

**Neutral Citation Number: [2023] EWHC 1120 (Ch)**

**IN THE HIGH COURT OF JUSTICE**

7 Rolls Buildings  
Fetter Lane  
London

**Before THE HONOURABLE MR JUSTICE LEECH**

**IN THE MATTER OF**

**XPRESS MONEY SERVICES LIMITED (IN SPECIAL ADMINISTRATION)**

**MR M GIBBON KC and MR R J TURNER appeared on behalf of Applicants**

**JUDGMENT**

**9<sup>th</sup> FEBRUARY 2023, 13.31-13.55**

**(AS APPROVED)**

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## MR JUSTICE LEECH:

1. By Application Notice dated 25 January 2023 the Applicants, Mr David Hudson and Mr Philip Reynolds, who are the joint special administrators (the “**Administrators**”) of Xpress Money Services Limited, (“**XMSL**”) applied for orders under Rule 114 of The Payment and Electronic Money Institution Insolvency (England and Wales) Rules 2021 (as amended by The Payment and Electronic Money Institution Insolvency (England and Wales) Amendment Rules 2022) (the “**Rules**”), and also under Regulation 21 of The Payment and Electronic Money Institution Insolvency Regulations of 2021 (the “**Regulations**”). Where I refer to individual Rules or Regulations in this judgment, I intend to refer to those statutory instruments or rules, unless I state otherwise.
2. The Administrators apply for orders in the following terms.
  - (a) that the distribution plan for the return of relevant funds held by XMSL exhibited to the witness statement of Mr Hudson dated 25 January 2023 (the “**Distribution Plan**”) be approved by the Court pursuant to Rule 114;
  - (b) that the Administrators shall be at liberty to set a “hard bar date” pursuant to Regulation 21 as soon as is reasonably practicable after the hearing of this application; and
  - (c) that the cost of and incidental to this application be treated as costs of the Administrators in pursuit of Objective 1 (as defined by Regulation 12.2).
3. XMSL was incorporated under the Companies Act 1985 on 16 December 1999. It is an authorised payment institution or “**API**” as defined by the Payment of Services Regulations 2017 and regulated by the Financial Conduct Authority. Mr Michael Gibbon KC, who appears with Mr Ryan Turner for the Administrators, took me through what he elegantly described as the statutory architecture to explain what an API is and how it operates.
4. XMSL is currently in special administration under the Regulations and according to their explanatory memorandum the special administration regime to which they adhere is modelled on The Investment Bank Special Administration Regulations 2011 (which created a number of objectives for a special administration of an investment bank). Regulation 12 also create a series of objectives for the special administration of payment institutions regulated by the Regulations and the Rules.
5. Before entering into special administration, XMSL carried on business as the provider of a network software platform which enabled cross border payments to be made through a network of agents around the world or on a direct principal-to-principal basis. It was required to safeguard relevant funds (as defined below) which it received in connection with certain kinds of payment transaction (although it was not required to safeguard all funds which were received in connection with all payment transactions

because the Regulations draw a distinction between two different kinds of payment transaction).

