Neutral Citation Number: [2025] EWHC 1958 (Ch)

Case No: CR-2023-006725

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

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

Date: 28 July 2025

Before :

THE HON MR JUSTICE MELLOR

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IN THE MATTER OF RATIONAL FOREIGN EXCHANGE LIMITED (IN SPECIAL ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT
AND IN THE MATTER OF THE PAYMENT AND ELECTRONIC MONEY INSTITUTION INSOLVENCY REGULATIONS 2021
AND IN THE MATTER OF THE PAYMENT AND ELECTRONIC MONEY INSTITUTION INSOLVENCY (ENGLAND AND WALES) RULES 2021

Between :

(1) KRISTINA KICKS **(2) EDWARD GEORGE BOYLE** **(As Joint Special Administrators of Rational Foreign Exchange Limited (in special administration))**	**Applicants**
- and -	
(1) MLS-MULTINATIONAL LOGISTICS SERVICES LIMITED (a company incorporated in Malta)	**Intervener**

- -
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Kate Rogers (instructed by **DLA Piper UK LLP**) for the **Applicants**
Timothy Higginson (instructed by **Bivonas Law LLP**) for the **Intervener**

Hearing date: 10th July 2025
Further submissions 14, 17 and 24 July 2025

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Approved Judgment

This judgment was handed down remotely at 2pm on 28 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON MR JUSTICE MELLOR

Mr Justice Mellor:

INTRODUCTION

1. On 10th July 2025, I heard the application of the Joint Special Administrators ('the **JSAs**') of Rational Foreign Exchange Limited ('**the Company**') for approval of their proposed distribution plan pursuant to rule 114 of the Payment and Electronic Money Institution Insolvency Regulations 2021 ('**the 2021 Regulations**').

2. Ms Rogers (Counsel for the JSAs) was aware of one previous decision under rule 114 to approve a distribution plan (*Xpress Money Services Limited (in Special Administration)* [2023] EWHC 1120 (Ch), Leech J.) and of another for which no judgment has emerged. Enquiries revealed that Leech J. also made the Order dated 13 March 2025 approving the distribution plan in that second case (*LCC Trans-Sending Ltd (in Special Administration).* It seems to be the case, as Ms Rogers suggested, that there has not yet been any reported judgment in which the Court has had to consider the approval of a distribution plan in circumstances where the company holds monies from EU domiciled customers, post Brexit.

3. Indeed, on the UK's exit from the EU ('**Brexit**'), on 31 December 2020, the repeal of the exercise of passport rights into the EU by payment services firms (like the Company) appears to have been at least one of the causes of the Company eventually having to be put into special administration.

4. The special administration of the Company has taken some time due to the complexity of its trading arrangements and deficiencies in the books and record-keeping of the business, although it is clear the JSAs have been assisted by the directors of the company and two key employees who were retained by the JSAs. This aspect gave rise to the second part of the application made by the JSAs – for directions from the Court. The directions sought are declaratory relief as to five methods by which the Company sought to continue servicing EU clients.

5. I also heard an application by the Intervener, MLS-Multinational Logistics Services Limited ('**MLS**'), appearing by Mr Higginson, for declaratory relief based on their contention that they were a creditor and/or customer of the Company.

6. Further details of the applications before the Court are set out below at paragraphs 18 and 27.

7. Due to the fact that I had been able to read extensively into the case in advance of the hearing, the hearing was shorter than the original estimate of 1 ½ days and completed in one day. The following day I was preparing this judgment when I hit upon a point which had not been picked up in submissions which concerned a potentially important date. As a result, I asked my clerk to send a short message to the two sides raising the point and inviting brief submissions.

8. In the event, Ms Rogers sent her submissions on 14 July. In response, I indicated that the further factual matters she raised should be the subject of a further witness statement and the second witness statement of Ms Kicks was duly filed on 17 July, whereupon I allowed time for Mr Higginson to respond. Accordingly, on 24 July, I received the second witness statements of Mr Micallef and Mr Gassower, along with Mr

Higginson's submissions. I have to discuss these below but I am grateful to both sides for dealing with the point I raised expeditiously.

BACKGROUND

9. The Company was placed into special administration on 29 November 2023 by order of Mr Justice Miles made on the application of the directors of the Company, pursuant to Regulation 8(1)(b) of the 2021 Regulations.

10. Kristina Kicks and Edward George Boyle were appointed as Joint Special Administrators of the Company. They now apply pursuant to the 2021 Regulations and the Payment and Electronic Money Institution Insolvency (England and Wales) Rules 2021 ('the **2021 Rules**'). In what follows, all references to a Rule or a Regulation, without more, are to the 2021 Rules and the 2021 Regulations respectively.

11. The Company operated in the payments sector, but its specialist business as a payment services company was offering currency conversions alongside payment services. Prior to Brexit, approximately 46% of the Company's business came from the EU. As already outlined, one of the many consequences of Brexit was that Regulations 26 to 30 of the Payment Services Regulations 2017 ('**PSR 2017**') were repealed, meaning that UK firms were no longer able to passport their payment services into the EU from 1 January 2021. In reality, this meant that UK payment services firms could no longer transact business from EU domiciled customers. This had a significant adverse effect on the Company.

12. As I have to relate in much greater detail below, the significant complications in this special administration have arisen from the methods which the Company used to continue servicing EU customers, both existing and new, along with various deficiencies in the books and records of the Company. As will be seen, the JSAs and their team have had to carry out painstaking work to establish the various methods used to carry out its business, with a view to being able to distribute the remaining funds available. This has also required a detailed legal analysis of the arrangements underlying those methods in order to establish which entities can properly claim to be a customer or creditor of the Company.

13. At all material times, the Company was part of a larger group, the parent of which is Rational Group Limited (now In Administration) ('**Rational Group**'). Another subsidiary is Xendpay Limited (also now In Administration), incorporated in England and Wales.

14. Xendpay is registered with the FCA as a PSD Agent of the Company, with FCA firm reference number 583155. In short, Xendpay was incorporated to operate a digital remittance platform through which certain (approved) customers could book their own trades instead of contacting the Firm's dealers/account managers. The system held account information for those customers booking their own trades, such as a pre-set profit margin which would be automatically added to any trade they booked.

15. As Brexit loomed, two further companies were incorporated within the Rational Group with the intention of performing the same services as their UK counterparts, but for European customers, post Brexit: Rational Foreign Exchange EU UAB, incorporated

in Lithuania ('**RFX EU**'); and Xendpay EU UAB, also incorporated in Lithuania ('**Xendpay EU**').

16. On these applications, I am not primarily concerned with why the Company came to enter special administration but parts of the history form part of the explanation as to the duration of this administration as well as the costs incurred so far. As well as the problems concerning EU customers, the directors advised the JSAs that throughout 2023, the Company faced financial challenges and significant cash flow issues caused primarily by three key issues. In brief:

    i) First, certain customers were failing to deposit monies with the Company in response to margin calls, either on a timely basis or, in some cases, at all.

    ii) Second, some customers did not settle their forward contracts at all when they matured, which left the Company liable to its counterparty. Ultimately the Company would meet the margin calls and sell the trade back to the market, often at unfavourable rates.

    iii) Third, any delay in settlement of forward contracts resulted in the Company rolling over contracts, potentially multiple times, so the Company was not able to collect revenue until customers eventually settled their forward contracts.

17. Attempts were made to pursue a solvent sale of the business but to no avail. By November 2023, the Company's cash position had deteriorated substantially such that the Company held minimal cash. On 26 November 2023, the Company's directors concluded that there was a shortfall in funds that the Company was required to safeguard under Regulation 23 of the Payment Services Regulations 2017 ('**Relevant Funds**'). Having taken advice, the Company gave the FCA a voluntary undertaking on 26 November 2023 to cease on-boarding new customers, to refrain from accepting new funds from customers, and to provide notifications to customers. The directors of the Company considered that there was no other option but to cease to trade, as a solvent sale had not been achieved. They took immediate steps to place the Company into special administration.

THE APPLICATIONS BEFORE THE COURT

18. By Application Notice dated 25 February 2025 ('the **Application**'), the JSAs applied for:

    i) Approval of the JSAs proposed distribution plan for the return of relevant funds held by the Company, pursuant to r.114(5)(a) of the 2021 Rules ('the **Distribution Plan Application**'); and

    ii) Directions in respect of the JSAs proposed treatment of European domiciled persons or entities, pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 ('**Schedule B1**') (as applicable pursuant to Regulation 37 of the Regulations ('the **Directions Application**').

19. On the Distribution Plan Application, the JSAs apply for orders in the following terms:

i) That the distribution plan for the return of relevant funds held by the Company be approved by the Court pursuant to Rule 114 of the 2021 Rules; and

ii) That the costs of and incidental to this Application be treated as costs of the JSAs in pursuit of Objective 1 (as defined by Regulation 12.2).

20. On the Directions Application, the JSAs apply for declaratory relief in the following terms (all terms as defined in the Schedule to the Order, and set out below):

i) Existing EU Customers who entered into a trade or transaction during the RailsR period are to be treated as customers and/or creditors of the Company.

ii) New EU Customers are not customers and/or creditors of the Company.

iii) EU Customers utilising the services of the Company during the Freemarket Period, on the basis of the Collections Model, are to be treated as customers and/or creditors of the Company.

iv) EU Customers utilising the services of the Company during the Freemarket Period, on the basis of the Payment On Behalf Of Model, are not customers and/or creditors of the Company.

v) EU Customers who entered into a trade or transaction with the Company during the Reserve Solicitation Period pursuant to the reserve solicitation process are to be treated as customers and/or creditors of the Company.

21. The thinking behind the Directions Application was explained as follows. Throughout the period of the special administration, the JSAs have investigated and taken legal advice upon the various contractual arrangements in place for the purpose of transacting EU business post Brexit. The JSAs have formed a view, on the basis of that legal advice, as to which claims from EU domiciled customers of the Firm are to be treated as claims to Relevant Funds, and which are not. Given that (i) that decision is a legal matter (analysing the contractual arrangements in place alongside the regulatory landscape) and not a commercial decision for the JSAs; and (ii) this is the first time, so far as the JSAs are aware, that a special administration of a payments services firm has required the reconciliation of European funds in a post-Brexit era, the JSAs make the Directions Application in respect of the proposed treatment of EU customer funds.

22. In addition, the JSAs hope is that having the Court give directions on these issues at an early stage may save numerous EU domiciled customers from feeling that they wish to appeal any adjudication by the JSAs that they are not a creditor or customer of the Firm or are only a creditor of the Firm (i.e. an unsecured creditor), rather than a customer with a valid claim to Relevant Funds.

23. So, on the Directions Application, I am asked to make findings at a general level as to the consequences of each of those five methods of doing business. However, I wish to emphasise that these general findings are not binding on any customer or potential creditor who may wish to establish that the analysis is not applicable to them for whatever reason.

