients will have their client assets returned in full, subject, where applicable, to discharging their share of costs associated with their return, together with any liabilities which they owe to Reyker.
- 4 The means of return proposed is either through transfer to one of four or five nominated brokers, or through the exercise by clients of a right to a return of client assets to themselves or at their direction. The vast majority of clients are eligible, as I said, for compensation from the FSCS which will cover the totality of their share of the costs which have been incurred by the administrators in administering these assets.
- 5 Turning to the statutory regime, the Regulations created a special administration regime for investment banks: Regulation 3(1). In broad terms the regime includes procedures for the setting of bar dates for proprietary claims to client assets; for deferring administration costs from those client assets; and for addressing the quantification of shortfall claims, and disputed or competing claims to those client assets. The Regulations define client assets by reference to the meaning which the term has in section 232(4) of the Act, namely assets which an institution has undertaken to hold for a client, whether or not on trust, and whether or not that undertaking has been complied with. The term ‘client’ is defined in Regulation 2 as a person for whom the investment bank has undertaken to receive or hold the client assets, whether or not on trust, and whether or not that undertaking has been complied with.
- 6 Special administrators are obliged to pursue the special administration objectives set out in Regulation 10(1). Objective 1 is to ensure the return of client assets as soon as is reasonably practicable, the objective with which today's application is primarily concerned. Objective 2 is to ensure timely engagement with market infrastructure bodies and the authorities, being the Bank of England, the Treasury, the FCA and the Prudential Regulation Authority. And Objective 3 is either to rescue the bank as a going concern or to wind it up in the best interests of creditors.
- 7 Regulation 10 also makes clear that the administrator is entitled to deal with and return client assets in whatever order he thinks best, and makes clear that the administrator must commence work on each objective immediately after appointment, prioritising the order of

work as he thinks fit, in order to achieve the best result overall for clients and creditors. He must work to achieve such objective as quickly and efficiently as is reasonably practicable.

- 8 Regulation 10(5) is important for present purposes. It defines the return of client assets to mean 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 right to the asset. This can be achieved by transferring assets to another institution: section 233(4) of the Act and Regulations 10B to 10G. It can also be achieved by returning or transferring assets equivalent to those which an institution undertook to hold for clients.
- 9 It is clear from Regulation 10A that the administrators must work in conjunction with the FSCS, and keep it fully informed of what is going on. This is significant in light of the costs position to which I shall come in due course.
- 10 There is also provision by Regulation 11 for administrators to set a bar date, sometimes called a soft bar date, for the submission of claims to client assets, if the administrator thinks it necessary in order to expedite the return of them. Once the soft bar date is set, the subsequent return of client assets may also include transfers within the meaning of Regulations 10B to 10G.
- 11 Regulations 10B to 10G provide for a means of facilitating the block transfer of client assets to another firm and impose a statutory override on any underlying restriction on assignment or transfer. There is a requirement to give notice to or to obtain the consent of any person who is a party to the client contract, and entitle any person to a return of client assets otherwise than by transfer in certain circumstances.
- 12 The quid pro quo for these enforced transfer arrangements is provided by a number of restrictions on transfer which fall into a number of categories. The most relevant for present purposes is the restrictions on partial property transfers where the arrangement is for the transfer of some but not all of the property, rights and liabilities of the bank. In that instance, there is no statutory override on any underlying contractual or other notice or consent requirement in respect of the transfer, and clients are entitled to demand a reverse transfer if they do not wish their assets to be held by the transferee firm.
- 13 The administrator is required by Regulation 10C(4) to take all necessary steps to give effect to any such reverse transfer, and Regulation 10B(10) makes provision for clients to be able to exercise their rights as soon as practicable after the transfer, therefore permitting a transfer on to a broker of their own choice.
- 14 I have already mentioned the soft bar date. Regulation 11 allows the administrators to establish the constituency of claimants interested in the distribution of client assets, and is designed to bring about an orderly distribution of them to those who are properly entitled. Reasonable notice is required to persons interested, to be given in accordance with Regulation 12E, which contains certain procedural requirements including details of notifications required to be given to both clients and the FCA.
- 15 The bar date provision itself in Regulation 11 requires claims to be submitted by clients for whom the bank held client assets by the relevant date. Where this power is exercised, Regulation 11(4) obliges the administrators to return client assets in accordance with the prescribed procedure. This means that client assets can then only be returned by a procedure to which the court has given its approval. The reference to a prescribed

procedure is a reference to the provisions for a distribution plan contained in Part 5, Chapter 3 of the Rules, which is the plan with which this application is concerned.

