Neutral Citation Number: [2025] EWHC 2397 (Ch)

Case No: PT 2023 000474

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST

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

Date: 22/09/2025

Before :

CHIEF MASTER SHUMAN

- -

Between :

G. G. F. FUND LIMITED	**Claimant**
- and -	
(2) ANGLIAN WINDOWS LIMITED (now called ASHI Group Limited)	**Defendants**
(3) E REALISATIONS 2020 LIMITED (in administration)	

- -
- -

Thomas Elias (instructed by **Blandy & Blandy LLP**) for the **Claimant**
Wendy Mathers (instructed by **Mills & Reeve LLP**) for the **Second Defendant**
Maxim Cardew (instructed by **Osborne Clarke LLP**) for the **Third Defendant**

- -

Approved Judgment

This judgment was handed down remotely at 2pm on 22 September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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CHIEF MASTER SHUMAN

CHIEF MASTER SHUMAN:

1. The claimant is the administrator and holder of the G.G.F. Deposit Indemnity Fund ("the fund"), held in accordance with the GGF Deposit Indemnity Fund Rules ("the rules"). The rules provide that any surplus in the fund belongs to the members of the fund and is held in proportion to their contributions over the lifetime of the fund. The claimant considers that it holds these funds as trustee.

2. At a board meeting on 30 March 2020 the claimant resolved to close the fund to new business, with effect from 1 April 2020. The fund is in the process of being wound up and the surplus funds need to be distributed to the members of the fund in accordance with the rules. However, there is some ambiguity and gaps in the rules which mean that the claimant seeks a determination from the court as to the correct interpretation of the rules so that it can distribute surplus funds, and protect its position as trustee. The claim is brought under CPR Part 64.2(a). The assets of the fund are approximately £4 million, before costs.

3. The claim was initially issued against three defendants, all of whom potentially stood to benefit from the distribution of the fund. All agreed to be made defendants for the purposes of representing themselves and certain classes of those who might potentially participate in any distribution.

4. The first defendant was removed as a party by order dated 7 February 2024. It had been placed into administration on 30 October 2023 and had assigned its rights (if any) to participate in the distribution of the fund to the second defendant.

5. The second defendant is a founding member of the Glass and Glazing Federation[1] ("the federation") and the fund. Due to its size and the duration of its membership it is one of the two largest fund members, by way of contributions. Since the inception of the fund it is estimated that the second defendant has paid in approximately £2.5 million.

6. Everest Ltd was also a founding member and the other largest fund member, by contributions. On 8 June 2020 Everest Ltd went into administration. Its name was changed to E Realisations 2020 Ltd, the third defendant. This was a prepacked administration and a new company bought out Everest's business.

7. At the directions hearing on 7 February 2024 Master Clark made a series of representation orders under CPR 19.9(2)(d)(ii). Given the difficulty in finding additional defendants and for reasons of proportionality, "interests-based" representation orders were made, including that the claimant represent certain classes of potential beneficiaries. It was also ordered that potential beneficiaries, of whom there are 127[2], be served with the claim and therefore given an opportunity to apply to be joined as a party. They have been duly served but none have applied to be joined as a party, or intimated that they would wish to be joined.

8. The issues have been grouped together into three broad categories: insolvency, missed payments, and customer claims. All parties have adopted positions for the insolvency

[1] Founded in January 1977 as an unincorporated association and then incorporated either on 31 August 2000 or January 2001.
[2] Those listed in Schedules A, B and C to the 7 February 2024 order.

and missed payments groups of issues, and where appropriate they have adopted opposing positions to enable the fullest possible arguments to be presented to the court. The claimant and the second defendant have taken opposing positions in respect of the customer claims.

9. In the circumstances I am satisfied that the issues identified and agreed by the parties have been properly tested before the court. I am extremely grateful to counsel for rigorously examining opposing arguments on the issues, both in their detailed skeleton arguments and as supplemented in their oral submissions.

Evidence

10. On behalf of the claimant, William Agnew has filed two witness statements dated 6 June 2023 and 26 July 2024. At the time of the hearing Mr Agnew was managing director of the federation, having been appointed a director on 1 October 2021. The federation was incorporated in January 2001. He was one of nine directors. He was appointed a director of the claimant on 21 August 2017. At the time of the hearing, the only other director was Anthony Smith, who was appointed on 3 March 2021. Mr Agnew has confirmed that he has no personal interest in the distribution of the fund and has no financial connection with the defendants.

11. On behalf of the second defendant, Phil Tweedie has filed one witness statement dated 28 June 2024. He is the managing director and chief financial officer of the second defendant. He was director and chief financial officer of the second defendant between April 2001 and March 2017, and then from September 2020. He was also a director of the claimant between 7 November 2006 and 1 March 2017, and his recollection is that he was chairman of the board for the majority of this period. In addition Mr Tweedie was a director of the federation from 1 May 2008 to 2 December 2010, and then from 4 September 2012 to 31 May 2016.

12. Rachel McDonnell, a partner at the second defendant's solicitors, Mills and Reeve LLP, has made two witness statements in these proceedings. The relevant one for current purposes is the second witness statement dated 28 June 2024.

13. On behalf of the third defendant, Alastair Massey has filed one witness statement dated 28 June 2024. He is a licensed insolvency practitioner in the firm, FRP Advisory Trading Ltd. He is one of the joint administrators of the third defendant which was formerly known as Everest Limited.

THE BACKGROUND

14. The federation is a membership organisation representing businesses that manufacture, supply or install glass and glazing in the United Kingdom and Ireland. It was founded in January 1977 as an unincorporated association. On 31 August 2000 it was incorporated as a private company limited by guarantee without share capital, and named the "Glass and Glazing Federation".

15. The federation's memorandum and articles are drawn widely. They are dated 22 August 2000 and were altered by special resolution dated 24 January 2001. Its objects are, "to carry on business as a general commercial company" (clause 3.8) and "to do all such other things as may be deemed incidental or conducive to the attainment of the

Company's objects or any of them" (clause 3.26). The federation's articles set out at article 6 membership of the federation and at articles 7 to 11, how a member may resign or have its membership terminated.

16. The federation's articles were updated, adopted by special resolution dated 30 September 2014. Part 4 deals with members and the conduct of general meetings. Article 32 provides that,

> "No person shall become a member of the Company unless
>
> 32 1 that person has completed an application for membership in a form approved in accordance with the Rules, and
>
> 32 2 that application has been approved in accordance with the Rules"

The reference to "Rules" is a reference to the federation rules.

17. Article 33 provides that,

> "33 1 A member may withdraw from membership of the Company only in accordance with the provisions for withdrawal specified in the Rules or, in the event that the Rules do not contain any such provisions, by giving at least three calendar months' written notice to the Company
>
> 33 2 Membership is not transferable
>
> 33 3 A person's membership terminates immediately when that person dies or ceases to exist"

18. The claimant was incorporated on 21 December 1979 as a private company limited by shares. All the claimant's shares are held on bare trust for the federation. Mr Agnew holds 2 ordinary shares and HSBC Marking Name Nominee UK Ltd holds 98 ordinary shares.

19. The claimant's Memorandum of Association dated 26 November 1979 sets out at clause 3(1) the objects of the company as,

> "To provide services for the Glass and Glazing Federation including the establishment maintenance and administration of a fund ("the Fund") for the benefit of members of the public who suffer, or would otherwise suffer loss arising from non-fulfilment of a contract effected between the member of the public and a member of the Glass and Glazing Federation. "

20. Further clause 3(3) provides that,

> "To hold any surplus monies of the Fund by way of reserve in such amount the Company may determine, and subject thereto, to hold the surplus of any accumulated fund in trust for the persons subscribing to the Fund in the proportion that the sum

> or sums contributed by each such subscriber respectively bears to the said surplus, and on a winding up of the Company and/or of the Fund to distribute any such surplus among such subscribers in such proportion subject to exceptions in the case of small subscribers."

21. Rule 3(21),

> "To do all such other things as may be considered to be incident or conducive to any of the above objects".

Therefore the making of the rules is within the objects of the claimant.

22. Mr Agnew at paragraph 9 of his first witness statement explains why the fund was set up, which was,

> "to provide Federation members (GGF Members) with a way of protecting consumer deposits at a low cost as part of the benefits of being a GGF Member. Essentially, the Fund would protect a consumer's deposit and stage payments up to certain limits and subject to certain rules. In the event that an installer that was covered by the Fund became insolvent and could not carry out the agreed work for the customer, the Fund would (subject to the payments being covered under its rules) either enable the work to be carried out by another installer at a cost to the consumer that took into account the deposit and stage payments already paid, or would repay the deposit and stage payment amounts to the consumer."