24. Although I propose to go on and decide the issue over the status of MLS (see further below), their application and status provides a good example of how an entity claiming to be a creditor or customer of the Company can apply to the Court for a decision as to their status, if the JSAs remain unpersuaded, even though this should be done after a rule 106 decision has been made. The entity in question can bring evidence of exactly how they say they became a customer or creditor of the Company and the Court will be able to determine the issue, if it is required to do so.

25. The Application was supported by the lengthy and detailed Witness Statement of Kristina Kicks dated 25 February 2025 ('**Kicks 1**'), which exhibits the proposed distribution plan for the return of safeguarded funds held by the Company ('the **Distribution Plan**') and the draft explanatory statement accompanying the Distribution Plan (which will be updated following judgment on this Application) ('the **Explanatory Statement**').

26. As already mentioned, the JSAs appear by Counsel Ms Kate Rogers who supplied me with a very detailed and useful Skeleton Argument. I must acknowledge also the detailed work which has been carried out by the JSAs and their team and their advisers at DLA Piper LLP.

27. The second application before the Court was issued by MLS as Applicant/Intervener against the JSAs as Respondent on 7 March 2025 seeking:

    i) Insofar as it is required, an order for permission to bring the application.

    ii) Insofar as the Court finds that a decision has been made by the Respondent pursuant to sub-paragraph (1) of Rule 106 of the 2021 Rules rejecting the Applicant's relevant funds claim and/or the Respondent has provided a written statement in compliance with sub-paragraph (2) thereof, an order, pursuant to rule 107(1) thereof, reversing or varying such decision.

    iii) Declarations that –

        a) The funds held at all material times by Rational FX and/or Rational Foreign Exchange Limited on behalf of the Applicant ('the Funds') are and at all material times were 'relevant funds' for the purposes of the 2017 Regulations and/or the 2021 Regulations.

        b) The Funds at all material times were 'safeguarded' funds for the purposes of the 2017 Regulations and/or the 2021 Regulations.

        c) The relevant provisions of the 2017 Regulations and/or the 2021 Regulations apply in this case.

        d) The Applicant at all material times contracted and/or held any relevant relationship with and only with Rational FX and/or Rational Foreign Exchange Limited.

        e) The Funds at all material times remained within and only within the jurisdiction of the 2017 Regulations and/or the 2021 Regulations.

f) The Funds at no time whether material or at all ever came under the jurisdiction of either Rational EU or any other relevant foreign corporation or entity.

g) The Applicant at no time whether material or at all ever had any contact, in either direction, with any party holding himself, herself or itself out to be a representative of Rational EU.

28. MLS appear at this hearing by Counsel, Mr Timothy Higginson, who supplied an admirably succinct Skeleton Argument setting out MLS's position. What comes through very clearly from MLS's evidence is a high sense of grievance at the failure to return a considerable sum (some $3.6m), the remaining part of funds which MLS contend was deposited with the Company.

29. I have to examine MLS's position in greater detail below, but in response to MLS's application, Ms Rogers for the JSAs submitted it was entirely unnecessary for two main reasons:

i) First, because no decision has been reached by the JSAs under Rule 106 yet, so seeking the declaration which I have set out under paragraph 27.ii) above was premature.

ii) Second, because the set of declarations under paragraph 27.iii) above is answered by the Directions Application, so it was unnecessary to apply separately. Ms Rogers acknowledged however that the evidence served by MLS in support of its application (the witness statements of Anton Micallef, Gadi Sassower and Carlo Greco) goes directly to certain of the issues on the Directions Application (those relating to paragraph 20.ii) above).

THE STATUTORY REGIME

30. Payment services businesses in the UK are subject to the PSR 2017 which were made to transpose the second EU Payment Services Directive ('the **Payment Services Directive II**') into domestic law. The PSR 2017 implemented the requirements of the Payment Services Directive II in England and Wales.

31. Regulation 23 of the PSR 2017 provides that an authorised payment institution must safeguard relevant funds (relevant funds being defined in Regulation 23(1) as being funds received for the execution of a payment transaction). (In Kicks 1 these are referred to as 'Safeguarded Funds' to ensure consistency with the proposed Distribution Plan and correspondence previously sent to customers). An authorised payment institution has two different options in respect of Relevant Funds, they can either be segregated from other funds held by the Company or covered by an insurance policy. The Company chose the segregation method.

32. Regulation 23 of the PSR 2017 creates a bespoke statutory regime in relation to Relevant Funds in the hands of the payment institution. The payment service users are granted rights over the Relevant Funds in priority to other creditors, by virtue of the express wording of Regulation 23(14) of the PSR 2017.

33. In order to achieve the safeguarding requirements of the Payment Services Directive II, the relevant funds needed to be treated as not being limited to those that were safeguarded but instead should extend to include company funds equal to the relevant funds which ought to have been, but were not, safeguarded; *Ipagoo LLP* [2022] EWCA Civ 302. Regulation 13(8) put this on a statutory footing.

34. Payment service users entitled to a Relevant Funds claim have an interest akin to a secured interest over the Relevant Funds, which takes priority over the waterfall of payments prescribed by s.175 of the Insolvency Act 1986 ('**IA 1986**'); *Ipagoo LLP* [2022] EWCA Civ 302. Although *Ipagoo* was an Electronic Money Institution (EMI) and therefore the decision was under the Electronic Money Regulations 2011, the decision of the Court of Appeal applies equally to the PSRs; *Re Allied Wallet* [2022] EWHC 1877 (Ch) at [8]. Claims to Relevant Funds rank ahead of unsecured creditors and the costs of the liquidation, other than the costs associated with distributing the Relevant Funds; Regulation 23(15).

35. The 2021 Regulations created a special administration regime for payment institutions and electronic money institutions: Regulation 4(2)-(3). It was modelled on the Investment Bank Special Administration Regulations 2011 (which were made in response to the problems that arose in the administration of Lehman Brothers: *Re SVS Securities Plc (In Special Administration)* [2020] EWHC 1501 (Ch) at [14] – the problems that arose could not be overcome by a Scheme of Arrangement under Part 26 of the CA 2006; *Re Lehman Brothers International (Europe)* [2010] 1 BCLC 496).

36. The special administrators are obliged to pursue the special administration objectives set out in Regulation 12:

> '(1) The administrator has the following special administration objectives.
>
> (2) Objective 1 is to ensure the return of relevant funds—
>
> (a) as soon as is reasonably practicable in accordance with regulations 13 to 15 and 17 to 34, or
>
> (b) promptly, in the case of post-administration receipts, in accordance with regulation 16, subject to paragraph (10).
>
> (3) Objective 2 is to ensure timely engagement with payment system operators, the Payment Systems Regulator and the Authorities in accordance with regulation 35.
>
> (4) Objective 3 is to either—
>
> (a) rescue the institution as a going concern, or
>
> (b) wind it up in the best interests of the creditors.'

37. The Application is concerned with Objective 1.

38. The distribution of Relevant Funds back to customers must be by way of a distribution plan, drawn up in accordance with Rules 112(2) – (4) and approved by the Court: Rules 112 and 114.

39. Prior to Court approval, the distribution plan must be put before the committee of customers/creditors for their approval (either with or without modification): Rule 113. If the distribution plan is not approved, the committee must have an opportunity to explain their position to the Court.

40. If a shortfall exists between the amount of Relevant Funds held by a Company and the amount of admitted claims to Relevant Funds, then the administrators must use company monies to top-up the Relevant Funds insofar as is possible; Regulation 13(8). There is provision in Regulation 19(2) for how any remaining shortfall (after top-up) is to be dealt with in the distribution plan. Any shortfall is to be borne pro rata.

41. The 2021 Rules prescribe specific elements that the distribution plan is required to address (detailed below). The 2021 Rules are modelled on the Investment Bank Special Administration Rules 2011.

42. As to costs, Regulation 18(5) and Rule 99 detail how a client's share of the expenses of the special administration will be discharged, insofar as they relate to the achievement of Objective 1. The costs and expenses of Objective 1 are to be paid out of Relevant Funds.

43. On an application to Court pursuant to Rule 114 for approval of a distribution plan, the court has a discretion as to whether to grant the relief sought, but it must be satisfied that (i) where Rule 111 applies (as it does here) that the JSAs have made the necessary notifications in accordance with that rule; and (ii) the creditors committee has approved the distribution plan under Rule 113, or that it has been given an opportunity to explain why not. It must also be satisfied that certain prescribed notifications have been given, pursuant to Rule 114(3) and (5).

The Approach to approving a distribution plan

44. The Rules do not provide any guidance as to the Court's exercise of discretion pursuant to Rule 114. Ms Rogers submitted that guidance can be taken from the authorities decided under the Investment Bank Special Administration Rules 2011, in which 'Objective 1' is very similar to the 2021 Rules (being the timely return of client money – this being the overall purpose of CASS 7A). I agree. Ms Rogers drew my attention to the following points from those authorities, all of which I accept and propose to apply.

45. *Re Strand Capital* [2019] EWHC 1449 (Ch) cited with approval the (unreported) decision of David Richards J in *Re MF Global UK Ltd* [2012] EWHC 3789 (Ch) at [24] (also cited with approval by Arnold J (as he then was) in *Re Beaufort Asset Clearing Services Limited* [2018] EWHC 2287 (Ch), adding only that Objective 1 concerned not only returning client assets but returning them as quickly as reasonably practicable):

> '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 clients assets to which the plan relates.'

46. In *Hume Capital Securities Plc* [2015] EWHC 25 (Ch) HHJ Keyser QC, sitting as a judge of the High Court, added at [11] (with which Arnold J (as he then was) agreed in Re Beaufort Asset Clearing Services Limited [2018] EWHC 2287 (Ch) at [11]):

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

47. In *Re SVS Securities Plc* [2020] EWHC 1501 (Ch), Miles J summarised the principles that have been developed by the Court at [32] – [34]:

> '[32] I have mentioned the court's discretion. Counsel for the applicant, Mr Bayfield QC, took me to a number 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.'

48. This summary was approved and applied by Trower J in *Re Reyker Securities plc* [2020] EWHC 3286 (Ch) at [22]-[23] and by Rajah J in *Re Blankstone Sington Limited* [2024] EWHC 1111 (Ch) at [9].

49. The court has to be satisfied that the proposed plan is fair and reasonable; *Re WealthTek LLP* (first judgment) [2024] EWHC 2520 (Ch) at [9].

The Facts in more detail

The Company

50. The Company was incorporated on 8 March 2005 to operate in the payments sector. The Company is authorised and regulated by the Financial Conduct Authority ('**FCA**') as an authorised payment Institution (as defined in Regulation 2(1)), with reference number 507958.

51. As already outlined, the Company was a payment services company, but its specialist business was offering currency conversions alongside payment services. As such, companies and individuals who had a need to make international payments could send the Company one currency, with an instruction to convert that currency to a second currency and pay it to a named beneficiary.

52. The Company offered both spot trades (being an immediate conversion of currency at the prevailing market rate) and forward contracts (a contract committing to the conversion of a specified sum of money at a future point in time for a pre-agreed exchange rate).