- 16 Where client assets are distributed in accordance with an approved distribution plan, a late-claiming client is not entitled to disrupt returns which have already been made, and the person to whom the assets have been returned acquires good title to them as against the late-claiming claimant. An administrator is required to distribute client assets to persons who fail to submit a claim by the soft bar date where the administrator has evidence from the bank's books and records that such a person is eligible to make a claim to client assets, but has not at that stage done so. Such persons are referred to as "potential claimants" under the Rules, and the Rules contain a procedure by which this is to be done. There is provision in Regulation 12 for how a shortfall is to be dealt with, and that any shortfall is to be borne *pro rata*.
- 17 Rule 144 of the Rules also prescribes certain specific elements that the plan is required to address, including timing; the identification of client assets; the calculation of what is called the "net asset claim", taking into account any liabilities owed by the client and / or the bank to the other in respect of financial contracts; and any shortfall claim. Also required to be addressed is the means of returning assets subject to a net asset claim; costs and how they are to be discharged (I will come back to costs in a moment); a provision for potential claimants who fail to respond to a notice given under Rule 143(2); and how security interests are to be dealt with.
- 18 The position in relation to costs requires some further explanation. Rule 144(2)(e) refers to how a particular client's share of the expenses of the special administration will be discharged insofar as they relate to the achievement of Objective 1.
- 19 The costs and expenses incurred in pursuit of Objective 1 are to be paid out of client assets. This is required by the application of an amended Paragraph 99 of Schedule B1, which is applied in its amended form by Regulation 15(4)(a). Rule 135 of the Rules then makes provision for what is to be paid out of the client assets; and Rule 137 requires that the costs be provided for in the distribution plan itself. The plan in the present case provides that the costs are to be shared per capita rather than by reference to the value of client assets. The maximum costs share allocated to a client will be the fixed sum of £2,500, but the costs are capped at the aggregate value of client assets held by each client, where it is lower.
- 20 The annex in the evidence identifies the amount of each client's costs share, and makes detailed provision for the manner in which costs are to be allocated and discharged, in a way which very substantially replicates the approach adopted in other cases. I should also add that over 98 per cent of Reyker's clients by number will be eligible to receive FSCS compensation, which will cover the entirety of the costs share. In that context I am satisfied that it is clear on the evidence that the arrangements that have been reached by the administrators for the purposes of including in the distribution costs ancillary to it mean that the FSCS will bear the vast majority of the Objective 1 costs if the distribution plan is approved. The manner in which this is achieved seems on the face of it to be fair and reasonable.
- 21 On an application to the court under Rule 146(2) for approval of a distribution plan, the court has a discretion under rule 146(5) as to whether to grant the relief sought, but it must be satisfied that the creditors' committee has approved the plan under Rule 145 of the Rules, or that it has been given an opportunity to explain why not. It must also be satisfied that

certain prescribed notifications have been given, those notifications relating to the position of prospective claimants pursuant to Rule 143.

- 22 In the most recent decision approving a distribution plan under the regime (*Re SVS Securities Plc* [2020] EWHC 1501 (Ch)) Miles J distilled the applicable principles governing the court's discretion as follows (at [32] to [34]):

"[32] I have mentioned the court's discretion. Counsel for the applicant, Mr Bayfield QC, took me to a number of decisions which illustrate the approach of the court in applications for approval of a distribution plan, namely: *Re MF Global UK Ltd* [2012] EWHC 3789 (Ch); *Re Hume Capital Securities* [2015] EWHC B25 (Ch); and *Re Beaufort Asset Clearing Services Limited* [2018] EWHC 2287 (Ch). The cases establish the following points. First, account must be taken of the purpose of the distribution plan under the Rules, which is to assist in the achievement of Objective 1 of returning client assets as early as possible. The court must be satisfied that the plan provides a fair and reasonable means of effecting the distribution of the client assets to which the plan relates.

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

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

- 23 In my view that summary speaks for itself, and will not be improved by any further commentary from me. I propose to adopt the same approach in relation to the present application.
- 24 In the present case, the administrators set the process in motion when they set a soft bar date for 7 April 2020 pursuant to Regulation 11. The evidence supports a conclusion that they did so for the legitimate reason that it provided an orderly and expeditious means of returning client assets.
- 25 After the expiry of the soft bar date, notices were sent out to potential claimants in accordance with rule 143(2), and they were sent to some 1,702 clients. A large number of those originally designated as potential claimants have subsequently engaged with the

distribution process, but there remain somewhere in excess of nine hundred potential claimants who may be entitled to assert a claim. The administrators continue to take steps to contact all the potential claimants.