23. This has the added benefit of giving consumers peace of mind and therefore encouraged them to contract with fund members, relatively secure in the knowledge that any deposit and certain stage payments would be protected in the event of the business they contracted with going insolvent so that either the work would be carried out or the monies refunded. Indeed the rules have a text box at the top of the page which says, "Always use a GGF fund member. To see the latest list of GGF Fund Members visit www.myglazing.com".

24. The fund is administered in accordance with the rules (the GGF Deposit Indemnity Fund rules). Those have been amended from time to time, but the ones in force in March 2020 were the rules dated January 2020. There was a modest rule change in July 2020 in respect of the time limits of claims and the issue of vouchers.

25. Mr Agnew describes the members of the fund as being bound by the rules. He references article 48.1 of the federation's articles of association[3], which provides that the claimant,

> "shall adopt a set of rules as it may deem necessary or expedient or convenient for the proper conduct and management of the Company and for the purposes of

[3] Articles of Association adopted by Special Resolution passed on 30 September 2014.

> prescribing the classes and conditions of membership, … such rules shall regulate -
>
> 48.1.1 … the rights and privileges of such members".

Article 48.2 provides that the rules are binding on all members of the federation.

26. The federation made rules that were amended from time to time. The version in force prior to the closure of the fund to new contributions were those dated August 2017 ("the federation rules"). Rule 3.1.12 of the federation rules provides that applicants for membership of the federation agreed to be bound by the federation rules. Rule 3.1.10 provides that,

> "Where an applicant sells directly to consumers and takes deposits from them, the applicant must protect these deposits by subscribing to GGF Fund Ltd via the Deposit Indemnity Scheme."

27. Rule 4.3.15 of the federation rules provides that.

> "Where a Member sells directly to consumers and takes deposits from them, the applicant must protect these deposits by their subscription to the GGF Fund Ltd via the GGF Deposit Indemnity Scheme. The Member will submit and make quarterly returns and payments on time, and observe the terms and conditions laid down by GGF Fund Ltd."

28. Section 14 of the federation rules deals with resignation and termination of membership and seven scenarios are provided for. Under rule 14.1 a member may terminate its membership by giving 3 months written notice to the Membership Department. Under rule 14.3 there is automatic termination within 3 months of a non-member acquiring a member, unless within that period they apply for and are accepted into membership. Immediate termination may arise under rule 14.4 which provides that,

> "14.4 The Membership of any Member which is a corporate body will be terminated immediately if any of the following happen: …
>
> 14.4.2 the Member being unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986
>
> 14.4.3 A receiver, manager, administrator or administrative receiver being appointed by the Member[4] undertaking assets or income or a substantial part of them
>
> 14.4.4 the Member passing a resolution for it to be wound-up or having a petition presented to any court for it to be wound-up or the member ceasing (or threatening to cease) to carry on its business ".

[4] Counsel for the claimant suggest that "over its" should be read in after "Member" and before "undertaking". Certainly there appears to be some missing words although the intention is plain.

29. Rule 14.6 sets out when the federation may terminate membership.

> "14.6.1 The Membership Department may resolve to expel a Member who fails to pay any subscription due to the GGF in accordance with the Rules, and does not pay such outstanding subscription within 14 days of demand being sent by the Federation.
>
> 14.6.2 The Membership Department may resolve to expel a Member for a material or persistent breach of the Rules or Consumer Code of Practice under Rule 13."

30. Rule 15.1 provides that an applicant for membership or a member may appeal to the board of directors against a decision of the membership department. The circumstances in which this may arise are set out in rules 15.1.1 to 15.1.3.

31. Mr Agnew's evidence is that the fund has operated successfully since 1979. He says that the fund's ledgers from 2008 to 2020 reveal that the fund has paid out or accrued £350,600 in claims. For 2020 there is £40,753.89 accrued but not yet paid out. He also says there are a further 71 customers with possible claims known by the claimant, but they have not approached the fund for assistance. The value of those claims is £171,189.11, and this has not been included in the accrued figures. In addition there is a retention of £37,627.94 as a general provision to cover claims in relation to consumers who requested cash refunds, rather than vouchers. To encourage the uptake of vouchers the payments are calculated at 80% of the voucher value.

32. The fund was financed by fund member contributions but was ultimately backed by Stop Loss insurance. This was designed to protect against extreme or unpredictable losses that the fund might suffer.

33. Mr Agnew explains in his evidence that there were concerns before the Covid 19 pandemic that the fund was vulnerable to the financial instability of the larger fund members. There was potential for a shortfall between the fund's cash reserve and its Stop Loss cover. The fund's accountants recommended in 2019 that insurance cover should be increased to mitigate against this risk.

34. The existing insurer's view of the finances of one of the larger fund members, combined with the impact of the pandemic, meant that it was unwilling to offer like for like cover for the year 2020/21. The premium increased from £50,000 to £89,600, with several new endorsements limiting the insurer's exposure.

35. Stop Loss cover was renewed until 31 March 2021, as I have indicated at a higher premium to try to cover for any failures during that period. However it was not sufficient to cover several large or multiple small failures of existing fund members. At the claimant's board meeting on 30 March 2020 the board resolved to close the fund to new business with effect from 1 April 2020, to terminate the fund and distribute any excess to fund members in accordance with the rules and after valid claims had been paid out. Mr Agnew sent a letter to the fund members dated 31 March 2020 notifying them of this decision.

36. The board initially set 30 September 2020 as the deadline for claims from customers. The deadline in respect of the third defendant was extended to 8 October 2020. On 16 October 2020 the claimant's board resolved that the termination date of the fund would be 31 March 2021.

37. Due to the uncertainty of the interpretation of the rules and because the claimant did not have complete information about payments to the fund going back to its inception the claimant was left with little option but to seek assistance from the court.

How the scheme of the fund worked

38. A member of the fund is defined under rule 2 of the rules as,

> "A Member of the Glass and Glazing Federation who routinely take Deposits on domestic Contracts and contributes to the Fund or, if the Glass and Glazing Federation shall be dissolved or if there shall be a payment of surplus assets of the Fund pursuant to these Rules, the persons who were Members of the Glass and Glazing Federation and whose Membership in respect of the Fund had not ceased or been terminated pursuant to these Rules at the time of such dissolution or payment (as the case may be), and Membership shall be construed accordingly."

39. It follows from this that a member of the fund also had to be a member of the federation. However the converse is not necessarily true. Some members of the federation did not routinely take deposits on domestic contracts and so would not also be members of the fund.

40. Rule 3 set out the general provision that,

> "The Fund has been established, and will be administered by GGF Fund Limited as a mutual fund for the purpose of protecting Customers' Deposits against the Defaults of Members. The accounting period of the Fund shall be coterminous with that of the Glass and Glazing Federation."

41. Rule 5(a),

> "If GGF Fund Limited is satisfied that a Deposit and/or Stage Payment was paid to a Member and that such Member will be unable to carry out the work of the subject of the relevant Contract by reason of the relevant Member's Default, then GGF Fund Limited will consider, at its absolute discretion whether Assistance will be provided to the relevant Customer from the Fund and, if Assistance is to be provided, what form it will take.

42. Rule 6 sets out how the fund is financed,

> "The Fund is financed by Members' subscriptions (as further provided in Rules 9 and 10 of these Rules). Any surpluses

> accruing to the Fund belong to the Members as provided in Rules 12 and 18 of these Rules."

43. Members of the fund are required to pay monies into the fund on a quarterly basis (30 April, 31 July, 31 October and 31 January), rule 9. This was one month after the close of the relevant quarter and calculated by reference to deposits received in that quarter: the relevant information being supplied by the member.

44. Rule 12 sets out the position with surpluses,

> " GGF Fund Limited may return to Members the whole or any part of any surplus not considered by GGF Fund Limited to be required for the purposes of the Fund, by relief of subscriptions, cash refund or by whatever other method GGF Fund Limited may deem appropriate.
>
> Any amount so returned to Members shall be allocated in proportion to their aggregate subscriptions paid during their respective periods of Membership."

45. Rule 13 deals with termination of membership.

> "GGF Fund Limited may terminate Membership at any time upon breach of or failure by a Member to observe any requirement upon the Member under these Rules (including but not limited to failure by a Member to pay subscriptions by the date of their falling due). Such termination shall be without prejudice to the Member's liability to perform all their obligations in respect of events occurring before such termination. In such a case, the Member shall have no right to participate in any return or distribution of assets of the Fund.
>
> Upon a Member ceasing to be a Member of the Glass and Glazing Federation, their Membership of the Fund will automatically cease."