6. Mr Hudson has exhibited to his witness statement in support of the application schedules of the transactions which generated relevant funds and those which did not. But in summary, on 28 October 2021 XMSL held relevant funds of \$57,425,510. It also had a number of unsecured creditors. Its funds were held in two safeguarding accounts at Barclays Bank PLC and on 15 February 2022 and 7 March 2022 the sums of £5,301.25 and £420,687.05 were deposited in the special administration account by the bank.
7. XMSL also held three non-safeguarding accounts at the Commercial Bank of Dubai which hold approximately £397,902 in total. Mr Gibbon KC told me this morning that those sums have also now been realised by the Administrators and are now held in the special administration account.
8. The purpose of the proposed Distribution Plan is to ensure the return of relevant funds as soon as is reasonably practicable in accordance with Objective 1 of Regulation 12.2. I am told that this is the first application under Rule 114 to approve the Distribution Plan or under Regulation 21 to set a “hard bar date” for that purpose.
9. The background is set out in some detail in the witness statements of Mr Hudson (which I have read and considered) and the Skeleton Argument of Mr Gibbon KC and Mr Turner. It is not necessary for me to set out that detailed background in this short judgment. Instead, I propose to focus on the specific powers and functions of the court in relation to this application.
10. Regulation 23 defines the term “relevant funds” as comprising: “(a) sums received from, or for the benefit of, a payment service user for the execution of a payment transaction; and (b) sums received from a payment service provider for the execution of a payment transaction on behalf of a payment service user” and Mr Gibbon KC explained in argument the difference between the two forms of transaction.
11. Regulation 21 of the Regulations also provides that special administrators may set a bar date for claims and to expedite the return of relevant funds. I will call it a “soft bar date” in accordance with industry usage although the Regulation does not define it in those terms. In the present case the Administrators set a soft bar date of 30 November 2022 by notice dated 31 October 2022. Having set such that date, Rule 111 then provides as follows:

“(1) This rule applies where after the bar date under Regulation 20 is passed there is evidence from either (i) the records of the institution or (ii) information received by the administrator that there is a customer who is eligible to make a relevant funds claim but that the administrator has not received the relevant funds claim from that customer and (b) the administrator has the means of contacting that customer. (2) The

administrator must send notice to that customer in writing stating that the administrator believes that that customer is eligible to submit a relevant funds claim.”

12. The notice under paragraph (2) must contain also certain statements which it is unnecessary for me to set out in full. But the principal information which the notice must contain is that the Administrators believe that the recipient has a claim to relevant funds. Mr Hudson’s evidence is that on 1 December 2022 the Administrators sent a text message to approximately 1,623 customers for whom XMSL held a valid mobile number and who had not submitted a claim. In Annex A to his statement he has also set out a complete summary of the communications with customers which the Administrators have undertaken.
13. Once they have set a soft bar date, the Administrators may then set a “hard bar date” by which date a relevant funds claim must be made to them by a person entitled to relevant funds. Once a hard bar date is fixed the Administrators must also give notice to eligible claimants in a manner specified in Rule 110. If a relevant funds claim is made before the hard bar date, then the Administrators may satisfy it in accordance with the relevant fund claims entitlement: see Regulation 21.5 and 21.6. However, if a relevant funds claim is made after the hard bar date the question whether a claimant is entitled to be paid out of the relevant funds will depend upon whether it is “reasonably practicable for the special administrators to make a distribution”: see Rule 115.
14. The purpose of an application to fix a hard bar date is, therefore, to crystallise the entitlements of eligible claimants to claim relevant funds and to bar late claims (save to the extent that it is reasonably practicable to pay them). Moreover, if there are undistributed relevant funds after the hard bar date, those funds are treated as company assets and become available for distribution to secured and unsecured creditors: see Regulation 21.7. A distribution to unsecured creditors may then be made by Rule 116 if there are funds available to pay them.
15. The Administrators may only fix a hard bar date with the approval of the court. Regulation 21(3) provides for them to apply for approval and Regulation 22 sets out the powers of the court on an application under 21(3) and the statutory preconditions for the exercise of those powers. It provides as follows:

“(1) On an application under regulation 21(3) for the approval of the court to set a hard bar date the court may— (a) make an order approving the setting of a hard bar date, (b) adjourn the hearing of the application conditionally or unconditionally, or (c) make any other order that the court thinks appropriate. (2) The court may make an order under paragraph (1)(a) only if— (a) it is satisfied that the administrator has taken all reasonable measures to identify and contact persons who may be entitled to the return of relevant funds, and (b) it considers that, if a hard bar date is set, there is no reasonable prospect that the administrator will receive claims for the return of relevant funds after that date.”