- 26 Against that background the distribution plan was formulated in consultation with the FSCS, the FCA and members of the creditors' committee; and the form in which it has been put before me is the one that the administrators consider to be an efficient way of returning client assets in accordance with Objective 1. In my view, the administrators' view on that point is to be given considerable weight. The administrators have selected five nominated brokers, which are all investment firms authorised and regulated by the FCA. The distribution plan therefore will probably give effect to at least five bulk transfers comprising the vast majority of Reyker's client assets to the nominated brokers.
- 27 The scope of the distribution plan is that it applies to all client assets held by Reyker at the date of administration, together with the fruits of those assets, by which I mean altered or new securities, dividends, redemption payments and the like accruing since the administration. I say no more than that the inclusion of the fruits is consistent with the approach that was adopted by Miles J in the SVS case, and seems to me to be right in principle, and sensible as a matter of commercial fairness.
- 28 The plan schedules return statements for clients. It contains client specific and other information to facilitate the client's understanding of what they are to receive. The core provisions of the plan are contained in clauses 4, 5 and 6. Clause 5 deals with the mechanism by which the client assets are subject to a bulk transfer to one of the nominated brokers. It includes provision to the effect that the transfer will ensure that clients are able to exercise their rights in relation to the assets as soon as reasonably practicable after the transfer, in a manner that is consistent with Regulation 10B(10), and that a client is entitled to opt out of the transfer, and to a reverse transfer in accordance with Regulations 10C(3) and (5). It also gives clients an opt-out right in respect of the transfer which will be indicated to them in their statement, and requires clients who do opt out to provide the administrators with the necessary instructions to return their client assets.
- 29 As to the residual assets which will not form part of any of the bulk transfers, and the assets of clients who opt out of transfers or subsequently request a reverse transfer, clause 6 provides a procedure for the administrators to seek specific instructions from the relevant clients as to how these assets are to be returned.
- 30 As to the structures of the transfers themselves, the administrators are at an advanced stage in relation to the proposed bulk transfers, which it is intended will cover the vast majority of the client assets. Two of the nominated brokers, Kin Capital Partners LLP and Logic Investments Limited, have entered into transfer agreements subject only to court approval of the plan; and an agreed form of transfer agreement has also been reached with Thompson Taraz Depository Limited, again subject to the court approval of the plan. The two remaining nominated brokers, James Brearley & Sons Limited and Pershing Limited, are in commercial negotiations with the administrators. The administrators are satisfied that each of the nominated brokers has the relevant FCA permissions and authorisations, and four of them have been specifically appointed and endorsed by one of the investment managers, who between them managed client assets for almost half of Reyker's retail clients. The administrators remain of the view that each of the nominated brokers is an appropriate future custodian for the client assets pursuant to the transfers made in accordance with the distribution plan.

- 31 I have given careful consideration to the provisions of clauses 5 and 6 of the distribution plan, and am satisfied, giving appropriate weight to the views of the administrators, the FCA and the creditors' committee, that they are fair and reasonable in their impact and effect.
- 32 As to the other requirements of Rule 144, which I have already outlined earlier in this judgment, I am satisfied that the distribution plan complies with them. As to timing, the annex to the distribution plan states in its final column that the proposed date of return for all clients' assets is "ASAP". At first blush this does not comply with the requirements of a schedule of dates on which the assets must be returned. However, I am satisfied that this particular requirement is one that requires a broad construction, and in circumstances in which for practical reasons it is not possible to identify a date certain, it is my view that the reference to an "ASAP" is sufficient compliance with the terms of the Rules. The timing in a case such as the present, as will often be the way, is dependent on a number of factors which are outside the administrators' control, a consideration which, as I understand it, was taken into account in previous cases such as Beaufort Asset Clearing and Strand Capital.
- 33 As to the identification of client assets, I am satisfied that the annex complies with the requirement to set out the unencumbered assets and encumbered assets which should be returned to clients, and to which clients they are to be returned, in accordance with Rules 144(2)(b) and 144(2)(c).
- 34 As to the net asset claim, clause 17 requires any amounts owing to a client to be discharged before they can have their client assets returned to them. A detailed dispute resolution mechanism is also contained in that clause, for the purpose of dealing with disputed or contingent liabilities under Rule 144. I am satisfied that this clause makes proper provision for dealing with disputes of that sort.
- 35 I have already considered the position in relation to costs, and explained why it is that I am satisfied that the provision that is made in relation to costs is fair and reasonable. As to potential claimants, clause 7 makes provision for how the administrators are to deal with the provision surrounding potential claimants as described in Rules 143 and 144 of the Rules. It makes clear that the administrators will, as required by the Rule, return client assets to potential claimants who have not responded to the Rule 143 notice. I am satisfied that the provisions contained in the plan for those purposes, taking into accounts the views of the administrators, the FCA and the creditors' committee, are themselves fair and reasonable.
- 36 As I have already mentioned, the two statutory conditions in relation to the approval of a distribution plan are first of all the approval of a creditors' committee and secondly the giving of the notification in accordance with Rule 143. I reiterate that the creditors' committee has unanimously approved the distribution plan, which they did by resolution passed on 31 July 2020, and in those circumstances Rule 146(5)(a)(ii) has been complied with. I am also satisfied that the notification requirements of Rule 146(5)(a)(i) have been complied with as well.
- 37 As to the other notification requirements, required both by the Rules and in order to satisfy the court that sufficient notice had been given to those parties interested for the purposes of ensuring that they have an opportunity to attend and explain to the court why it is that they have concerns with the distribution plan, on 13 August the administrators wrote to all clients. This included potential claimants and stated that the plan was available to view on the Reyker website along with an explanatory statement and Frequently Asked Questions guide, and gave contact details for the purpose of obtaining a hard copy of the plan at no additional charge.