Dealings with EU Customers

53. Rational Group's initial response to the problems posed by Brexit was to incorporate RFX EU and Xendpay EU in Lithuania and seek a licence from the Bank of Lithuania to handle European based payment services through those entities. That route did not work, therefore Rational Group sought alternative methods of continuing its business with European customers, such as white labelling the products of other companies which had obtained a European licence. In this instance, a white label is effectively a Rational FX wrapper on a product sold by a different company, which did have the ability to transact EU business by virtue of having a European based subsidiary.

54. Ms Kicks provided a helpful summary of the different methods pursued by the Company in order to transact business from EU domiciled customers after Brexit, at various points in time, namely:

    i) 1 January 2021 – 8 March 2023: RFX EU acted as EMD agent to UAB PAYRNET, a company incorporated in Lithuania authorised by the Bank of Lithuania to issue electronic money and payment services ('**PayrNet**'), forming part of the Rails Bank group ('**RailsR**') and ('**the RailsR Period**').

    ii) 1 April 2023 – administration: RFX EU white labelled the services of Currencycloud B.V., a company incorporated in the Netherlands ('**Currencycloud**') and ('the **Currencycloud Period**').

    iii) 5 May 2023 – administration: the Company entered into various contractual arrangements with FreemarketFX Limited ('**Freemarket**') and ('the **Freemarket Period**').

55. Ms Kicks also exhibited an extremely detailed and helpful diagram showing the various flows of funds in each of these arrangements.

Reconciliation of funds

56. Since their appointment the JSAs have worked to identify and reconcile the funds held by the Company. They have taken control of funds from 10 different banks, held in 134 bank accounts, in 58 different currencies. The JSAs have, as is required by the 2021 Regulations, constituted a single asset pool of Relevant Funds. Details of the extensive reconciliation exercise are described in Kicks 1.

57. At the point of forming the Committee in February 2024, it became apparent that certain persons/entities did not agree with their categorisation (based on information in the Company's books and records) as either a customer or a creditor of the Company. The fact that the Company's books and records were not maintained in the manner that they should have been, extended the reconciliation exercise considerably, as Ms Kicks describes.

58. Owing to the consequences of Brexit and the Company's attempts to maintain business with EU customers, Ms Kicks says, and I accept, that the JSAs needed to undertake substantial investigations, with the assistance of legal advice, in order to determine what funds were held by the Company on behalf of customers domiciled in the EU; how, when, and why these funds were paid to the Company; the basis on which the Company holds these funds; and accordingly, whether these EU domiciled customers have a claim to Relevant Funds. This was a necessary line of investigation in order to achieve Objective 1. Ms Kicks explains that this process was complex and involved a review and reconciliation of all records held, detailed enquiries with the Company's directors/financial controller, and enquiries with third parties e.g. Currencycloud and Freemarket. Over some 95 detailed paragraphs in her Witness Statement, Ms Kicks deals with this process, which gives some idea of the time and effort which has been required.

59. The reconciliation process was complete, and the distribution plan drafted, by August 2024, at which point the draft Distribution Plan was sent to the FCA.

60. The JSAs also provisionally adjudicated upon claims to Relevant Funds.

61. The reconciliation exercise, taken together with the provisional adjudication, revealed that there is, unfortunately, a significant shortfall in Relevant Funds, even after the JSAs have topped-up the Relevant Funds insofar as possible from the Company's own monies. On the basis of the preliminary adjudication, the difference between the Relevant Funds available for distribution and the total amount of eligible claims to Relevant Funds is £14.76m prior to any costs being taken ('the **Shortfall**'). At present the JSAs estimated that customers with admitted claims to Relevant Funds will receive 7.7p/£.

The Committee

62. In accordance with Rule 69(2), the JSAs considered that the committee should consist of mainly customers of the Company, with no more than 1 creditor of the Company, in order to appropriately reflect those with an interest in the achievement of the Objectives. The total number of the committee is a minimum of 3 and a maximum of 5; Rule 69(1). Given the issue that arose with the categorisation of persons/entities as either customer or creditor of the Company (see above), the initial meeting of creditors in February 2024 had to be adjourned.

63. On 12 March 2024, at the adjourned meeting, a committee was elected, comprising Joltstyle Limited (represented by Andrew Lamb); DBN Services Limited (represented by Daniel Skordis); Global Hospitality & Events Limited (represented by Marcus Heal); Mornington Consultancy Ltd (represented by Oliver Mayes) and Holy Land Dates Limited (represented by Mohammed Nazim Awan) ('the **Committee**'). Holy Land Dates Limited has a claim both as a customer and a creditor. The other four members of the Committee are all customers of the Company.

Bar date

64. In accordance with Regulation 20 of the 2021 Regulations, the JSAs considered that it would expediate the return of Relevant Funds to set a bar date for the submission of claims to Relevant Funds. On 5 July 2024, the JSAs set a bar date of 31 July 2024.

65. Pursuant to Rule 111, after the bar date had passed, on 15 August 2024, the JSAs sent a notice to all potential customers (customers whom the JSAs had contact details for, who were eligible to make a claim to Relevant Funds according to the records of the Company or information received by the JSAs, but who had not done so) ('the **Rule 111 Notice**').

SERVICE/NOTIFICATION OF THE APPLICATION

66. In her witness statement, Ms Kicks set out the details of how service and/or notification of the Application was effected. The final draft of the Distribution Plan was sent to the Committee on 9 January 2025. A virtual committee meeting was held on 22 January 2025 to consider and approve the Distribution Plan. The meeting was attended by 4 out of the 5 Committee members, who all approved the Distribution Plan without modification.

67. The finalised Distribution Plan, as approved by the Committee, was sent to the FCA on 3 February 2025.

68. Ms Kicks' evidence, which I summarise here, satisfied me that all potential customers and creditors of the Company have been informed of the intention to make the Directions Application at the same time as seeking Court approval of the Distribution Plan, by way of the progress reports and in the covering letter to the bar date notice sent to EU customers.

69. The JSAs posted password protected copies of the Application, together with the proposed Distribution Plan, the Explanatory Statement containing FAQs, Kicks 1 (and the exhibit thereto) and the Draft Order onto Interpath's portal. By way of covering letter dated 7 March 2025, sent by email, the JSAs provided all customers and creditors (as detailed at paragraph 260 of Kicks 1: all customers who have submitted a Relevant Funds claim; all customers who were sent the Rule 111 Notice; and any other known EU customers, to the extent that they do not fall within the above two categories) with a link to the portal and the relevant password to access the documents and notice of the date, time and venue of the first directions hearing on 27 March 2025. The letter confirmed that the customer/creditor could request a hardcopy if needed. By email of 7 March 2025, the FCA were also provided with a copy of these documents and notice of the first directions hearing.

70. As such, the JSAs submit that they have complied with their service obligations pursuant to Rule 114(3). I agree.

71. Ms Kicks reports that they received contact from 4 customers/creditors of the Company, in response to the Application, prior to the first directions hearing on 27 March 2025, along with MLS. MLS aside, no other customer or creditor has filed evidence in response to the Application (permission having been given by the Order of (then) Deputy ICC Judge Agnello KC dated 27 March 2025 made at the interim directions hearing).

72. Following that hearing, the JSAs sent updating correspondence to the customers and creditors of the Company, including a copy of the order made at that hearing and the hearing notice.

73. A solicitor from Spector Constant & Williams, who acts on behalf of Limebay Holdings Ltd ('**Limebay**'), a customer of the Company, confirmed that they would be attending the hearing on their client's behalf, but that Limebay would not be instructing counsel to attend.

THE DIRECTIONS APPLICATION

A. JURISDICTION

74. Paragraph 63 of Schedule B1 to the Insolvency Act 1986 applies to a special administration of a payment services Company, per Regulation 37 (see the table contained at Regulation 37).

75. Ms Rogers submitted, and I accept, that it is well-established that questions of law (rather than commercial judgment), which affects the adjudication and treatment of claims (such as whether or not third parties are properly creditors of the company), is

an appropriate issue on which administrators may seek directions from the Court pursuant to Paragraph 63 of Schedule B1. It is on this basis that the JSAs apply for the declaratory relief which I set out above.

76. Ms Rogers also emphasised that the Directions Application is made in circumstances where this is the first matter before the Court concerning a payment services company that holds monies from EU domiciled customers post Brexit, when such companies lost the ability to passport their services to EU domiciled customers directly. The industry has developed ways of continuing to deal with EU customers by alternative methods in the post Brexit period, however, insofar as Ms Rogers is aware, these methods have not been considered by a Court before, certainly not in connection with the approval of a distribution plan pursuant to the 2021 Regulations.

77. The impact that the various alternative methods used by the Company to transact business with EU clients has upon the categorisation of claimants' claims to Relevant Funds, is the subject of the Directions Application.

78. In what follows, I set out the JSAs analysis of the position under each heading. I carried out extensive pre-reading in advance of the hearing and was assisted by the oral submissions made to me. As such, I was satisfied that the analyses set out below were correct.

B. EXISTING CUSTOMERS DURING THE RAILSR PERIOD (§3 of the Proposed Order)

79. RFX EU entered into an agency agreement with PayrNet (a subsidiary of Rails Bank) on 18 November 2020 (the '**PAA**'). RFX EU was appointed as an EMD agent of PayrNet (see §57 of Kicks 1) to carry out the permitted activities defined in Part A of Schedule 1 to the PAA (payment services).

80. On 17 November 2020 RFX EU and the Company entered into an outsourcing agreement ('the **Internal Outsourcing Agreement**'). The purpose of the Internal Outsourcing Agreement was to outsource the services provided to customers, from RFX EU to the Company (e.g. onboarding customers and processing trades), in return for the revenue due to RFX EU being paid to the Company.

81. On 26 November 2020, existing customers of the Company that were domiciled in the EU ('**Existing EU Customers**'), were sent an email with the following text ('the **Amended Terms Email**'):

> 'As the Brexit transition period comes to an end on December 31, 2020, we are making the necessary changes to stay aligned with the new rules and regulations. In order to continue providing you with our service, we will be updating our Terms & Conditions and Privacy Policy, which take effect on January 01, 2021 and will apply to your use of our services from January 01, 2021
>
> …

> The dedicated accounts feature will go live in the month of December. We will contact you again in the coming weeks with more information.
>
> You don't need to take any further action upon receiving this email. By continuing to use our services, you agree to the updated terms.'

82. This email was sent by the Company (or Xendpay as agent for the Company). It makes no reference to RFX EU, Xendpay EU or PayrNet, nor does it require the Existing EU Customers to onboard with those entities (it explicitly says that they do not need to take any further action). This email gives the reader the impression that the Company was updating their terms and conditions, not that a new entity (RFX EU) would be providing them with services on behalf of PayrNet (another entity with whom none of these customers had contracted previously).

83. As far as the JSAs are aware, Existing EU Customers were never contacted on this subject again (as is suggested in the Amended Terms Email).

84. If Existing EU Customers clicked on the hyperlinked 'terms and conditions' in the Amended Terms Email, then, according to Jigar Shah (a director and the Company's COO) ('**Mr Shah**'), customers would have been presented with PayrNet's terms and conditions for the relevant client type (e.g. private or corporate) and relevant location (Germany or non-Germany) ('the **PayrNet T&Cs**').