46. Termination of the fund is set out in rule 18.

> "GGF Fund Limited may terminate the Fund at any time. If the Fund shall be terminated in connection with any establishment of a new fund providing similar benefits, GGF Fund Limited may direct the vesting of all or any part of the assets of the Fund in the persons authorised to administer such successor fund.
>
> Upon termination, otherwise than by investing the assets in a successor fund, the surplus assets attributable to Members shall be ascertained after all Claims made by Customers for Assistance from the Fund prior to commencement of the winding-up have been determined and fully provided for and after full provision has been made for all outgoings of the Fund

> (including costs and expenses incurred by GGF Fund Limited) which may be incurred in connection with the winding-up and otherwise under these Rules (including the provisions of Rules 6 and 17 hereof).
>
> The distribution of such surplus shall be made to Members [whose subscriptions are fully paid up to the date of the termination], in proportion to their aggregate subscriptions paid during their respective periods of Membership."

47. Mr Agnew explains that members of the fund would submit a quarterly return of deposits taken from consumers. The value of the deposits would be declared and the subscription payment to be paid to the fund would be calculated as a flat percentage rate of the deposits taken.

48. The federation maintained a membership list, which for obvious reasons, was available to consumers via its website. As I have already indicated rule 14.4 of the federation rules set out when the membership of a member may be terminated.

49. The fund maintained a list of fund members, but these were not published as a matter of routine. Mr Agnew says that the last published list was in 2020, and although it had been planned that certificates of membership would be issued in early 2020, this was not done.

The Law

50. The principles of construction are uncontroversial. The court must strive to find the intention of the party or parties by interpreting the words used in their documentary, factual and commercial context. In *Marley v Rawlings* [2014] UKSC 2, Lord Neuberger made it clear, paragraphs 19 – 20, that the approach to interpretation is the same whether a document is a commercial contract or a will.

51. In *Arnold v Britton* [2015] UKSC 36 Lord Neuberger considered the natural meaning of a service charge clause of a holiday chalet. At paragraph 15 he explained the court's approach to construction,

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was

> executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

52. In *Towcester Racecourse Co Ltd v The Racecourse Association Ltd* [2002] EWHC 2141 (Ch) 1, Patten J, obiter, accepted that the memorandum and articles of association of a company fall to be construed under the established rules for the interpretation of contracts. In that case nothing turned on express terms, but rather on what terms could be implied to give rise to the duties said to be imposed on the defendant.

53. Counsel for the third defendant submits that it is permissible for the court when taking into account the objective factual background, to have regard to documents such as the claimant's memorandum. He relies in particular on the speech of Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at paragraphs 912H-913A. Subject to the requirement that it should have been reasonably available to the parties and with the qualifications stated by Lord Hoffman in *BCCI v Ali* [2002] 1 269, the documents and more generally the objective facts can encompass a wide range of material. It undoubtedly includes the claimant's memorandum from August 2000[5] and the amended articles, by special resolution dated 30 September 2014.

54. Counsel for the third defendant also made two other points. First, the court will generally favour a "commercially sensible construction"[6]. In choosing between rival interpretations, the court should consider the reasonableness of the result, including which is the more (or less) commercial construction, per *Rainy Sky SA v Kookmin Ban*k [2011] UKSC 50, Lord Clarke at paragraphs 29 to 30. Although as Lord Hodge observed in *Wood v Capita Insurance Services Ltd* [2107] AC 1173 at paragraph 13,

> " Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed

[5] By special resolution dated 2 January 2001.
[6] *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, Lord Steyn at 771A.

> professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in Sigma Finance Corpn (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

55. Second, insofar as there is a tension between the primary document being construed, here the rules, and a document referred to in that document, here, for example, the federation rules, the primary document will prevail. Counsel referred to *Modern Building (Wales) Ltd v Limmer and Trinidad Co Ltd* [1975] 1 WLR 1281, Buckley LJ at 1289E-G. Although this is the description of the process where the court may read incorporated clauses with such modifications as may be necessary to make them apply to the contract, with the proviso that the court cannot remake the "bargain".

56. In respect of the insolvency issues, there is an argument as to whether the rules are ultra vires. Counsel for the third defendant submits that the court will attempt to construe a document so that it is lawful: *Great Estates Group Ltd v Digby* [2011] EWCA Civ 1120, Toulson LJ at 98. This concept was pithily described by Lord Hamblen in *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] UKSC 38 at paragraph 95,

> "It is a well-established principle of contractual interpretation in English law, which dates back at least to the time of Sir Edward Coke (see Coke upon Littleton (1628) 42a), that an interpretation which upholds the validity of a transaction is to be preferred to one which would render it invalid or ineffective. In the days when Latin was commonly used in the courts, it was expressed by the maxim *"verba ita sunt intelligenda ut res magis valeat quam pereat"* - translated by Staughton LJ in Lancashire County Council v Municipal Mutual Insurance Ltd [1997] QB 897, 910, as "the contract should be interpreted so that it is valid rather than ineffective"."

FIRST GROUP OF ISSUES: INSOLVENCY

57. In terms of representation, the third defendant represents itself and three other insolvent parties: Cheam Windows Ltd, Designs 49 Ltd, and the Crown as successor in title to Cheadle Glass Ltd. The second defendant represents itself, and, in particular, as assignee of HPAS Ltd[7] and Disign House Maidstone Ltd. They are described by counsel for the second defendant as the later insolvents. The claimant represents all other members of the fund who would benefit from the exclusion of any of the insolvent parties.

58. As to the relevant insolvency events:

[7] Formerly the first defendant.

Date	Party/entity	Nature of event
8 June 2020	Third Defendant	entered administration
7 July 2020	Cheam Windows Ltd	entered Creditors Voluntary Liquidation
7 September 2020	Cheadle Glass Company Ltd	entered into administration but see below
9 September 2020	Designs 49 Ltd	entered Creditors Voluntary Liquidation
17 August 2021	Cheadle Glass Company Ltd (Crown as successor in title)	entered Creditors Voluntary Liquidation 6 December 2023 dissolved
28 October 2022	Disign House Maidstone Ltd	Entered into administration
30 October 2023	First Defendant	Entered into administration

(1) Claim Form Issue 1: What is the relevant date on which a person must be a Member of the Fund in order to participate in any distribution following the winding up of the Fund?

59. There are four possible categories of dates. The third defendant argues that it is 31 March 2020/1 April 2020, when the fund closed to new business. In theory it could be 30 September 2020 or 8 October 2020, the final date by which customer claims had to be made. The claimant's tertiary position is the latter date, being the last date that claims from customers could be accepted. The second defendant argues that it is 31 March 2021, when the claimant's board determined that to be the termination date of the fund, albeit conditionally as the minutes record that it is subject to counsel's opinion[8]. The claimant argues that the date is when the surplus is paid, so an, as yet, unascertained future date, although in the alternative 31 March 2021.

[8] No opinion was disclosed, and it may be inferred that it was not obtained.

60. The second defendant's argument is the most persuasive and is grounded in the exercise of the termination power. The relevant date is therefore 31 March 2021.

61. In exercise of its power under rule 18 of the rules to terminate the fund, the board selected 31 March 2021. In contrast the board meeting minutes dated 30 March 2020 demonstrate that the board had considered that it had power under rule 18[9] to terminate at any time but considered that it was appropriate to ensure that as many claims by customers as possible were made. The wording of rule 18 assumes a staged process:

    i. "all customer claims are determined": which would imply that the fund is closed to new business

    ii. termination may take place at any time and the fund is then wound up

    iii. distribution of the remaining surplus assets to members

62. What is apparent from the board minutes dated 30 March 2020 is that the board agreed to close the fund to new business from 1 April 2020, that is not the same thing as the members' rights crystallising at termination. As counsel for the second defendant submits a power is not validly exercised unless an intention to exercise it is apparent or that intention can be imputed. The latter cannot arise where the board have expressly stated their intention not to exercise the power: Lewin on Trusts 20th, 29-074, and *David v Richards & Wallington Industries* [1990] 1 WLR 1511.

63. The third defendant places reliance on rule 3(3) of the claimant's memorandum and the imposition of a trust. However the fund, whilst closed to new business, continued to operate. The purpose of the fund was to provide a mechanism to benefit customers and to receive claims, including those from customers of early insolvents who had lost their deposits: per rule 3 "protecting Customer's Deposits against the Defaults of Members". In contrast to 31 March 2020/1 April 2020, after 31 March 2021the function of the fund was to wind up its operations.

64. The claimant relies on the use of "member" in rule 18 to support its contention that the date is when the surplus assets are paid to members. Although the definition of "member" in rule 2 uses the past tense "were". Further the causative event is not the payment out of the surplus, but rather the dissolution of the fund at a time when it is solvent so that there will be a surplus to pay out. The argument that the fund will not be terminated while it is actively administering assets and making decisions about them I do not consider to be a persuasive argument. There is a distinction between dissolution or termination and distribution of assets. The latter is a consequence of the former. That can be demonstrated by the example of a partnership where general dissolution is the moment in time when the ongoing nature of the relationship ends, even though the partners may continue to be associated for the purposes of winding up their affairs. The same applies with equal force to the argument that 8 October 2020 is the appropriate date, being the last date when claims from customers would be accepted. That reflects a pragmatic way of bringing finality or certainty to the claims mechanism and I do not see how it could be said to relate to the issue of membership. That seems to me to be a non sequitur and certainly not embedded in the rules.