- 38 The FCA was provided with a copy of the plan on 3 August, and there has been adequate confirmation from the FCA that it does not object to the plan. There has also, as I understand, been further communication with the FCA, none of which cuts across the conclusion that the FCA is content for the court to proceed to approve the distribution plan, if that is what the court chooses to do.
- 39 In all these circumstances, I am satisfied that clients have had sufficient time to read and consider the distribution plan, and have known for some considerable period of time prior to the circulation of the plan that they were in a position where they have to meet a soft bar date, and there has been regular communication with the clients throughout the period of the administration.
- 40 I now turn to consider the position of the single client who has attended the hearing. Although the distribution plan is put forward by the joint administrators with the unanimous support of the creditors' committee, its approval is not supported by all creditors because I have read correspondence from, and heard submissions in opposition from Ms Deborah Martin. She is recorded in Reyker's records as being the beneficiary of cash and client assets held in an ISA wrapper. The cash amount is the relatively small figure of £160-odd, and the client assets are some 120,605 units in the Astute Capital Plc 7.5 per cent series 6 bonds.
- 41 It appears that Ms Martin is concerned to ensure that the plan and its approval should not interfere with her rights to pursue a dispute in relation to her holdings. Her dispute is not entirely clear, but it seems to relate in some way to the fact that she originally invested c.£123,000 with Reyker, and that in cash terms there is now only £160 left, albeit that she is recorded as holding the units in Astute Capital Plc.
- 42 Part of the situation in which she finds herself has been achieved by what she calls "amortisation", as I understood what she told me. And she also says that the transfer of her interest in the Astute bonds under the terms of the distribution plan to a new broker will, and I am using her terminology, "alienate" the bonds for investors like her.
- 43 I am bound to say that I was unable to identify precisely what it was that she meant by this concern. Having gone through the correspondence with considerable care, it seems that Ms Martin's concern flowed from the fact that an investment should not have been made in the bonds in the first place, although her concerns were articulated in a rather broader way now, and she made allegations of fraud in relation to the way in which matters might proceed henceforth.
- 44 So far as the original investment is concerned, she may or may not be right, and I make no comment one way or the other. However, I am quite satisfied that her concerns about her original investment and the further allegations that she made are not relevant to the issue that I have to decide. The reason for this is that what the plan does is transfer the legal interest in the Astute Capital bonds out of the legal ownership of Reyker, which presently holds them as nominee or custodian, either into the name of a new broker or, at Ms Martin's direction, to some other broker prepared to accept them. The transferee will then continue to hold them as nominee for Ms Martin.
- 45 I was wholly unable to identify from what she said how this had any effect on her rights. Such rights as she has to the Astute bonds themselves will be preserved. If she has any rights arising out of what she claims was a mis-selling of the bonds in the first place, they

too will survive as claims against those liable, including Reyker, and she may or may not have a claim over against the FSCS, I know not. All of that, however, is in my judgment for another day, and none of it is affected by the relief that I am asked to grant today, which is simply concerned with giving back client assets, either to the clients to whom they belong, or to another solvent broker, to hold on their behalf or at their direction. As I say, I was unable to identify anything in what Ms Martin told me as to why it was that her position would be prejudiced by that being the consequence of the approval of the distribution plan.

- 46 As I say, Ms Martin was the only creditor or client who attended before me to express concerns about the relief I was asked to grant. Accordingly, in circumstances in which I am satisfied that the statutory conditions for approval under Rule 146 have been complied with, and that the distribution plan provides a fair and reasonable means of returning the client assets held by Reyker and in a manner which will result in their return as soon as is reasonably practicable, it seems to me that this is a distribution plan which I should approve. I will make an order to the effect sought by the applicants.

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