85. Clause 4 of the PayrNet T&Cs provided a specified method of acceptance:

    i) By registering with RFX EU (for EEA clients outside Germany); or

    ii) Checking the box online during the registration process with RFX EU confirming that you agree to the terms and conditions, otherwise confirming agreement to them, or making use of the services (for German clients).

86. Clause 4.2 specifies that the customer will become a client of PayrNet once they have taken the step specified in clause 4.1. In the circumstances, for EEA customers outside of Germany, by registering with RFX EU, the customer was agreeing to the PayrNet T&Cs and becoming a client of PayrNet, with RFX EU acting as EMD agent.

87. Existing EU Customers were not onboarded with RFX EU, as there was no indication of the need to take a positive step i.e. register with RFX EU (there was in fact a contrary positive indication that Existing EU customers need not do anything).

88. The Company's terms and conditions of business did provide for updates to be made by way of notice in writing (at clause 2). It is of course acceptable for an update to be by way of notification, on the basis that if the customer continues to place orders then they are accepting the amended/updated terms. As Ms Rogers submitted, the question for the court in such an instance would be whether, as a matter of fact in the particular circumstances, the amended terms had been adequately incorporated into the contract between the parties (by way of variation). However, what the Company was trying to achieve by the Amended Terms Email was not in fact an update to its terms and conditions, which the customer had previously agreed to. This was a new set of terms

and conditions with a different counterparty, and an agent performing services that the customer had not previously contracted with.

89. On the facts, as Ms Rogers submitted, this is a question of offer and acceptance. The provision of the PayrNet T&Cs may be construed as an offer to contract. The position is as follows:

i) PayrNet, acting via RFX EU as its agent, offered to contract with existing customers of the Company for the provision of e-money services, with associated (and limited) payment services being provided by RFX EU under a separate contract, alongside.

ii) The Amended Terms Email does not notify EU customers that RFX EU would be acting as PayrNet's appointed agent. No mention is made of any agency relationship.

iii) The email was sent by the Company, without any mention being made of either PayrNet or RFX EU in the body of the email, or in the footers. In fact, the footers to the email said '*you are receiving this email because you are registered with RationalFX… Rational Foreign Exchange Ltd trading as RationalFX is registered in England & Wales (Company number: 05385999)…*'. The body of the email stated '*in order to continue providing you with our service… [the PayrNet T&Cs]…will apply to your use of our services*…' (emphasis added). Therefore, on the face of the email, the Company was stipulating an update to its terms and conditions, which would mean that the Company could *continue* providing services to its existing EU customers. The use of the word 'continue' suggested the same services as previously, not that a new entity would be providing services.

iv) If or once the customer clicked on the hyperlink and viewed the PayrNet T&Cs, these of course stated that the relevant contract was with PayrNet, with RFX EU acting as agent and providing payment services under a separate (further) contract. As such, there was a contradiction with the body of the email.

v) Clause 4 of the PayrNet T&Cs (aside from the T&Cs specific to Germany) stated 'you can agree to this Agreement through registering with [RFX EU]. When will you become a client of ours? You will be bound by this Agreement once you have agreed to it as set out above…' This is again contradictory to the body of the email, which says 'you don't need to take any further action upon receiving this email. By continuing to use our services, you agree to the updated terms'. In the case of a contradiction between a covering email/letter and the terms of business themselves, Ms Rogers submitted that the terms should prevail.

90. I have to consider what the reasonable customer receiving the Amended Terms Email, together with the PayrNet T&Cs, would have concluded. On reading clause 4 of the PayrNet T&Cs, it would be reasonable to conclude that, by not registering with RFX EU, they had not entered into a contractual relationship with PayrNet (with RFX EU acting as agent), or with RFX EU. The customer may have concluded that the terms were 'possibly' applicable, but possible is not good enough; see *Hamad M. Adlrees & Partners v Rotex Europe Limited* [2019] EWHC 574 (TCC) at [174]-[180].

91. The JSAs did not consider that Existing EU Customers became subject to the PayrNet T&Cs and formed a contract with RFX EU, by simply using the services of the Company (i.e. acceptance by conduct), for the following reasons:

    i) Funds held on account for existing EU customers were not moved to PayrNet (Rails Bank) but remained with the Company.

    ii) Given that RFX EU had no staff on the ground and all services were outsourced to the Company, the customer would have contacted the Company (not RFX EU) to place future trades.

    iii) Whilst acceptance can be by conduct, acceptance must be communicated, therefore the customer must have known that they were contacting RFX EU to place a trade. Given that the customer was not made aware of the Internal Outsourcing Agreement, nor the interchange of functions between the Company and RFX EU, the customer would not have thought that they were communicating such acceptance to RFX EU.

    iv) Acceptance by conduct must be unequivocal. In circumstances where it is not clear who the customer was dealing with, that acceptance cannot be viewed as unequivocal.

    v) There was no process that would have led an existing customer to believe that they were 'registering' with RFX EU.

    vi) Clause 4 of the PayrNet T&Cs stipulates a method of acceptance, as such acceptance by another method will rarely suffice.

92. Whilst the applicable clause for German clients was wider (thereby providing a lower threshold for acceptance of the PayrNet T&Cs), the above analysis continues to apply. In any event, the JSAs have only received five potential claims from German domiciled customers, in the total sum of £12,600 (per the books and records) and none of these would be categorised as Existing EU Customers, therefore the point is academic.

93. A general point to note is that the provision of payment services to EU domiciled customers by the Company, post Brexit, was not permitted from a regulatory standpoint. However, in reality this is what happened. Simply because it was not permitted as a matter of regulation, should not, Ms Rogers submitted, mean that the customers' funds are not safeguarded. They were still provided for use in a payment transaction and she submitted that the Company should have safeguarded those funds. It is on this basis that the JSAs proposed to treat Existing EU Customers as having a claim to Relevant Funds. I consider that is the correct course.

C. NEW CUSTOMERS DURING THE RAILSR PERIOD (§4 of the Proposed Order)

94. During the RailsR Period, new customers domiciled in the EU ('**New EU Customers**') were primarily onboarded through the Company's website (or Xendpay's website, which acted as agent to the Company). All New EU Customers were required to tick a box to confirm that they had read, understood and accepted the terms and conditions for onboarding with the Company (for EU Customers onboarded offline they would

receive an email requesting they do so, with a link to the relevant acceptance page on the Company's or Xendpay's website). The 'terms and conditions' were hyperlinked. By clicking that link customers were taken to the terms and conditions webpage (see Kicks 1 at §63). During the RailsR period, 5 different sets of terms and conditions were shown on this page, with the following headings:

i) Global (excluding EEA): All clients: Click here to download and review our Global Terms and Conditions to understand them in full.

ii) EEA (excluding Germany):

a) Private clients: Click here to download and review our EEA Terms and Conditions for Private Clients

b) Corporate clients: Click here to download and review our EEA Terms and Conditions for Corporate Clients

iii) Germany:

a) Private clients: Click here to download and review our German Terms and Conditions for Private Clients

b) Corporate clients: Click here to download and review our German Terms and Conditions for Corporate Clients

95. The JSAs understand from Mr Shah that the PayrNet T&Cs applicable for customers in Germany were introduced around April 2021, at the request of PayrNet. Before their introduction, the PayrNet T&Cs at paragraph 94 ii) above, were the only terms and conditions in place in respect of EU customers (see Kicks 1 at §69).

96. Below the links to the above terms and conditions, the webpage stated (from around April 2021):

> 'In the EU, Xendpay services are provided by RationalFX EU… Rational Foreign Exchange EU, UAB is an EMD Agent of UAB PayrNet, an Electronic Money Institution authorized by the Bank of Lithuania under the Law on Electronic Money and Electronic Money Institutions (license reference 72, issued on 2020-08-28) for the issuing of electronic money and provision of the related payment services.'

97. The same applied for Xendpay.

98. By clicking on the link to the EEA or German terms and conditions, customers were taken to the PayrNet T&Cs for both EEA customers and German customers. The JSAs used the 'wayback machine' and cross checked that the PayrNet T&Cs available to customers during the RailsR period are the same as those held in the Company's books and records. Ms Kicks confirms they were.

99. Pursuant to the PayrNet T&Cs, New EU Customers were contracting with PayrNet and RFX EU (as PayrNet's EMD agent). Acceptance was by way of clause 4, set out above. As New EU Customers were undertaking a registration process (handled by the

Company on behalf of RFX EU, pursuant to the Internal Outsourcing Agreement), they were accepting the PayrNet T&Cs.

100. As PayrNet were providing the customer with e-money services and RFX EU was to provide the customer with payment services alongside the e-money service (on PayrNet's e-money licence), the PayrNet T&Cs anticipated (at clause 5.3) that there would be a further agreement between RFX EU and the customer, dealing with the information required under the Law on Payments of the Republic of Lithuania No VIII-1370 of 28 October 1999 (as amended). This did not in fact happen – there were no separate terms between RFX EU and the New EU Customer providing the information required under the Law on Payments of the Republic of Lithuania No VIII-1370 of 28 October 1999 (as amended). However, whilst the customer was not provided with required information, the payment services were still provided, which, on the contractual documentation, was by RFX EU.

101. Once the customer had ticked the box to confirm that they had read, understood, and accepted the terms and conditions, that was automatically recorded on the Company's internal system ('the **Xend Platform**') and could not be manually overridden.

102. On entering into the PAA, PayrNet opened five bank accounts in RFX EU's name, with LHV Bank (an Estonian Bank) ('**RFX EU PayrNet Accounts**'). Mr Shah informed the JSAs that all five accounts were safeguarded accounts; four of the PayrNet accounts were in the name of RFX EU; and one account was in the name of the Company but it was not used to collect monies from EU customers, it was only used for UK based customers to send euros to the Company.

103. At a later point in time, RFX EU opened 32 accounts with Crown Agents Bank ('**CAB**') in multiple different currencies ('**RFX EU CAB Accounts**'), in order to utilise CAB as a provider of foreign exchange services.

104. During the period January 2021 – February 2022, EU customers (whether existing or new) would be given the account details of the RFX EU PayrNet Accounts (or the relevant account e.g. the collections account). Funds would then be sent from the RFX EU PayrNet Accounts to the Company's account(s) with Barclays Bank Plc, from where the Company would execute the necessary trade with its counterparty (because the Company carried out the services, rather than RFX EU, pursuant to the Internal Outsourcing Agreement). The converted currency would then (in the main part) return to the Company's Barclays account and then on to the beneficiaries' bank account. Some of the counterparties for exotic currencies were prepared to return the funds directly to the beneficiary.

105. For currencies other than euros, EU customers sent the funds to RFX EU CAB Accounts. In some instances, CAB could convert the funds (e.g. AED or INR), for anything else, the funds were transferred from RFX EU CAB Accounts to the Company's CAB accounts, then sent on to a banking counterparty to perform the trade.