[9] The board minutes incorrectly refer to rule 17.

(2) Additional Issue 1A: Is it necessary to be a "Member" within the Fund Rules to participate in any distribution?

65. Reliance is placed by the third defendant on the memorandum to support the contention that the entitlement to share in the surplus assets arises from being a "subscriber", not being a member. The memorandum at paragraph 3(3) provides that any surplus monies of the fund are held on trust for the person subscribing to the fund. It is submitted that this is not just any surplus on a winding up of the claimant and/or the fund but also any surplus arising during the operation of the fund. As the memorandum does not define "subscriber", it is suggested that the court can look to a dictionary definition of the word. The Shorter Oxford English dictionary defines to "subscribe" as to "[c]ontribute or promise (a specified amount) to or for a fund" and a "subscriber" as "A contributor to a project, fund, etc". That is an extremely wide definition, it could encompass someone paying the regular amount for a monthly magazine to an investor who might commit capital to a fund. This unduly elevates a linguistic construction and fails to embed it into the rules. It is the rules that are the key document.

66. The rules specifically define a member and how surpluses[10] may be returned to members. The key term to participate in the distribution of the fund is being a "Member". Whilst there is some justified criticism that there are tensions and ambiguities within the documents, importing a requirement for someone to be a subscriber in order to benefit from the fund is to introduce an unnecessary level of vagueness and does not have textual support from the rules.

67. Rule 18 of the rules provides that on termination of the fund, "the distribution of such surplus shall be made to Members [whose subscriptions are fully paid up to the date of the termination][11]…" The definition of member is set out in the definitions section under rule 2. Further support, if necessary, for the significance of member is set out in rule 13, which deals with termination of membership where "[i]n such case, the Member shall have no right to participate in any return or distribution of assets of the Fund."

68. Accordingly the answer to the question is that it is necessary to be a member within the rules in order to participate in any distribution.

69. This analysis is also consistent with the claimant's approach. In a letter dated 3 December 2020 Mr Agnew wrote to Mr Beattie, one of the joint administrators of the third defendant, stating that although the third defendant had been a long-standing member of the fund, it had ceased to be a member in accordance with the rules upon its insolvency. Counsel for the claimant also makes a valid point that if non-members could participate in any distribution it would be in the interests of that insolvent company to call for an immediate winding up of the fund so that they could extract their share of any assets. That is contrary to the object of the fund and that its general purpose in the rules was to protect customers deposits against defaulting members.

[10] Rule 12 and at the discretion of the claimant.
[11] The square brackets are in the rules.

A (3) Additional Issue 1B: As another way of putting Claim Form Issue 1, on what date did (or will) termination and, if different, dissolution of the Fund occur within the meaning of the Fund Rules?

70. This is the same answer as issue 1 and for the reasons set out thereunder, termination occurred on 31 March 2021.

71. Further "termination" is not defined in the rules but it does not need to be. It is a straightforward word meaning the act of ending something or the end of something. In the context of the fund it plainly means that it is brought to an end. Rule 18, which specifically deals with termination, refers to Members; it could have but does not refer, for example, to subscribers to the claimant. Rule 13 is clear, a member has an obligation to perform all their obligations in respect of events occurring before their membership is terminated, but goes on to say, "In such a case, the Member shall have no right to participate in any return or distribution of assets of the Fund".

72. Counsel for the second defendant uses the analogy of an unincorporated association to emphasise the distinction to be drawn between termination and the winding up process: which is a useful one. In *Re Sick and Funeral Society of St Joseph's Sunday School* [1973] 1 Ch 51 an unincorporated association had been formed at a Sunday school to provide for sickness and death benefits for its members, only teachers or scholars of the school could join. On 12 December 1966 the society resolved to wind up the society with effect from 31 December 1966. The liquidators asked the court to determine how the surplus assets should be distributed between members or former members and in what proportion. Megarry J at 31H to 32B analysed the position as,

> "The realities of the situation here seem to me to be that this society suspended all operations on December 31, 1966, with a view to being wound up. Nearly a third of the members expressly agreed this at the 1966 meeting, and nearly a half of them reiterated this at the 1968 meeting. It took some time for the machinery of winding up to be ascertained and set in motion, but this machinery was no more than was required to give effect to a decision that was supported in terms by a percentage of the membership …"

So the substantive rights of the members crystallised on 31 December 1966. The judge also considered how to analyse the position of payments by members to the association, albeit this was in the context of an unincorporated association, whereas the claimant is an incorporated company, which has the rules as the main document, but also the company documents together with the company documents for the federation and the federation rules. At page 33F-34A he said,

> "It seems to me, with all respect, that much of the difficulty arises from confusing property with contract. A resulting trust is essentially a property concept: any property that a man does not effectually dispose of remains his own. If, then, there is a true resulting trust in respect of an unexpended balance of payments made to some club or association, there will be a resulting trust in respect of that unexpended balance, and the

> beneficiaries under that trust will be those who made the payments. …
>
> On the other hand, membership of a club or association is primarily a matter of contract. The members make their payment, and in return they become entitled to the benefits of membership in accordance with the rules. The sums they pay cease to be their individual property, and so cease to be subject to any concept of resulting trust. Instead, they become the property, through the trustees of the club or association, of all the members for the time being, including themselves. A member, who by death or otherwise, ceases to be a member thereby ceases to be part owner of any of the club's property … If, then, dissolution ensues, there must be a division of property of the club or association among those alone who are owners of that property, to the exclusion of former members."

(4) Claim Form Issue 2: Does a person who suffers an insolvency event have their membership of the Fund terminated automatically? If not:

a. what further steps would be sufficient to terminate a person's membership of the Fund; and

b. if the Federation, or the Claimant, is entitled to terminate such membership, should it do so (or decline to do so) prior to any distribution of the monies from the Fund?

73. The third defendant argues that insolvency cannot give rise to automatic termination of the membership of the fund: active steps are required. Reference is made to the definition of "Defaulting Member" in the rules which is, "A GGF Member who is in Default in relation to a Contract for one of the reasons given in the Definition of Default". Default refers to circumstances where a contract cannot be completed because the member had been adjudged bankrupt, or if incorporated where an administration order or winding-up order has been made by the court or a resolution adopted for a creditors' voluntary winding-up. It is therefore said that a member includes bankrupt individual members and corporate members in administration or liquidation. However, the definition of member specifically refers, in the scenario of the fund being dissolved, to those whose membership in respect of the fund had not ceased or been terminated.

74. The third defendant goes on to submit that there are two requirements to be a member of the fund: membership of the federation and membership of the fund. As to the former, paragraph 13 of the rules, says,

> "Upon a Member ceasing to be a Member of the Glass and Glazing Federation their Membership of the Fund will automatically cease."

75. Counsel submits that the only basis on which the third defendant might no longer be a member of the federation is it entering administration. Article 48 of the federation articles provides that the Federation shall regulate,

> "… the terms on which members may resign or have their membership suspended or terminated".

76. Counsel refers to *In re BW Estates Ltd (No 2)* [2017] EWCA Civ 1201. The Court of Appeal held that member within the context of the company's articles and the statutory framework of the Companies Act 2006 included any member registered on the companies register, whether alive or dead, and if corporate, whether subsisting, in an insolvency procedure or dissolved. Twenty five of the one hundred shares were held by an Isle of Man company which had been dissolved in 1996 but remained on the register of members. A directors meeting attended by the sole director on 28 August 2013 purported to appoint joint administrators. It was held that the Duomatic principle[12] could not apply, although the dissolved company had ceased to exist it remained a member of the company and as a shareholder technically had a right to attend and vote. I do not accept counsel's contention that in accordance with this case a dissolved company or one that has suffered an insolvency event is a member for the purpose of the rules. It is the construction of the rules and the interplay with the contextual documents that are key to determining the issue.

77. Counsel for the third defendant refers to rule 14.4 of the federation rules which provides that, "The Membership of any Member which is a corporate body will be terminated immediately if any of the following happen." The stated scenarios include under rule 14.4.1, where a member enters into any formal or informal voluntary composition or arrangement with its creditors or under rule 14.4.2 the member being unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986. In respect of the former sub-sub rule there is a proviso that, "However, the Membership Department has the power at its discretion to continue Membership of any such Member." Emphasis is placed on "will be" in rule 14.4. Counsel then relies on rule 14.6 of the federation rules which provides for termination of membership by the federation, which speaks of "may resolve to expel a member". Then under 13.6, an example of an appropriate sanction being to "expel the Member from Membership". His analysis is that the language of section 14 rules is consistent with "termination" being an act by the federation or the member, so requiring a positive step. Some emphasis is placed on the use of the word "termination" rather than "cease". Although there is no obvious distinction between the use of these words. Contrast this with rule 14.3 where if a member is taken over by a non-member, membership is said to automatically cease. Although the rule itself provides a period of 3 months to allow the non-member to acquire membership.