16. I turn next to Rule 114. If the Administrators propose to make a distribution from the “asset pool of the API” then Rule 112(2) imposes an obligation to draw up a Distribution Plan to be approved by the creditors committee (if there is one) and the court. Rule 114(5) provides as follows:

“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 Rule 111 applies the administrators 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 members of the committee or has given them an opportunity to explain why the committee was 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.”

17. If the two conditions in sub-paragraph (2)(i) and, if applicable, sub-paragraph (ii) apply, then the court has a discretion whether to make an order approving the Distribution Plan. The Rules provide no guidance how the court should exercise that discretion, but Mr Gibbon KC submits that I should follow the guidance of David Richards J (as he then was) in *Re MF Global UK Ltd (In Special Administration)* [2013] 1 WLR 3874 and also of Arnold J (as he then was) in *Re Beaufort Asset Clearing Services Ltd* [2018] EWHC 2287 (Ch) (which deal with similar legislation). In *Re MF Global UK Ltd* and after dealing with the requirement of notice, David Richards J then went on to consider the basis which the court should exercise its discretion and said this:

“In my judgment, account must be taken of the purpose of the Distribution Plan under the rules, which is to assist in the achievement of the first objective of returning client assets, as it seems to me the court must be satisfied that the plan provides a fair and reasonable means of effecting the distribution of client’s assets to which the plan relates.”

18. I agree with this passage and I apply it to an application under Regulation 22. The only point which I would add is that Objective 1 under the present statutory regime does not merely involve the return of client assets. It also involves returning them as quickly as is reasonably practicable.
19. I turn, therefore, to Mr Gibbon’s KC submissions in relation to both applications. I begin with the application for approval to set a hard bar date. Mr Gibbon KC submits that the two statutory preconditions in Regulation 22.2 have been met and that the court can be satisfied both that the Administrators have taken all reasonable measures to identify and contact eligible claimants (sub-paragraph (a)) and that there is no reasonable prospect of a claim for relevant funds being received after the hard bar date (sub-paragraph (b)). There was some debate between Mr Gibbon KC and the court about the appropriate test (if any) for “reasonable measures” and “no reasonable

prospects” of receiving a claim. The Regulation itself provides no real guidance as to how the court should interpret those provisions but it is unnecessary for me to express any firm view about how the court should approach the test in Regulation 22.2 in a more difficult case because both sub-paragraphs are clearly satisfied in the present case.

20. I am fully satisfied that that there is no reasonable prospect of a claim for relevant funds being received after the hard bar date and that the Administrators have taken all reasonable measures to identify and contact all eligible persons. I reach that conclusion for the reasons which Mr Gibbon gave and which I will summarise briefly:
- (1) In the period after it ceased trading on 19 June 2020 and until the Administrators were appointed by the court, XMSL carried out a tracing exercise to pay or distribute relevant funds. This tracing exercise reduced the relevant funds from \$1 million to \$574,000 by 28 October 2021.
  - (2) Following their appointment on 11 February 2022, the Administrators conducted a further tracing exercise and used all communication channels available to them to inform persons who may be entitled to make a relevant fund claim of that fact. These steps have resulted in very few relevant fund claims.
  - (3) Those eligible to make a claim have to have attempted to make payments through XMSL’s Xpress Money network before 19 June 2020 and those payments are now very stale. Moreover, the Administrators have been able to identify transactions over almost 13 years from 30 July 2010 to 17 March 2020.
  - (4) The largest entitlement to relevant funds which the Administrators have been able to identify is for \$5,000 and it relates to a cancelled payment from Sweden to Yemen on 24 August 2019. However, most of the eligible payments were for very small amounts. Indeed some were as low as \$1.22 (of which there are seven separate transactions). The amounts are generally so small that a person who attempted to make the payment may not have realised that their payment was not successful and that they are entitled to a return of the relevant funds. Alternatively, they may not have a sufficient incentive to make a claim, or given the size they cannot be bothered to do so.
  - (5) Finally, between March 2022 and the soft bar date in November 2022 only seven claims were received. Further, an exercise to identify further eligible claimants after the soft bar date had passed, has resulted in only one claim. In total those eight claims amounted to no more than \$5,411.
21. I consider, therefore, that the prospect of any further claims being received after the Administrators have fixed the hard bar date is highly unlikely and, although it may not be vanishingly small, I am satisfied that there is no reasonable prospect of a claim being received.