106. The JSAs concluded that the funds moving from RFX EU to the Company are not Relevant Funds. Such funds were received by the Company pursuant to the Internal Outsourcing Agreement and pursuant to the Company's obligations to RFX EU, not the Company's obligations to EU customers, with whom it had not contracted.

107. During the period February 2022 to March 2023 the funds flowed differently. In February 2022 the RFX EU PayrNet Accounts were closed. It is now understood by the directors of the Company that LHV Bank had compliance issues with PayrNet and offboarded PayrNet (but this was not disclosed to the directors at the time). As a result of the closure of the RFX EU PayrNet Accounts, EU customers were directed to send their funds to Lloyds bank accounts held in the Company's name in the UK. The Company then performed the trade/transaction before returning the funds to the beneficiary.

108. Accordingly, in this second period, New EU Customers were shown (and agreed to) the PayrNet T&Cs, but customer monies were paid into a Lloyds bank account held in the UK in the name of the Company. However, it is important to appreciate that PayrNet had not terminated the PAA. Therefore, EU customers continued to sign up as a PayrNet client, using their e-money services (of which there must have been an immediate breach given that the Company held the customers' money and PayrNet did not provide e-money services) and the PayrNet T&Cs confirmed that payment services would be provided by RFX EU under a separate contract.

109. The directors of the Company (along with the Financial Controller) informed the JSAs that, upon the closure of the RFX EU PayrNet Accounts, all funds were swept to a segregated (but not safeguarded) account that the Company held with Lloyds Bank in January/February 2022. However, these funds were allegedly later swept to safeguarded accounts at Lloyds (the JSAs have no visibility on this). The Company's Lloyds accounts were closed in 2023, upon which the JSAs were told that any remaining funds were either returned to customers, or where this was not possible were swept to the Company's accounts with CAB, Yes Bank, or JP Morgan.

110. This use of the Company's Lloyds bank accounts during the RailsR Period continued for a little over one year, until PayrNet entered an insolvency process in Lithuania on 9 March 2023. The Company allegedly made all EU customers 'inactive' as of this date. However, the books and records reveal that the Company continued to process trades/transactions on behalf of EU customers between 9 March – 31 March 2023, when no European partner was in place. Only three EU customers may have a claim for trades/transactions entered into during this period, with a total of only £40.53. None of these customers have submitted a proof of debt in the administration thus far.

D. THE CURRENCYCLOUD PERIOD

111. RFX EU entered into a Business Introducer Agreement with Currencycloud (albeit four different entities in the Currencycloud group) dated 28 February 2023 ('the **IB Agreement**'). Pursuant to the IB Agreement, RFX EU was to procure customers for Currencycloud's cross boarder payment services and carry out limited services on behalf of Currencycloud (see clause 3.1). Whilst RFX EU was permitted to use Currencycloud's program or interface, as part of the services that it was providing to customers, RFX EU expressly agreed not to carry on any activity that formed part of the payment services provided by Currencycloud (clause 3.2).

112. Currency Cloud provided terms of use to the end customer ('the **Currencycloud T&Cs**'). These terms and conditions stated, at clause 1.2:

> '**Business Introducer**. If you have been introduced to us by a Business Introducer, then the Business Introducer may provide the first level of customer service and perform other functions necessary and appropriate to support the provision of the Services, pursuant to a separate agreement between the Business Introducer and Currencycloud. You are not a third-party beneficiary of that separate agreement between the Business Introducer and Currencycloud.'

113. RFX EU, as the 'Business Introducer', was to act as agent for the customer (per clause 8.2):

> '**Business Introducer**. If you have been introduced to us by a Business Introducer, then your Business Introducer shall be an Authorised Person and shall act as your agent for the purposes of your using the Services unless you have informed us in writing that you have agreed otherwise with the Business Introducer. In the event that a Business Introducer does not act as an Authorised Person or ceases to act as an Authorised Person, you are required to inform us of this immediately'

114. The directors informed the JSAs that, during this period, customers based in the EU were redirected from Rational Group's website to Currencycloud's website, which had a 'RFX' logo on the site, if they stated that their residency was in the EU. Customers were onboarded by Currencycloud and as such, by onboarding, the client was accepting the Currencycloud T&Cs.

115. The JSA have identified web archives/captures (using the Wayback machine tool) which accord with the above.

116. The Funds Flow diagram shows that no funds from customers using the services of Currencycloud were received into either RFX EU or the Company. As such, the Company does not hold any funds (and consequently, no Relevant Funds) from customers during this period.

E. THE FREEMARKET PERIOD (§§5 and 6 of the Proposed Order)

117. The Company entered into an 'Outsourcing Agreement' with Freemarket on 5 May 2023 ('the **FM Outsourcing Agreement**').

118. Freemarket provided the Company with 'Additional Terms' dated 14 June 2023, which were signed by the Company on 18 July 2023 ('the **Additional Terms**').

119. The JSAs wrote to Freemarket by letter and email of 20 May 2024, 9 July 2024 and 3 October 2024, in order to explore the position between Freemarket and the Company more fully. Freemarket provided responses dated 7 June 2024 ('the **June Letter**') and 17 July 2024 ('the **July Letter**') and 5 November 2024 ('the **November Letter**').

120. Freemarket took the position that the FM Outsourcing Agreement was terminated by clause 18.2 of the Additional Terms, which is an entire agreement clause, because the Company was found by Freemarket to be in breach of the FM Outsourcing Agreement

due to its failure to provide signed FM Customer T&Cs from EU customers to Freemarket. The JSAs do not accept that as the position has not been reconciled with the Company's records or the account given by Mr Shah. Termination of the FM Outsourcing Agreement was dealt with at clause 12 and paragraph 3 of Schedule 6 of the FM Outsourcing Agreement. Clause 18.2 of the FM Additional Terms does not comply with the termination requirements contained within those clauses. Further, the consequences of termination, as set out at clause 13 of the FM Outsourcing Agreement, did not follow.

121. Freemarket operated two different models of facilitating funds flow from the Company's clients, as is explained at §5 of the June Letter:

i) The Collections Model: Underlying clients of the Company would settle funds into an account held in the name of the Company at Freemarket. These funds would then be sent out to the Company's accounts held elsewhere, or direct to a third-party FX provider, for bulk currency conversion and onward payment to the relevant beneficiaries ('the **Collections Model**'). Essentially, Freemarket is largely being used as a holding account by the Company in the Collections Model.

ii) The Payment on Behalf of Model: Underlying clients of the Company who wanted to instruct payments to third parties directly from Freemarket (or receive payments from third parties) would set up a dedicated virtual IBAN ('**vIBAN**') in their own name (as opposed to the name of the Company). This was essentially like a bank account (or ledger) in the customer's own name into which the customer could receive payments or make payments from, however the customer did not have access to Freemarket's systems, all transactions were administered by the Company on behalf of the underlying client ('the **POBO Model**').

122. Freemarket's position is that:

i) The Additional Terms were applicable to the Collections Model and that, underlying clients using the Collections Model, did not have any agreement with Freemarket.

ii) The FM Outsourcing Agreement was applicable to the POBO Model, until allegedly terminated on 14 June 2023. Underlying clients using the POBO Model being required to sign Freemarket's terms and conditions ('**the Freemarket T&Cs**').

123. Freemarket do not consider that any customer should have been onboarded to the POBO Model post 14 June 2023.

124. Mr Shah has a different account to that given by Freemarket. The Company understood that the need for both the Collections Model and the POBO Model was due to the source of the incoming funds being paid to Freemarket. Freemarket would accept funds from a third party, but not from a fourth party, which resulted in the need for a vIBAN.

125. It was explained by Mr Shah that customers using the Collections Model were recorded on the Xend platform as FMP and customers using the POBO Model were recorded on

the Xend platform as FMA. Whatever model the customers were using, they always signed the Freemarket T&Cs and no such customer signed any terms and conditions with the Company.

126. On that basis, the Company considered all customers to be clients of Freemarket, once the customer was approved for onboarding by Freemarket and the Freemarket T&Cs were signed.

127. Existing customers of the Company were sent the Freemarket T&Cs in a bulk mail shot via a system called Hubspot. Customers were informed that the services would be provided by Freemarket from thereon. New EU customers during this period were sent the FM Customer T&Cs manually when being onboarded.

128. Once the customer was onboarded, funds would be paid into Freemarket using either the account held in the name of the Company, or the vIBAN of the customer, depending on the model. In order to act on a payment instruction, the Company would remove the funds from its named account, either into its own accounts first and then onto Velocity (or other banking partner offering currency conversions) or directly onto Velocity, for the purposes of the currency conversion. Following conversion, the exchanged funds would be received back into the Company's accounts for payment onto the intended beneficiary of the payment instruction. This is supported by the funds flow diagram. The Company occasionally used Freemarket for the currency conversion and payment out, but this was rare due to the high fees charged.

129. In respect of outgoing funds, an underlying customer using the POBO Model could, at least in theory if not practice, make payment to a beneficiary from their vIBAN account with Freemarket. However, underlying customers using the Collections Model would need funds removing from the Company's account with Freemarket, such that the Company could carry out any currency conversion and pay the beneficiary.

130. Freemarket's position is that it safeguarded funds received under the POBO Model through to payment being executed. However, funds received under the Collections Model were the obligation of the Company to safeguard through the payment process (save that they were safeguarded for the time that they were sitting in the Company's account with Freemarket, before they were removed for currency conversion and onward payment) (see the November Letter).

131. By way of email on 12 May 2023 at 1:33pm, the Company asked Freemarket for clarification on three important points. Freemarket responded over the course of two emails (12 May 2023 at 3:49pm and 17 May 2023 at 10:29) with the points shown first and the confirmation/answers shown in italics (although it should be noted that these questions and answers were neither satisfactory nor sufficient to address the regulatory position):

> 'Clarification and confirmation that, as RFX are not regulated in the EU following the suspension of Railsr, Freemarket have the necessary regulatory approval to service EU customers '*Yes, RFX EU customers are covered. We have the ability to work with EU businesses under our current license as we have explained in the past, but also to add additional comfort to you, we will be*

> *obtaining our European licence via the Central Bank of Ireland in 2 – 4 weeks.'*
>
> Confirmation from Freemarket that all safeguarding obligations are with, and will be met by, Freemarket as the Principle [sic] '*Confirmed. Freemarket safeguards all funds, however this does not encompass our client's own safeguarding responsibilities*.'
>
> Confirmation that if & when required, RFX have the authority to use our own FX and payment out (outbound payments) rails '*Confirmed. You are free to leverage other providers/your own rails when moving funds outside of Freemarket*.''

132. Based on their investigations and legal advice, the JSAs came to the following conclusions:

    i) The FM Outsourcing Agreement relates to the POBO Model and the Additional Terms relate to the Collections Model, as suggested by Freemarket.

    ii) The Freemarket T&Cs should only have been given to clients utilising the POBO Model. The services provided by Freemarket, through the Company, are detailed at clause 1.4 of the Freemarket T&Cs and these services could only relate to the POBO Model. Clause 1.9 reinforces that the Freemarket T&Cs only apply to use of the services as defined therein.

    iii) In reality, the Company asked all customers to sign the Freemarket T&Cs, whether or not they were utilising the POBO Model or the Collections Model.