78. I note though under article 33.3 of the federation articles, "A person's membership terminates immediately when that person dies or ceases to exist." Further a member of the federation is not automatically a member of the fund.

79. Reading article 33.3 of the federation articles with rule 13 of the rules, a dissolved company ceases to exist as a legal entity. Testing counsel for the third defendant's hypothesis against the position of Cheadle Glass Ltd, that company entered a CVL on 17 August 2021 and was dissolved on 6 December 2023. Any of its assets have become the property of the Crown. It cannot be said that this company is still a member of the

[12] Which in broad terms provides that shareholders may informally approve company actions., without the need of a formal company meeting, provided that they all consent unanimously and are fully informed.

federation: article 33(3). Therefore it cannot be a member of the fund: rule 13, second paragraph.

80. Moreover the federation rules, rule 14.4, sets out in plain language what will happen to a corporate body when any of the insolvency events in rules 14.4.1 to 14.4.4 occur. This provision can be contrasted with rule 14.6 which deals with termination of membership by the federation. These refer to a decision being taken by the membership department to expel a member. There is also a provision for appeals in certain circumstances, none of these apply to termination under rule 14.4. Further rule 14.4 is not couched in the same language as rule 14.6, stating that the membership "will be terminated immediately if any of the following happen", as opposed to "may resolve to expel a member". This supports the construction that membership under the federation rules terminates automatically. There is one caveat in rule 14.4.1 where a member enters into any formal or informal voluntary composition or arrangement with its creditors. Then the membership department has the power at its discretion to continue membership of any such member. Counsel for the claimant submits two points in relation to this, which I accept. Firstly, a discretion needs to be exercised in order for federation membership to continue; therefore, if the discretion is not exercised the membership terminates because of the insolvency event. Secondly, the very fact that there has been an insertion of this power in clause 14.4.1 shows there is no such discretionary power vested in the membership department in relation to rules 14.4.2 to 14.4.4.

81. This difference makes commercial sense. If a corporate member is insolvent, it will not be able to pay its membership fees, continue to run its business as it had done but if membership does not terminate it may continue to advertise that it is a member of the federation. Counsel for the claimant also observes that imposing a requirement on the federation to take a positive step to terminate membership, in the event of insolvency, as it would be formalistic and pointless, there is no discretion for the membership department to take. I agree there is no commercial logic to that.

82. Counsel for the third defendant says that his analysis applies equally to termination of membership of the fund. He again seeks to draw a distinction between the use of "ceased" and "terminated", in the definition of member in rule 2 of the rules, which itself refers back to the federation rules. He says this supports the position that termination requires a positive act. I disagree. Whilst I accept that the rules have used cease and termination differently, albeit the former in a very limited way, that it is to place undue emphasis on the nuances of the use of these words. The context of "cease to be a member" only arises if the member company is taken over by a non-member company. Whereas termination[13] under the federation rules arises either as a result of an insolvency event (rule 14.4 of the federation rules) or as a result of a failure to pay any subscription due or breaching the rules or consumer code of practice (rule 14.6 of the federation rules). Both of these occur as a result of a positive event but there is a difference between the cause and the effect of that positive event. In respect of the former termination of the membership is automatic. That accords with the commercial context and the purpose of the federation and the fund. Whereas not every breach or failure to observe the federation rules would give rise to termination, although it might

[13] It also includes a fund member terminating its membership, rule 14.1 of the federation rules, and a personal insolvency event under rule 14.5.

do, and the decision to terminate is a discretionary one exercised by the board of the federation.

83. In terms of membership of the fund the member must be (i) a member of the federation (ii) who routinely take deposits on domestic contracts and (iii) contributes to the fund. A member who has suffered an insolvency event will no longer be a member of the federation as a result of rules 2 and 13 of the rules, therefore not satisfying (i). Moreover they are unlikely to satisfy (ii) and (iii) due to their insolvency. Counsel for the claimant also makes an observation that the fund would not agree to cover new customers of entities who had suffered an insolvency event. The risk would be disproportionate to members who have suffered an insolvency event and would be disproportionate to the contribution, if capable of being paid and received, of 0.2% of the deposits taken.

84. I am satisfied that on a proper construction of the rules an insolvency event will automatically terminate membership of the fund.

(5) Additional Issue 2A: Would the termination of an insolvent (or any) party's membership now (or in the future) affect (i.e. remove) their entitlement to a distribution from any surplus in respect of the Fund?

85. I have already concluded that the fund terminated on 31 March 2021. In order to participate in any distribution following the dissolution of the fund that entity must have been a member of the fund on 31 March 2021.

86. The process of winding up the fund has commenced: the fund was closed for new business on 30 March 2020 and terminated on 31 March 2021. At that point the interests of the members crystallised. In *Abbatt v Treasury Solicitor* [1969] 1 WLR 561, in the context of a member's club where an old club ceased to function and was replaced by a new club with a new constitution, Pennycuik J analysed the position at termination at 567G-H as,

> "It follows, in my judgment, that the club property became distributable amongst the persons who were members of the old club when it ceased to function. It is an implied term of the contract of membership of a members' club that an individual member is precluded from obtaining the realisation and distribution of the club property so long as the club functions. But once the club ceases to function the reason for this disappears and the right of the existing members must, I think, crystallise once and for all."

87. Although his decision was reversed on appeal, this point was unaffected.

88. It is not open to the claimant to try to terminate the membership of a member who was a member at the date of termination but has suffered an insolvency event after that date. This analysis is reinforced by the language of the rules. Rule 18 provides that,

> "The distribution of such surplus shall be made to Members [whose subscriptions are fully paid up to the date of the termination]."

(6) Claim Form Issue 3: In accordance with the answers to questions 1 and 2, are any of the following entitled to participate in any distribution:

a. E Realisations 2020 Limited (in administration) (formerly Everest Limited)

b. Cheam Windows Limited (in liquidation)

c. Designs 49 Ltd (in liquidation)

89. It follows from the analysis above that none of the above are entitled to participate in any distribution: they were not members of the fund on 31 March 2021. In paragraph 58 above I set out a relevant chronology of the insolvency events. In respect of each of these parties they suffered an insolvency event that falls within rule 14.4 of the federation rules, their membership of the federation (and therefore the fund) terminated prior to 31 March 2021.

(7) Additional Issue 3A: In accordance with the answers to questions 1 and 2, are any of the following entitled to participate in any distribution:

a. The Crown (as successor in title to Cheadle)

b. Anglian (as assignee of HPAS Limited)

c. Disign House Maidstone Limited.

90. In respect of Anglian (as assignee of HPAS Ltd) and Disign House Maidstone Ltd the insolvency event occurred after the 31 March 2021 and they are entitled to participate in the distribution of the fund.

91. The position of Cheadle Glass Ltd is different. For the purposes of the federation rules the insolvency event was 7 September 2020, when it entered into administration. It was therefore not a member of the fund on 31 March 2021 and is not entitled to participate in the distribution.

(8) Additional Issue 3B: If and to the extent that the Fund Rules exclude (or purport to exclude) insolvent entities from participating in any distribution:

(a) are such Rules ultra vires the Fund's Memorandum and Articles and/or outside the authority of the Fund's directors to adopt?

(b) are such Rules void as being contrary to public policy under the anti-deprivation rule?

92. Counsel for the third defendant advances two arguments to support his contention that the rules cannot exclude the earlier insolvents from the distribution. Firstly, that the rules are ultra vires the fund's memorandum and articles, and outside the authority of the fund's directors to adopt. Secondly, that they are void on public policy grounds as they fall within the anti-deprivation rules.

93. In *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38 Lord Collins described the anti-deprivation rule at paragraph 1 as,

> "The anti-deprivation rule and the rule that it is contrary to public policy to contract out of pari passu distribution are two sub-rules of the general principle that parties cannot contract out of the insolvency legislation. … The anti-deprivation rule is aimed at attempts to withdraw an asset on bankruptcy or liquidation or administration, thereby reducing the value of the insolvent estate to the detriment of creditors…."

94. As to the first argument, the third defendant submits that one of the purposes of the claimant is, per article 3(3) of the claimant's memorandum,

> "To hold any surplus monies of the Fund by way of reserve in such amount the Company may determine, and subject thereto, to hold the surplus of any accumulated fund in trust for the persons subscribing to the Fund in the proportion that the sum or sums contributed by each such subscriber respectively bears to the said surplus, and on a winding up of the Company and/or of the Fund to distribute any such surplus among such subscribers in such proportion subject to exceptions in the case of small subscribers."