22. Mr Gibbon KC also submits that there is no reason for the court not to exercise its power in favour of authorising the setting of a hard bar date and every reason to do so. He also submits that if the court were to decline to authorise the setting of a hard bar date, the special administration would remain on foot for no real purpose and without the Administrators being able to effectively wind down the company.
23. I accept that submission and I am satisfied it will further the purpose of the special administration to permit the Administrators to set a hard bar date. I am also satisfied that it may well hinder Objectives 1 and 3, namely, to ensure the return of relevant funds as soon as is reasonably practicable and to wind up XMSL in the best interests of its creditors, if I do not approve the Administrators' decision to set a hard bar date. I therefore grant the relief and approve the setting of a hard bar date.
24. I turn, therefore, to the Distribution Plan. I am satisfied on the evidence that the statutory precondition in Rule 114(5)(a)(i) has been met by the text messages which the Administrators sent out on 1 December 2022. In particular, I accept Mr Hudson's evidence that this was the only means of contacting customers who have not made the claim but were eligible to do so. I also take further comfort from the steps taken by the Administrators to communicate with customers which he set out in his witness statement and in the Annex.
25. Mr Gibbon KC has also drawn my attention to the fact that the FCA has been consulted about the application and if it has not formally consented to it, it has raised no objections.
26. I turn next to the terms of the Distribution Plan itself. It is Mr Hudson's evidence that it is conventional and straightforward because there is only one type of asset, namely, cash, and only two types of creditor, namely relevant funds claimants (who are not secured creditors but a form of preferential or preferred creditors) on the one hand and unsecured creditors on the other.
27. I have read the proposed Distribution Plan and I accept Mr Hudson's evidence. Mr Gibbon KC submits that it is not for the court to second guess the professional judgment of the administrators where no objection has been taken by creditors and he has drawn my attention to the decision of the late Henry Carr J in *Re Strand Capital Limited* [2019] EWHC 1449 (Ch) at [7] and [8]. He also points out the notice of this hearing has been given on the Administrators' website and that there has been no opposition to this application.
28. I am satisfied that it is appropriate to make an order under Rule 114(5)(a) to approve the Distribution Plan without modifications. In my judgment, it represents a fair and reasonable means of effecting the distribution of the relevant funds held by XMSL and to further Objective 1 as soon as is reasonably practicable. I also take into account in reaching that conclusion the fact that there is no objection from any of the company's creditors. I will, therefore, make an order to that effect.



29. I add as a footnote to the two substantive applications that there was, again, some debate before me about the form that an order should take on an application of this kind and, in particular, whether the court should impose conditions in relation to the timing of the hard bar date and whether the court can and should make any modifications to the Distribution Plan.
30. In this case I am satisfied that it is unnecessary for the court to give any directions about the hard bar date or when the Administrators should set it. XMSL ceased trading on 19 June 2020 and the sums in question are relatively small. But that is not to say that there will not be cases where it is important for the court to give more detailed directions either in relation to the setting of the hard bar date or in relation to the Distribution Plan itself. I leave those issues for another occasion.
31. Finally, I add a second footnote. Mr Gibbon KC drew my attention to the fact that the Administrators are now free to distribute the relevant funds because the limitations on the company's powers have been lifted by the FCA. There is, therefore, no obstacle to them going ahead and both fixing a hard bar date, as soon as they consider appropriate, and then carrying into effect the Distribution Plan.

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This transcript has been approved by the Judge