133. The customer therefore believed, through the Freemarket T&Cs, that it was utilising the services of Freemarket. However, Freemarket did not consider that it was contracting with these customers.

134. The Company was performing the currency conversion and outbound payment for EU customers, despite the passporting rights in the PSR 2017 having been repealed. Freemarket had no control over the customers' funds once they had left the Company's accounts held at Freemarket. Freemarket were simply no part of the currency conversion and the payment service, in the Collections Model.

135. Whilst the Company was not permitted to transact on behalf on EU clients, the JSAs nonetheless consider that funds provided by these customers should be safeguarded. The monies were provided for the purposes of a payment transaction, it is simply that the transaction was performed by an entity who could not do so under the PSR 2017. The JSAs took this same decision in respect of Existing EU Customers during the RailsR period (see above) and in respect of Reverse Solicitation funds (see below).

136. In summary, the JSAs consider that customers utilising the POBO Model are clients of Freemarket and that customers utilising the Collections Model are clients of the Company. Whilst Freemarket claim that 30 customers utilised the POBO Model, the JSAs have been able to reconcile 25 customers to that list. Freemarket's position is that only two of these customers transacted using the vIBAN provided and only one had a balance on their account at the date of special administration. That balance was sent to

the JSAs by Freemarket, however, I agree that the JSAs should return it, on the basis that the customer is a customer of Freemarket.

F. REVERSE SOLICITATION (§7 of the Proposed Order)

137. On some occasions, from 22 May 2023 to the date the Company entered into special administration, the Company used a process that it describes as 'reverse solicitation', which involves the EU customer completing a 'reverse solicitation form' confirming that the customer approached the Company, rather than the other way around ('**Reverse Solicitation**'). This does not solve the regulatory issue – the Company could not passport its services to EU based customers at all; it was not merely an issue of who solicited who. Therefore, it seems that, as with Existing EU Customers, the Company was simply providing payment services to EU customers in breach of regulation. That does not change the fact that the monies were provided for the purposes of a payment transaction and the JSAs have taken the decision that these funds should be treated as Relevant Funds.

138. Ms Rogers was at pains to point out that, on the basis the passporting rights in the PSR 2017 had been repealed, the Company was not actually providing these services (or the above services to Existing EU Customers or customers using the Collections Model in the Freemarket Period) pursuant to the PSR 2017 (and therefore Regulation 23 and the obligation to safeguard was not directly applicable). However, on the basis that the customer in these instances did contract with the Company, the JSAs take the position that it would be unfair to leave them without a claim to Relevant Funds on account of the Company's breach of regulation. This position has been discussed with the FCA.

G. MLS-MULTINATIONAL LOGISTIC SERVICES LIMITED'S APPLICATION

139. The MLS application was before Deputy ICC Judge Agnello KC at the interim directions hearing. Relevant directions were as follows:

    i) The evidence filed in support of the MLS Application was to be treated as MLS' evidence in response to the Directions Application.

    ii) Insofar as the MLS Application seeks to allege that its claim to Relevant Funds has been rejected and seeks an appeal of that decision, the application was adjourned for directions to be given at the conclusion of the hearing of the Application, and

    iii) The costs of MLS are reserved to this hearing.

140. As I mentioned above, the JSAs position is that the MLS Application is entirely unnecessary. The JSAs contend as follows: MLS is based in the EU and contracted with RFX EU during the RailsR Period (i.e. is a New EU Customer), in particular, during the RailsR period when customers were sending funds to the Company's Lloyds bank account. The JSAs have made a preliminary adjudication of all claims, but they say that a final adjudication is not being made until the Court has delivered judgment on the Directions Application. For that reason (i) no decision pursuant to Rule 106 has been made by the JSAs, meaning paragraph 2 of the relief sought by MLS is unnecessary; and (ii) the declaratory relief sought by MLS will be answered by the Directions

Application and it was not necessary for paragraph 3 of the MLS Application to be separately made.

141. Ms Rogers submitted that the proper course was for the MLS Application to be heard as a response to the Directions Application. Indeed, as indicated in the second direction I recorded above, Deputy ICC Judge Agnello KC seems to have accepted that and treated the evidence filed in support of the MLS Application as a response to the Directions Application.

142. In fact, Ms Rogers developed her submissions on the Directions Application first. Then I heard Mr Higginson on MLS's application, to which Ms Rogers responded with a short reply from Mr Higginson. I then proceeded to hear the Distribution Plan Application.

MLS's submissions

143. I listened with interest to Mr Higginson's submissions which were carefully structured and aimed at establishing that MLS contracted with the Company. However, in large part, all of his submissions seemed to me to skirt around the fundamental question of when, how and between whom the contract relating to MLS's funds was concluded.

144. Mr Higginson stressed the fact that the pre-contractual negotiations were with RationalFX in London, that the account details provided were with RationalFX in London, and, as far as MLS were concerned, they were contracting with RationalFX in London. This chimes with the clear evidence in the MLS witness statements, which made the point very forcefully that if MLS had known they were contracting with a Lithuanian entity, they would not have touched this arrangement with a bargepole.

145. When making these points, Mr Higginson placed great emphasis on the significance of the RationalFX logo which appeared on emails sent to MLS, as if the use of the logo could only signify the Company. I was unimpressed by this point, since it is extremely common for branding to be shared across companies in the same group. Yet on the emails sent to MLS and especially the first one (at HB955) inviting Mr Sassower to accept 'our terms & conditions', the footer identified both the Company and RFX EU.

146. Mr Higginson also stressed that in the correspondence after the contract had been made, MLS were not told (until much later) that they had contracted with RFX EU. Although I had reviewed the correspondence, I was resistant to a further trawl through the correspondence in his submissions because it merely solidified the dispute between the parties and did not shed any useful light on the fundamental question.

147. At one point in his oral submissions, Mr Higginson made it clear that it was MLS's case that the contract (with the Company) had been made prior to Mr Sassower agreeing to the terms & conditions by ticking the relevant box online (albeit this was the first time this contention surfaced). This submission immediately invited the question: so, when was the contract made? Mr Higginson's response was startling. He said he could not say and no-one could say, only that it must have been prior to 23 August 2022. This was Micawberism – in the hope that something might turn up. It was also completely contradicted by the documents and the evidence before the Court, to which I now turn.

148. There was relatively little detail about the extent of the onboarding process which MLS must have gone through. However, the JSAs had previously explained their position in detail to MLS in a letter dated 18 December 2024 (in which the Company is referred to as 'RFXL' and RX EU as 'Rational EU'), to which Ms Rogers drew my particular attention in her submissions. In the following quote from the letter, I have emphasised the date of 07 December 2022 for reasons which I will explain:

> '….we have identified that MLS is not a customer of RFXL but appears to have contracted with Rational EU. A copy of the T&Cs we understand that MLS accepted, by clicking the hyperlink in the Automated Email (enclosed) and accepting the T&Cs by checking the box to confirm MLS had read, understood and accepted the T&Cs, were enclosed within our September Letter.
>
> MLS's acceptance of the T&Cs was recorded on the Group's back-office platform ("Xend"). Our investigations have identified that this recording process occurred automatically on a person accepting the relevant T&Cs online, which could not be manually overridden. A screenshot of MLS's page on the Xend platform, showing MLS accepted the T&Cs on **07 December 2022** is set out below, which constitutes the Group's records referred to at paragraph 7 of our September Letter.

Compliance Events

Description	Passed	Note
KYC Completed	✓	
T&Cs / ICA Signed	✓	☑
Forced Verification	✗	
Company Report Received	✓	☑
Director Verification	✓	GAD SASSOWER
Beneficial Owners (Shareholder) - Verification	✓	
Authorised Signatories Verification	✓	GAD SASSOWER
Added to Watchlist	✓	☑

> The T&Cs recorded that the contract was with Rational EU and noted the agency relationship with PayrNet. As such, based on our investigations, it appears any rights of your client are in respect of Rational EU and/or PayrNet, over which we are not appointed and have no control of.

> RFXL and Rational EU were party to an internal outsourcing agreement, pursuant to which Rational EU outsourced certain services to RFXL, thereby allowing RFXL's employees to onboard customers and process trades on behalf of Rational EU. MLS may have therefore communicated with RFXL employees, but the accepted T&Cs clearly show the contractual relationship was not with RFXL.
>
> We therefore do not consider that RFXL was required to safeguard any funds received from MLS pursuant to the Payment Services Regulations 2017.'

149. In the Xend database record for MLS, it can be seen that the tick box is greyed out. This was explained on the basis that once ticked, it cannot be changed. That database record confirms, as one would expect, that all the relevant checks were carried out as part of the onboarding (and registration) process.

150. It is clear that, at the time, MLS were not told of the Outsourcing Agreement between the Company and RFX EU and no individual drew their attention to the fact that they would be contracting with PayrNet with RFX EU as its agent.

151. However, Mr Sassower's evidence was very clear. He received the 'welcome' email dated 23 August 2022 which featured the RationalFX branding and which said:

> 'Welcome to RationalFX.
>
> You are just one final step away from verifying your account and sending money overseas at bank-beating exchange rates.
>
> Click here to accept our terms & conditions. …'

152. Mr Sassower says he clicked on the link (i.e. the hyperlink 'here'). He says he had no option but to accept the terms – whatever they were. He emphasised that he 'did not read in any way at all any of them.'

153. In his second witness statement, Mr Sassower added some further detail. He recalled that 'The actual box ticking occurred during and in the context of a telephone conversation I had with an employee from Rational in London.' He does not (and did not) know his name but Mr Sassower continued:

> 'He ..took me through the pages on the computer in sequence and told me what to click on and where. I simply did what he instructed me to do. I had no idea of the detail or potential consequences of what I was doing. Certainly, I was not aware that, by clicking, I was getting into a contract, if with anyone then with anyone other than Rational in London. He told me that I was just activating the account and I accepted this and proceeded as he instructed.'

154. Although Mr Higginson submitted that we did not know which set of terms & conditions Mr Sassower accepted (out of the five which would have been presented to

him as at 23 August 2022), there is nothing to suggest that Mr Sassower did anything irrational. It is far more likely than not that he clicked on the 'EEA (excluding Germany)' 'Corporates' terms and I so find. Ms Kicks' evidence also established that the final step which Mr Sassower must have taken was to tick the box (as shown below) in a pop-up window entitled "ACCOUNT ACTIVATION" which said:

> 'To activate your account please accept our terms and conditions below.
>
> ■ I have read and understood and accept RationalFX's terms and conditions and privacy policy.'

155. His acceptance of the terms & conditions was then recorded, as shown above, in the Xend database.

156. Various statements of MLS's Lloyd's account in the papers show an opening balance of zero on 8 September 2022, with $25m odd being deposited on 9 September with various withdrawals and charges until 31 March 2023, leaving a closing balance on that date of some $3.6m.

157. I must now deal with the conundrum posed by the 07 December 2022 date given in the JSAs letter as the date on which MLS accepted the PayrNet T&Cs for Corporate Client (excluding Germany).