Adopting his earlier argument on language, "subscriber" whilst not defined, by its ordinary usage means someone who contributes or promises to pay a specified amount to or for a fund, or a contributor to a fund. As at 1 April 2020, the date when the fund closed for new business, the third defendant was a subscriber. If the fund rules exclude a subscriber, such as the third defendant, this contradicts paragraph 3(3) of the claimant's memorandum. This it is said does not advance the purposes in paragraph 3(1). Further paragraph 3(21) sets out an object,

> "To do all such other things as may be considered to be incident or conducive to any of the above objects."

It is followed by an independent objects clause,

> "And it is hereby declared that the objects of the Company as specified in each of the foregoing paragraphs of this Clause (except only if and so far as otherwise expressly provided in any paragraph) shall be separate and distinct objects of the Company and shall not be in any way limited by reference to any other paragraph or the order in which the same occur or the name of the Company."

It is therefore said that in so far as the fund rules purport to exclude insolvent parties from a distribution to which they are entitled under paragraph 3(3) of the claimant's memorandum they are void.

95. The problem with this position is the operation of the Companies Act 2006. Under section 28 the provisions of the claimant's memorandum are treated as provisions of the claimant's articles. Section 39 provides that,

> "(1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution."

96. The effect of this provision is to abolish the ultra vires doctrine[14], which had been established to protect third parties who were contracting or transacting with the company.

97. Counsel for the third defendant says section 40 of the Companies Act 2006 makes it clear that section 39 does not operate to confer authority on the directors that they would not otherwise have. The objects of a company still continue to limit the authority of the board, shareholders collectively and any of its agents to bind the company. This section is to be read purposively. Palmer on Company Law summarises this at paragraph 3.324 as,

> "The purpose of s.40 of the Companies Act 2006 is to protect those dealing with the company in good faith from the consequences of the directors of the company exceeding their power under the company's constitution. However, it is not the purpose of the section to remove the other legal consequences that flow from the directors' exceeding their powers under the company's constitution, or at least not to modify these consequences further than is necessary to effect the policy of protecting outsiders. Thus, where the directors exceed their power under the constitution, they may still expose themselves to action by the shareholders of the company, suing either individually or derivatively, or by the company itself. "

98. I note that the only shareholders of the claimant are two nominee shareholders, who hold their shares for the federation as beneficial owner.

99. Going through this analysis though with reference to the claimant, the rules are valid per section 39 of the Companies Act. The rules themselves are not inconsistent with the provision of paragraph 3(3) of the claimant's memorandum. It would be artificial to ignore the use of the present tense, "To hold the surplus of any accumulated fund in trust for the persons subscribing to the Fund…" By the third defendant's analysis an earlier member of the fund who had been expelled from the federation, perhaps for breach of the consumer code of conduct would still be able to participate in the distribution if at any stage they had been a subscriber. This is contrary to the purpose of the fund. As the rules state at paragraph 3,

> "The Fund has been established, and will be administered by GGF Fund Limited as a mutual fund for the purpose of protecting Customers' Deposits against the Defaults of Members."

The objects of the claimant at paragraph 3(1) are

> "To provide services for the Glass and Glazing Federation including the establishment maintenance and administration of

[14] Which had already been eroded under the Companies Act 1989 allowing greater flexibility in governance.

> a fund ("the Fund") for the benefit of members of the public who suffer, or would otherwise suffer loss arising from non-fulfilment of a contract effected between the member of the public and a member of the Glass and Glazing Federation."

100. A member of the fund is an entity who is a member of the federation and who routinely takes deposits on domestic contracts and contributes to the fund. References to "subscriptions" can be found in rules 6, 7, 9 to 13 and 18 of the rules. The provision in paragraph 3(3) of the claimant's memorandum and the use of the present tense is consistent with the rules, specifically in rule 18 that, " The distribution of such surplus shall be made to Members [whose subscriptions are fully paid up to the date of the termination]…" The rules do not go beyond the wide remit of the claimant's memorandum. Accordingly the rules are not ultra vires the fund's memorandum and articles and are not outside the authority of the fund directors to adopt.

101. Counsel for the third defendant developed his alternative argument that, whilst the "predominant purpose" of the rules was not to evade the insolvency laws, the inevitable consequences of adopting the claimant's analysis is that a member's insolvency event, before the fund's termination, would deprive it of an entitlement to participate in any surplus. (Although the entitlement is derived from its membership of the federation together with its membership of the fund.) Counsel in a carefully crafted argument suggests that depriving earlier insolvents is sufficient to infringe the anti-deprivation rule, or is sufficient to infer the objective[15] intention required to infringe the rule.

102. He submits that his analysis is consistent with the public policy objectives of the anti-deprivation rule. In particular he submits that the third defendant was the largest contributor to the fund; other parties, albeit that they too were subscribers to the fund, would receive a significant windfall; creditors of insolvent entities will include domestic customers who ironically will suffer even though the fund was intended to benefit them.

103. In *Belmont v BNY* Lord Collins said,

> "103. As has been seen, commercial sense and absence of intention to evade insolvency laws have been highly relevant factors in the application of the anti- deprivation rule. Despite statutory inroads, party autonomy is at the heart of English commercial law. Plainly there are limits to party autonomy in the field with which this appeal is concerned, not least because the interests of third party creditors will be involved. But, as Lord Neuberger stressed [2010] Ch 347, para 58, it is desirable that, so far as possible, the courts give effect to contractual terms which parties have agreed. And there is a particularly strong case for autonomy in cases of complex financial instruments such as those involved in this appeal.

[15] Analysis taken from *Belmont v BNY*, paragraph 106. "If the anti-deprivation principle is essentially directed to intentional or inevitable evasion of the principle that the debtor's property is part of the insolvent estate, and is applied in a commercially sensitive manner, taking into account the policy of party autonomy and the upholding of proper commercial bargains, these conclusions on the present appeal follow."

> 104. No doubt that is why, except in the case of a blatant attempt to deprive a party of property in the event of liquidation (Folgate London Market Ltd v Chaucer Insurance plc [2011] EWCA Civ 328), the modern tendency has been to uphold commercially justifiable contractual provisions which have been said to offend the anti-deprivation rule: Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd [2002] 1 WLR 1150 ; Lomas v JFB Firth Rixson Inc [2010] EWHC 3372 (Ch) ; and the judgments of Sir Andrew Morritt C and the Court of Appeal in these proceedings. The policy behind the anti-deprivation rule is clear, that the parties cannot, on bankruptcy, deprive the bankrupt of property which would otherwise be available for creditors. It is possible to give that policy a common sense application which prevents its application to bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy."

104. Counsel for the claimant draws a parallel with the current case and *Money Markets International Stockbrokers Ltd (in liquidation) v London Stock Exchange* [2002] 1 WLR 1150, which applied existing insolvency principles to the facts of the case. The LSE had evolved from an unincorporated association to a mutual company, which later demutualised. Shares were classified into A and B shares with the latter carrying voting rights and participation rights on dissolution. MMI had become a member by acquiring a stockbroking business and its associated B shares. MMI became insolvent. Under LSE's articles a member upon becoming bankrupt had to transfer its shares back to the LSE. The issue was whether this breached the insolvency principles, that on insolvency an insolvent's assets are to be available for distribution amongst its creditors, so that the relevant provision of the articles was invalid. It was held that the B shares were not freely transferable but an incidence of membership. The objective of the provision was to maintain the integrity of the stock market and not to deprive creditors of the value of the B shares. The article was not struck down.

105. As all parties accept in this case there is no suggestion that the claimant, or the federation, sought to evade the insolvency laws or deprive the creditors of assets. The claimant, which has existed since 1979, was set up to hold the fund. This was a commercial arrangement operating to benefit members of the fund so that customers doing business with them would have the confidence that their deposits were protected. It would be the antithesis of this for an insolvent entity to retain its membership.

106. Further, members of the fund do not hold a specific interest in the fund. This is where the analysis by the third defendant and the elevation of article 3(3) of the claimant's memorandum into a declaration of trust falls into error. Rule 6 of the rules specifically states that,

> "The Fund is financed by Members' subscriptions (as further provided in Rules 9 and 10 of these Rules). Any surpluses accruing to the Fund belong to the Members as provided in Rules 12 and 18 of these Rules."

107. Counsel for the claimant fairly describes this as a hope that, depending on the levels of customer claims and the expense of administration, that there might be a surplus to distribute. Indeed the risk of the failure of members and the difficulty in obtaining Stop Cover insurance at the same level of cover drove the claimant into the decision to terminate the fund. The right to participate in any distribution is an incident of membership of the fund, the termination of membership means that that right ends.

108. It cannot therefore be said that this arrangement is designed to evade insolvency laws, it is commercially justifiable and the anti-deprivation rules are not applicable.

(9) Additional Issue 3C: Does an insolvent entity that was a "person subscribing to the Fund" within the meaning of clause 3(3) of the Claimant's Memorandum of Association remain as such notwithstanding its insolvency; (b) is any surplus in respect of the Fund held on trust for the persons subscribing to the Fund, including any insolvent party; and/or (c) is an insolvent party that is "a person subscribing to the Fund" in any event entitled to participate in any distribution pursuant to clause 3(3) of the Claimant's Memorandum of Association ?

109. As analysed above, the issue is who was a member of the fund at termination. The claimant's memorandum at clause 3(3) sets out the objects of the claimant. It is consistent with but must also be read with the rules. So an insolvent entity is not of itself prohibited from participating in distribution. However a member who has suffered an insolvency event has its membership of the federation automatically terminated, it is no longer a subscriber to the fund within the meaning of clause 3(3) and it cannot therefore be a member of the fund. The lack of membership of the fund is key.

SECOND GROUP OF ISSUES: MISSED PAYMENTS

(1) Claim Form Issue 4: Are Members who have missed quarterly payments:

a. entitled to participate in any future distribution;

b. entitled to participate in any future distribution, but only upon terms (and what should such terms be); or

c. not entitled to participate in any future distribution.

110. To an extent all parties agree that members, or subscribers in the case of the third defendant, are entitled to participate.

111. This follows as a matter of construction of rule 18 of the rules. The wording of the rule has been amended at least twice. The initial iteration provided for termination of the fund on not less than 12 months' notice. Rule 25 provided that the amount to be distributed (if any) "shall be distributed to Members whose subscriptions are fully paid up at the date of the termination…" By 2000 the rules had changed to permit immediate termination of the fund. One can see the logic of then altering the wording to "members whose subscriptions are fully paid up to the date of the termination". The rules, rule 18, states,

> "The distribution of such surplus shall be made to Members [whose subscriptions are fully paid up to the date of the

termination], …"

112. I construe the rule to mean that all members of the fund at the termination date are entitled to participate in the distribution, whether they are up to date or not. Support for that analysis can be derived from the rules themselves. In rule 13 reference is made to the position where a member has had its membership terminated by the claimant. The rule expressly states, "In such a case, the Member shall have no right to participate in any return or distribution of assets of the Fund". Whereas rule 18 does not require that the subscriptions must be paid prior to the date of termination, but rather "be fully paid up to the date of the termination". This is consistent with the power of the claimant to terminate the fund with immediate effect, and the fact that there is a delay between the quarterly returns and when payments are due.

113. Further support for this construction can be found in rule 7 which provides that on winding up "Every member undertakes to contribute the full amount of the year's subscriptions to the Fund…"

114. Counsel have also considered whether the part of rule 18 in parenthesis is significant. Could it be said, for example, that this is a sub-set of members? There is no evidence before the court as to the rationale for introducing this text in square brackets in the 2005 iteration of the rules. What this goes to in my view is the construction that you must be a member of the fund as at 31 March 2021 in order to participate in the distribution but that prior to distribution subscriptions must be fully paid up to 31 March 2021. This balances an iterative construction process within its commercial context.

115. Counsel for the second defendant also seeks to rely on rule 12 of the rules to demonstrate "the primacy of the proprietary interest of the members on the funds" She seeks to distinguish this feature from case law relating to the dissolution of unincorporated associations and clubs. I am not sure that is right. It is equally consistent with the fund's existence being to provide a mechanism to protect the deposits of domestic customers. It is not an investment vehicle for fund members; where there are adequate reserves in the fund its purpose is met and then the claimant may return surplus monies. There may be no surplus monies, and indeed the decision to terminate the fund was predicated on various assumptions which included the potential risk of a shortfall between the held deposits (fund value) and the Stop Cover insurance, if one or more of the larger contributors to the fund became financially unstable.

116. I have construed rule 18 to allow members to bring their subscriptions up to date, so the issue of implying such a term in the rules does not arise.

117. Given the gaps in the financial information held by the claimant I consider it is incumbent on the claimant to identify what payments have been missed, or to use the best evidence available by reference to historical payments, so that the member can bring its subscriptions up to date prior to distribution of the fund.

(2) Additional Issue 4A: Are Members who have missed quarterly payment entitled to participate in any future distribution under the Fund Rules as a matter of construction and/or pursuant to clause 3(3) of the Claimant's Memorandum of Association on the basis that they are "person[s] subscribing to the Fund"?

118. For the reasons I have already given members who have missed quarterly payments are still members of the fund, and are still "persons subscribing to the Fund" for the purposes of clause 3(3) of the claimant's memorandum.

(3) Claim Form Issue 5: How far back should the Fund look when considering whether quarterly payments have been missed:

a. To June 2012, when the last interim distribution was made to Members; or

b. To April 2014 (the earliest date from which the Claimant has reliable records of missed payments);

c. To some other date (and, if prior to 2007, on what basis);

119. There is a significant gap in the claimant's records. As Mr Agnew explains at paragraph 64 of his first witness statement,

> "a. From the start date of the Fund we had a total figure for each Fund Member of all contributions paid over the life of their membership up to 2006, so we did not have details of any individual quarterly payments made or missed during that time;
>
> b. From 2007 to 2014 we had data from the GGF Fund database which showed the amount and the date of payments received from Fund Members, but not which quarter those payments related to, so again we could not tell from this data whether any Fund Members had missed contributions for a particular quarter; and
>
> c. From 2014 onwards we held full data on the Access Dimensions database showing the quarterly contributions made by Fund Members so we could see from this data where quarterly contributions had been paid or not paid."

120. Counsel for the second defendant makes entirely valid points that adopting a presumption that all payments have been made prior to 2014 is potentially unfair, and provides a windfall to some members. It is said that any of the 28 members designated as "fully paid up" before 2006 may in fact be missed payment parties because the claimant does not have accurate records before 2014. The same point can be made in respect of members similarly designated for the period 2007 to 2014. Although I note that an interim payment was made in 2012, albeit a commercial decision was taken by the claimant board given the quality of the data at that time. Mr Agnew, who was not a director of the claimant until 21 August 2017, has reviewed the available documentation, including an email from Mark Attwood of Kreston Reeves, the company's independent auditors, dated 8 October 2020. At paragraph 65 of his first witness statement he says,

> "According to Kreston Reeves records, the management of the Fund at the time made a commercial decision that as the contributions payable by Fund Members were based on a percentage of each Fund Member's turnover they would use the

> turnover figures submitted by Fund Members (which the Fund did have records of) since 2007 as the basis for an approximation of the contributions that would have been paid by Fund Members over the years since the start of their membership. This approach assumed that all Fund Members had made all contributions required, effectively ignoring the historical missing payments issue that an examination of the data available in an email sent to us in connection with the final distribution had now revealed."

121. That approach assumed that fund members had made all contributions required, which would mean that historical missing payments would be ignored. The sum of £170,604 was set aside by the claimant's board to distribute to members. The second defendant received a distribution of £57,581.16. Mr Agnew in his second witness statement at paragraph 17 says,

> "Taking Anglian, only as an example to show the difference in treatment, according to the Fund records it did not receive quarterly returns or payments from Anglian during the period from Q4 2013 to Q4 2014. For those two years there is no corresponding entry in the statutory accounts for Anglian as a trade debtor –presumably because the Fund had not received a return, and had not therefore issued an invoice. Compare that with 2011 where a debt owed by Anglian is listed in the trade debtors, as a return had been received by the Fund and an invoice issued."

122. Given the unreliability of the data, the only realistic, and indeed fair, approach is to adopt the date of April 2014.

(4) Additional Issue 5A: Given that the Fund does not have records which go back to the inception of the Fund permitting it to identify where members have missed quarterly payments, does the lack of data (in particular as to individual quarterly payments prior to 2014) mean that some other solution is appropriate to ensure fairness between classes of member?

123. The schedule to the order dated 7 February 2024 sets out three categories of parties. Schedule A comprise 54 entities (one of which is the Treasury Solicitor in respect of claims for Cheadle Glass Company Ltd) described as missed payment parties. These include entities who have paid their final quarter payment in 2020, but may have missed some previous payments, of which they were not notified in the period 31 March 2020 to 31 March 2021. This group includes the second defendant. Ms McDonnell's witness statement records that the second defendant's solicitors sent out a survey to 55 missed payment parties to obtain additional information about their understanding and recollection of events. The eight substantive responses suggest that these parties were unaware of the alleged missing payments until after the termination date of the fund. Schedule B is a list of 19 parties described as non-paying parties, these are entities who did not pay their final quarter payment in 2020, but may include entities who have historically paid when asked. Schedule C is a list of 54 parties said to be fully paid up parties.

124. The fault with the failure to keep proper records pre-2014 lies at the door of the claimant. However the payment of fund subscriptions was reliant on fund members providing quarterly returns setting out how much that member had taken by way of deposits from customers during the relevant period. The contribution to the fund would be a flat rate of 0.2%. It was the submission of the return by the member that triggered the amount to be paid to the fund.