158. In her second witness statement, Ms Kicks explains that this date derives from an extract of the Xend Export on 14 March 2024 provided to the JSAs by Mr Shah. In her first witness statement, Ms Kicks had already referred to a number of inconsistencies which had been identified in relation to the Xend Export when compared to the Live Xend, and she explained that the Xend Export had to be checked against the Live Xend for verification purposes before the Live Xend was closed. Due to these inconsistencies, Ms Kicks explains that the Company's financial controller (retained by the JSAs as a consultant at the time) took screenshots of the key pages on the Live Xend for the top 20 EU customers. Ms Kicks exhibits a copy of the screenshots relating to MLS.

159. These show that MLS's account was added to Live Xend on 3 August 2022, and also record that:

i) In the 'Details' 'Client' tab, the legal entity is 'RationalFX EU';

ii) MLS's account is described as 'pending' and 'under verification review' on 3 August 2022, changing to 'verified' on 23 August 2022 and then to 'active' on 2 September 2022.

160. Ms Kicks' clear evidence (in both Kicks 1 and 2) was that an account could only be verified/activated if the T&Cs had been accepted.

161. The final point made in Kicks 2 was that the Live Xend screenshots for MLS do not show the 7 December 2022 date anywhere.

162. Based on all the evidence before me, the 7 December 2022 appears to be an anomaly. It is inconsistent with all the other evidence. All the other evidence appears to be

entirely consistent with an account record for MLS being added to the database on 3 August 2022, and then Mr Sassower accepting the T&Cs on 23 August 2022, resulting in the change in the status of the account from 'pending' to 'verified'. Accordingly, I find that the date when Mr Sassower accepted the T&Cs was 23 August 2022 and not 7 December 2022.

163. As for the entity with which MLS contracted, I am left in no doubt that it was PayrNet with RationalFX EU acting as agent to provide payment services, and not the Company, notwithstanding the impassioned evidence from the MLS witness statements. I completely understand the grievance which was eloquently conveyed by the witness statements of Messrs Micaleff and Sassower, but nothing that was said by and on behalf of MLS can displace, in my judgment, the effect of what I find Mr Sassower did when he clicked his acceptance of the T&Cs, which were those of PayrNet with RationalFX EU (i.e. the Lithuanian company) acting as agent and as the provider of payment services.

164. In these circumstances, I refuse each of the declarations sought by MLS, as set out in paragraph 27.iii) above. As for the other relief sought by MLS, that sought in i) is otiose and that sought in ii) is premature, since the JSAs have not yet made a Rule 106(1) decision in relation to MLS, even though it is now clear (barring some extraordinary revelation) which way the decision will go.

PART III: THE DISTRIBUTION PLAN APPLICATION

APPROVAL OF THE DISTRIBUTION PLAN

165. The JSAs said that the Distribution Plan has been formulated and proposed in accordance with Part 6 of the 2021 Rules. The purpose of the 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.

166. As explained above, Relevant Funds are those provided to the Company for the purpose of a payment transaction. This does not include margin (either deposit margin or variation margin), which must be deposited with the Company to cover any potential loss to the Company if a customer's forward contract moves 'offside' (i.e. begins to make a loss) due to movement in the currency market. Customers with a claim to deposit/margin funds being held by the Company have an unsecured claim:

    i) The forward contracts sold by the Company were not investments and not MiFID business, because they came within the 'means of payment' exemption contained in Article 10(1)(b) of the MiFID Org Regulation (Commission Delegated Regulation 2017/565). Therefore, they were not subject to CASS 7 and accordingly, neither were the deposit/margin funds held by the Company; and

    ii) Deposit/margin are by their very nature deposits, they are not sent to the Company for use in a payment transaction at the point of deposit. It is possible that such deposits may be returned in the future. This is supported by the FCA's Perimeter Guidance Manual, Chapter 15 Q12.

167. The Company categorised the funds received by the Company into the following categories: (i) payment queue; (ii) deposit/margin; and (iii) unallocated funds in ('**UFI**'). Monies would move into the payment queue upon receipt of a payment instruction, as such, these are Relevant Funds. As above, deposit margin/variation margin are not Relevant Funds. UFIs are funds received by the Company that are neither in the payment queue nor received for deposit margin/variation margin. The majority of these funds were received within the 6 months prior to administration, therefore after consultation with the FCA, the JSAs have taken an informed view to treat customers with claims to UFIs as having claims to Relevant Funds.

168. The Distribution Plan was approved by the Committee on 22 January 2025 without modification.

169. A copy of the draft Distribution Plan was sent to the FCA on 7 August 2024, together with the Explanatory Statement. The FCA raised limited considerations which it wanted the JSAs to consider. A revised copy of the Distribution Plan and Explanatory Statement were sent to the FCA on 1 November 2024 and 12 December 2024. The final version of the Distribution Plan and Explanatory Statement, as approved by the Committee, was sent to the FCA on 3 February 2025.

170. The FCA indicated it had no further comments to make in respect of the Distribution Plan and confirmed that it would not be in attendance nor represented at the hearing. The Distribution Plan has been sent to all others named in Rule 114(3) and the Rule 111 Notice was sent to required people, as explained above.

171. As to the other notification requirements, required by the Rules in order to satisfy the Court that sufficient notice has been given to interested parties for the purpose of ensuring that they have had an opportunity to attend and explain to the court any concerns they may have with the Distribution Plan (Rule 114(3)) I have already set out the steps taken by the JSAs, which seem to me to meet the relevant requirements.

Key terms of the Distribution Plan

172. I should mention certain key terms of the Distribution Plan as discussed in Kicks 1, as follows.

173. Identity of the customers: Rule 112(2)(b) requires the identity of the customers to whom a distribution is to be made, to be set out in the distribution plan. Ms Rogers submitted that this provision can be satisfied by use of the defined term 'Admitted Safeguarded Funds Claim'. The JSAs consider that to identify customers by name would (i) cause data protection concerns; (ii) potentially lead to unrest in the body of customers/creditors with differing claims; and (iii) prejudice returns from iBanFirst, who purchased the customer list for a deferred consideration, payable on the basis of funds earnt from those customers by iBanFirst.

174. Calculating a customer's claim to Relevant Funds (DP clause 4): clause 4 deals with how an eligible customer's admitted claim to Relevant Funds will be calculated.

175. Timing of the distribution (DP clause 5): Rule 112(2)(a) requires the JSAs to set out a schedule of dates on which distributions will be made. Kicks 1 envisaged that the Distribution Plan would have been before the Court in or around April 2025. It was

therefore anticipated that a distribution would be made late spring 2025. If the Distribution Plan is approved by the Court, it is anticipated that a distribution will be made in the Autumn of 2025. There is provision to insert a date into the Distribution Plan at clause 5.4. The remainder of clause 5 deals with (i) how each customer's share of Relevant Funds is to be calculated and how the Shortfall is to be borne; (ii) the conditions upon which further distributions are contingent; and (iii) that distributions will be made in GBP.

176. Shortfall (DP clause 6): the Shortfall (i.e. the difference between the amount of Relevant Funds held by the JSAs, as topped-up, and the total of all 'Admitted Safeguarded Funds Claims', as defined), will be borne pro rata between those customers with an eligible claim, in accordance with Regulation 19(2).

177. Dispute resolution mechanism for rejected claims (DP clause 10): In accordance with Rule 107, a customer has 21 days (or such other period as the JSAs may agree) from receiving their statement of reasons rejecting their claim to Relevant Funds, within which to apply to court for the decision to be reversed or varied. If such a claim is pending, the administrator must not make a distribution without the permission of the court: Rules 107(9) and/or 109(4). If the court gives permission, the administrator must make provision for the disputed claim as directed by the court: Rules 107(10) and 109(5). To avoid the time and cost of attending court on such occasions (given that there is already a significant Shortfall in the amount of Relevant Funds that customers are to receive back), the JSAs have proposed clause 10.4 in the Distribution Plan, which provides that if any application to court has been made prior to a distribution, the JSAs shall reserve an amount equal to what the aggrieved customer will receive if the application were successful before the Court. The reserve will be held until such time as the application has been fully concluded. The JSAs hope is that the Directions Application will reduce the scope for such disputes, which could otherwise be numerous on the particular facts of this matter.

178. Potential customers (DP clauses 11 and 14): the JSAs determined that the most appropriate way to deal with 'Potential Customers' (defined in the Distribution Plan at clause 1), is to make provision for potential customers out of the Relevant Funds when the initial distribution is made (in accordance with Regulation 20(6)). Any potential customers who have not submitted a claim to Relevant Funds after hard bar date (which the JSAs will apply to the Court for, at the appropriate time, in order to close the special administration) will lose their right to receive their provision, which will then be distributed (in accordance with Regulation 21(5)). Potential customers who did submit a claim after the initial distribution but before any hard bar date will be treated as a 'late customer' (as defined) ('**Late Customer**').

179. Late Customers (DP clause 12): Regulation 20(5) and Rule 115(3) require that a customer submitting a late claim after the bar date, but before an initial distribution should, so far as reasonably practicable, be included within the initial distribution. Further, pursuant to Regulation 20(9) and Rule 115(4), a late claim post initial distribution must be included in any subsequent distribution of Relevant Funds. In order to satisfy this requirement, the JSAs propose to set an initial pre-distribution cut-off date 45 days before the first distribution. The cut-off is needed to give sufficient time to adjudicate on the claim, allow 21 days for any challenge to the adjudication to be made, calculate the amount to be distributed (allowing any provisions for Potential Customers) (see Kicks 1 at §221). The JSAs will attempt to determine any claim

received post the initial pre-distribution cut-off date and include that claim in the initial distribution if admitted, but no guarantee can be made. If a Late Customer submits their claim after the initial distribution but before the hard bar date, the Late Customer will either receive (i) the distribution that they would have received in the initial distribution (as soon as reasonably practicable), if sufficient funds are held; or (ii) if insufficient funds are held, a partial distribution, with the ability to participate in any subsequent distribution.

180. Undistributable claims to Relevant Funds (DP clause 13): At clause 13 provision is made for those very limited number of cases where Relevant Funds cannot be returned to a client (e.g. because the Company made a SAR (suspicious activity report) to the National Crime Agency when trading, or because the customer is on a sanctions list) ('**Non-Distributable Safeguarded Funds**'). Such funds will be set aside and segregated unless and until either (i) the legal or practical reason preventing distribution falls away; or (ii) the hard bar date has passed (in which case the customer will lose their right to participate in the distribution).

181. JSAs release (DP clause 16): clause 16 provides releases to the JSAs and various third-party advisors. Once the Distribution Plan is approved and the JSAs and their advisors have fulfilled their duties in relation to the method of distribution, they seek their release. The purpose of this clause is to avoid unnecessary time and costs being incurred defending unmeritorious claims that Relevant Funds should have been returned in a manner inconsistent with the Distribution Plan. Similar provisions have been contained in previous distribution plans approved by the Court (e.g. WealthTek LLP). All customers have had a chance to consider the Distribution Plan and no customer has raised an objection to the inclusion of this clause.

Reasons to approve the Distribution Plan

182. Ms Rogers made the following submissions as to why the Distribution Plan should be approved.

183. The Distribution Plan contains a scheme by which (i) all Relevant Funds held by the Company at the date of administration; plus (ii) company funds which have been used to top-up the Relevant Funds held, in accordance with the top-up requirement in Regulation 13(8), owing to the Shortfall, will be returned to clients with an admitted claim to Relevant Funds (clause 2). The Distribution Plan defines clients with an 'Admitted Safeguarded Funds Claim' as being a claim to Relevant Funds made by any client pursuant to Rule 102, which has either been admitted by the JSAs pursuant to Rule 106; or admitted by order of the Court (clause 1). Accordingly, she submitted that the Distribution Plan should be approved for the following reasons.

184. First, the Distribution Plan complies with the requirements of the Regulations and the Rules. The Court is referred to the table demonstrating compliance with the Rules, attached to this skeleton argument. The statutory pre-conditions for approval of the Distribution Plan, contained in Rule 114(5)(a)(i) and (ii), are satisfied.

185. Second, the form of the Distribution Plan is one that the JSAs consider to be the most effective way of returning Relevant Funds in accordance with Objective 1. The JSAs' view on that point is to be given considerable weight, as per the above authorities.

186. Third, the Distribution Plan has been approved by the Committee. It has also been developed in consultation with the FCA (a copy first being provided to the FCA in August 2024, with further iterations following in November and December 2024 following FCA comment). No customers have filed any evidence to oppose the Distribution Plan. MLS' evidence goes to the Directions Application. The Court should give weight to (i) the Committee's and customer assessment of what is in their best interests; and (ii) the non-objection from the FCA (who have a mandate to intervene but are not attending the hearing to do so).

187. Fourth, the JSAs have had difficulty relying on the books and records of the Company (§195 of Kicks 1), the Distribution Plan is the result of a long and detailed reconciliation exercise in which the JSAs have done all that they can to achieve a result that they consider to be fair and reasonable.

188. Fifth, the JSAs approach to costs is fair and reasonable (I discuss this in the next section). The JSAs have provided for very limited future costs post the issue of this Application (which in some instances have been exceeded) to avoid diminishing the return to customers any further. The JSAs remuneration for their Objective 1 costs is significantly below what they will recover. There is provision in the Distribution Plan for a cost rebate to customers if funds allow.

189. The FCA lifted the OIREQ on 1 February 2024, meaning that the JSAs are at liberty to distribute once the Distribution Plan is approved.

COSTS

Jurisdiction

190. The JSAs sought an order that the costs of and incidental to the Application be treated as the costs of the JSAs in pursuit of Objective 1.

191. Rule 99 provides for expenses properly incurred by the JSAs in the pursuit of Objective 1 to be paid out of Relevant Funds. Pursuant to Regulation 18(5), claims to Relevant Funds do not take priority over the costs of distribution. The costs of distribution comprise the expenses set out in Rule 99; Rule 99(5).

192. The costs of distributing the asset pool include collecting it in and then making it good (insofar as is possible) where relevant funds have not been properly safeguarded, per Asplin LJ at paragraph [92] of her judgment in *Ipagoo*:

> 'I should add that given the proper interpretation of 'asset pool' includes relevant funds which have not been properly safeguarded, in order to achieve conformity with the purposes of the EMD, in my judgment, it is also necessary, as a consequence, to interpret 'costs of distributing the asset pool' in regulation 24(2) so as to include the costs of making good the asset pool in circumstances where relevant funds, or some of them, have not been safeguarded. These are administrative costs associated with the asset pool itself. Such an interpretation falls within the breadth of the approach to interpretation approved by Lord Dyson JSC in *Lehman* [2012] Bus LR 667, para 131.'

Objective 1 costs

193. Owing to the Shortfall, the overwhelming purpose of the Special Administration to date has been to investigate, ascertain, collect in and distribute Relevant Funds. Included within this workstream is assessing (and provisionally rejecting) claims that the JSAs did not consider were properly Relevant Funds claims. This is a necessary aspect of investigating and distributing Relevant Funds. It was not possible to identify the Shortfall unless and until (i) significant work had been carried out in order to ascertain the totality of the Relevant Funds asset pool; and (ii) all claims to Relevant Funds had been considered and provisionally adjudicated upon. Based on Ms Kicks' evidence, Ms Rogers therefore submitted that this has been an extensive task, a submission I accept.

194. Ms Kicks says that very limited activity has taken place on other workstreams (Objectives 2 and 3), because the first priority is to return Relevant Funds as swiftly as possible. This is confirmed by comparing the sums incurred by the JSAs in respect of their time costs for each Objective as at 21 February 2025 (as set out in Kicks 1):

i) Objective 1: £2,758,400.60

ii) Objective 2: £98,761.45

iii) Objective 3: £123,125.65

iv) It is also demonstrated in the JSAs SIP 9 records (calculated on a time costs basis) as at 21 February 2025.

The costs reserve

195. Rule 112(2)(d) requires that the Distribution Plan set out the amount to be retained from the Relevant Funds in order to meet Objective 1 costs. The JSAs proposed a costs reserve of £4,309,438.00 (inclusive of VAT) ('the **Costs Reserve**'). The VAT is not recoverable because the Company was not registered for VAT prior to the Special Administration

196. In this regard, in her oral submissions, Ms Rogers discussed the details set out in the helpful table at §239 of Kicks 1, which sets out clearly how the costs reserve for Objective 1 costs is broken down between the JSAs remuneration; the JSAs legal advisors; expenses incurred by the JSAs; and contingencies; and also between actual costs (both paid and unpaid); future costs and contingent costs. Further detail is provided in Kicks 1 and in her exhibit, where the costs of DLA Piper UK LLP, as at 21 February 2025, are broken down by workstream albeit at a reasonably high level of generality.

The JSAs remuneration

197. The JSAs remuneration costs were fixed by the Committee at the Committee meeting on 29 April 2024, pursuant to Rule 163(5). It was recognised that the reconciliation exercise in order to ascertain the Relevant Funds held by the Company, adjudicate on the claims and thereafter facilitate the return of Relevant Funds, was going to be an extensive task. Therefore, the Committee's preference was to fix the JSAs remuneration by way of a percentage of the realisations. Accordingly, the JSAs proposed

remuneration equivalent to 40% of realisations to that date, and 25% of future realisations, which was accepted by the Committee ('the **Fee Approval**').

198. In accordance with the Fee Approval, the JSAs will receive remuneration of £2,072,680 (exclusive of VAT), on the basis of the funds recovered as at 9 January 2025. On a time costs basis, the work done by the JSAs to the slighter later date of 21 February 2025 was £2,980,287.70. Accordingly, unless further realisations are made, the JSAs will only receive remuneration equivalent to 72% of their time costs and 75% of their Objective 1 costs (based on their time costs as at 21 February 2025, further time costs have been incurred since such date).

199. The JSAs remuneration detailed in the Costs Reserve is calculated on the basis of the Fee Approval.

200. On the basis that there are no house funds held by the Company (and there is unlikely to ever be, even if further realisations are made, because of the top-up requirement contained in Regulation 13(8), it would seem that the JSAs are unlikely to recover their Objective 2 and Objective 3 costs in accordance with Rule 98.

201. As a putative member of the class entitled to a distribution, Mr Higginson on behalf of MLS invited me to scrutinise the costs incurred by the JSAs on Objective 1 carefully, particularly with a view as to proportionality, and their proposed remuneration. He registered a degree of protest at the scale of the costs incurred. The costs information provided to me is at a relatively high level of generality and far removed from what would be supplied for the purposes of a detailed assessment. However, as I understand matters, my role is not to conduct a detailed assessment or anything like that. I noted that the JSAs have conducted a very significant amount of work and will recover only a proportion of their time costs.

202. In the circumstances, I accept that the costs incurred in the Application are in pursuit of Objective 1.

Future costs

203. Ms Rogers drew attention to the fact that there is no provision for a potential litigation reserve in the Distribution Plan. Whilst this is not a case in which the FSCS are involved (and consequently not a case in which, once compensation has been paid by the FSCS, the right to pursue litigation on behalf of the clients is subrogated to the FSCS, as was found to be the case in Re *Wealthtek LLP*), the JSAs nonetheless declined to include a proposed litigation reserve in the Distribution Plan. The JSAs considered that the return to clients should not be impacted any further than has already occurred by reason of the Shortfall at the date of administration. Further, the JSAs heeded the comment of Rajah J at [37] of the second *Wealthtek LLP* judgment '*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.*' Accordingly, any litigation brought by the JSAs in an attempt to recover funds on behalf of the Company, which can then be used to meet the top up requirement and potentially increase the Relevant Funds, will need to be done so on a conditional basis (unless funded by a third-party source).

204. So the JSAs intention is that the costs of pursuing further realisations in order to further top-up the Relevant Funds (future Objective 1 costs outside of the Costs Reserve), should be met from the realisations (if any) made (see clauses 7.4 and 7.5 of the Distribution Plan). Absent these provisions, there will be no incentive to pursue future realisations. It is in the interests of customers that such actions, where identified with merit, are pursued, because of the prospect of producing realisations to top-up the Shortfall. Accordingly, I approved the inclusion of these provisions.

205. The JSAs do not want the level of return to customers with an eligible claim to Relevant Funds to fall below 7.7p/£ on the initial distribution, therefore the future and contingent legal costs that the JSAs have incurred, or may incur, in pursuit of Objective 1 (as provided for in the Costs Reserve), have been limited to costs directly associated with this Application.

206. The JSAs are to consider whether the costs reserve can be reduced at the point of considering further distribution/s (see clause 7 of the Distribution Plan).

CONCLUSIONS

207. For all the reasons set out above, in conclusion:

i) I approve the Distribution Plan as proposed by the Joint Special Administrators, and I will make the orders as sought in the Distribution Plan Application.

ii) Having analysed the relevant contractual arrangements which were fully set out in the evidence, I conclude it is appropriate to grant the declaratory relief as sought by the Joint Special Administrators in the Directions Application.

iii) One of the sets of contractual arrangements was illustrated by the experience and evidence of the Intervener, MLS. I took MLS's evidence into account when making the relevant declaration sought in the Directions Application. In addition, the analysis of the relevant parts of MLS's evidence demonstrated that MLS's contention that they were a customer and/or a creditor of the Company, however vehemently advanced, was incorrect.

208. Ms Rogers made submissions on MLS's costs in her skeleton argument, arguing that MLS should not be entitled to any costs because their application was unnecessary. I have not yet heard costs submissions from Mr Higginson, but in the light of my conclusions on MLS's application, as presently advised I cannot see any basis for MLS seeking any costs, not least because it would be unfair to the general body of the Company's customers to have their claims reduced by the payment of any costs by the JSAs to MLS.

209. I ask Counsel to seek to agree an Order giving effect to the decisions I have made relating to MLS and I ask Ms Rogers to file the remaining Orders to give effect to this Judgment.