125. There is inevitably some unfairness between the treatment of non-paying parties, missed payment parties and fully paid-up parties. However, it would be unprincipled to distinguish between non-paying parties and missed payment parties; the key is membership of the fund. I have already construed rule 18 to permit subscriptions to be brought up to date, as at 31 March 2021. That opportunity is to be afforded to the missing payment parties and the non-paying parties. Given the issues with the records and data, pre-2014, there needs to be some pragmatism deployed in this case.

(5) Additional Issue 5B: Should a distinction be made between "Missed Payment Parties" and "Non-Paying Parties"?

126. No. The key is whether they are members at the date of termination of the fund, so it does not matter whether they are classed as "Missed Payment Parties" or "Non-Paying Parties". Adopting an arbitrary categorisation by reference to accidental or deliberate actions by the member is unsupported by the rules. In addition given the issues with the records this could lead to an inconsistent method that may be unfair to members.

(6) Additional Issue 5C: How should factual uncertainties about whether payments have been missed be taken into account?

127. It was the responsibility of the claimant to maintain adequate records. The note on the rules recorded that the latest list of fund members was available on the specified website. Rule 9 provided that,

> "All Members will pay quarterly subscriptions to the Fund on or by 30 April, 31 July, 31 October and 31 January in each year, being one month after close of the relevant quarter, calculated by reference to Deposits received in that quarter."

128. There are factual uncertainties as to whether returns were submitted to the claimant in the period 2014/2015. Counsel for the second defendant illustrates this by reference to minutes of the claimant fund board. The minutes of the meeting held on 21 July 2014 acknowledges that there was a large number of fund members either not returning their quarterly returns or not paying the invoices after submitting a return, "it was obvious there was a need to re-engineer the process to make it function correctly". The meeting held on 16 March 2015 recorded that there was still concern in respect of the review of returns and payments, so an 8 point plan was devised. As to the 2014/2015 accounts, Mark Ennals reported that

> "there was no contributions in January 2015 as the Deposit Returns had not yet been sent out as he had been advised not to do so. There was an urgent need for these 4th Quarter declarations to be sent out immediately."

129. Whilst it is clear from the meetings that the claimant was actively seeking to address its records issues, some gaps remained. For example, in an email chain from Asha Pyndiah of the claimant to Mr Tweedie ending 1 August 2022 there was a query about the label "still looking for the spreadsheet". The response was,

> "Finance compiles a spreadsheet every year to record the quarterly returns by member. The note will suggest that we had to go back and check these manual records. We couldn't locate some of them, especially 2014/2015". "

130. In the circumstances, where the claimant has no evidence to demonstrate that payments have been missed for any particular quarter (post April 2014), the member is assumed to have paid. I assume given the increased reliability of the records post April 2014 this will affect only a small proportion of "payments".

(7) Additional Issue 5D: Do questions of proportionality have a part to play (as between the quantum of any missed payments and the share of any distribution foregone)?

131. As a general statement questions of proportionality are relevant to the question of construction: when testing the consequences of a particular construction the court will look at the commercial outcome. Lord Hodge's statement in *Wood v Capita,* paragraph 54 above, encapsulates this.

THIRD GROUP OF ISSUES: CUSTOMER CLAIMS

(1) Claim Form Issue 6: What sum, if any, should be retained by the Claimant, and for how long:

a. To meet any customer claims

132. There are realistically three options: retain sufficient funds to meet the full extent of potential claims, retain nothing because sufficient time has elapsed or limit the retention, and if so to what amount and for how long.

133. Mr Agnew in his first witness statement set out the detailed process that the claimant has carried out following the decision to close the fund to new business from 1 April 2020. He describes the process of responding to customer claims in paragraph 38 as,

> "Under the Rules of the Fund, in response to a customer claim the Fund had complete discretion to decide what form assistance to a customer should take. Under rule 5(b) the Fund would either enable another GGF Member to complete the work or would make a payment to the customer equal to the deposit and/or stage payments that had been lost. If the Fund was to allow another GGF Member to complete the works then it would issue a voucher redeemable with a GGF Member. In January 2020 those vouchers had to be redeemed within one year of issue. In order to provide a degree of certainty to the closure of the Fund and any amounts outstanding against it, it was decided at the Fund Board meeting on 7 July 2020 that the

> date for redeeming those vouchers should be brought forward, to five months from the date of issue."

134. All fund members were written to notifying them of the change, and that the final deadline for customer claims was 30 September 2020.

135. During the period 2020/2021 Mr Agnew comments that the vast majority of the consumer claims related to failures by the third defendant and Cheam Windows Ltd. The total value of the paid claims was £186,034.66. the claimant accrued an amount of £40,753.89 in respect of claims which are not yet finalised. These are broken down as,

> "a. Unclaimed vouchers £6,807.14; "
>
> b. Customer requested claim form but failed to return it - £21,359.75;
>
> c. Customer submitted claim form but failed to send in supporting documents so their claim is "pending" £12,587.00."[16]

136. In addition fund members notified the claimant of an additional 71 customers that may have a claim. None of these customers have approached the fund. The value of these potential claims is £179,182.11. The claimant does not consider it likely that these customers will make a claim against the fund.

137. The last deposits which were eligible for protection were paid in the period 1 January 2020 to 31 March 2020. There is an obvious distinction between customers who have triggered the rule 6 process under the rules and those who have not. Given the passage of time and the time limits set out in the rules I do not consider that it is necessary for the claimant to retain the sum of £179,182.11.

138. The claimant, understandably, seeks the protection of a Benjamin order before distributing the funds to the members. This will not prevent a customer who subsequently comes forward and establishes a good claim from pursuing a proprietary remedy against those to whom the claimant has made payment. What it does do though is protect the claimant, as trustee of the fund, from personal liability for wrongful distribution. As Lewin on Trusts (20th ed) paragraph 39-01 says,

> "A Benjamin order does not vary or destroy beneficial interests but merely enables trust property to be distributed according to the practical probabilities. Its effect is therefore that the trustees are protected, in that they cannot afterwards be accused of a breach of trust as they have acted under the authority of an order of the court, but it preserves the right of any person actually entitled to follow the trust property if he later appears."

139. In its original form a Benjamin order was concerned with unknown claimants but that has been extended to resolve practical problems with distributing funds for known and unknown claimants. In *Re MF Global UK Ltd (No. 3)* [2013] 1 WLR 3874 a bank had gone into special administration holding client monies. The regulatory framework

[16] Mr Agnew's first witness statement, paragraph 45

imposed a trust of these monies and stated in principle how the fund was to be divided. David Richards J, as he then was, approved directions for the bank to implement a bespoke procedure for inviting and determining claims, and a Benjamin order to authorise distribution without regard to any claims other than those submitted and accepted. At paragraph 26 he said, the court has jurisdiction to,

> "give directions to trustees to distribute trust property on particular bases when the court is satisfied it is just and expedient to do so"

At paragraph 32,

> "bearing in mind the need to "balance both the interests of established [beneficiaries] to a timely return of their money and the interests of persons with serious but unresolved claims".

140. I am satisfied that the claimant has taken reasonable steps to identify and notify those customers who may have a potential claim to come forward. The time limits to do so were quite clear and in respect of the fund with a value of £179,182.11 no customers have come forward. There are 71 customers who may have a claim but have not triggered rule 6 under the rules, which itself gives the fund absolute discretion as to whether assistance will be provided. It is appropriate to make a Benjamin order permitting the claimant to distribute this sum.

141. The position in respect of those customers who have triggered rule 6 is slightly different for the claimant. In Lewin on Trusts, paragraph 24-031,

> "trustees will not be able to distribute safely on their own authority once they have notice of a claim, or of circumstances which could give rise to a claim, unless they are able to take the view that the claim is almost indisputably a bad one."

In *MF Global* the judge set out at paragraphs 17 to 19 a proposed procedure for identifying and processing claims.

142. I consider that the known customers who have triggered rule 6, those who make up the sum with a value of £40,753.89, should be given a further opportunity to advance their claims or to utilise their vouchers. There needs to be a time limit to this process: both as to notification and conclusion. I would have thought that a period of 3 months would be reasonable. If, at the end of that period, any of the sum remains, that should be distributed under the protection of a Benjamin order. This can be formulated in the first instance by the claimant and included in a proposed draft order giving effect to this judgment.

TABLE OF OUTCOMES: PT 2023 000474 GGF

FIRST GROUP OF ISSUES: INSOLVENCY

5. Issues relating to insolvency.

(1) Claim Form Issue 1: What is the relevant date on which a person must be a Member of the Fund in order to participate in any distribution following the winding up of the Fund?

A: 31 March 2021: the date of termination of the fund

(2) Additional Issue 1A: Is it necessary to be a "Member" within the Fund Rules to participate in any distribution?

A: Yes, it is necessary to be a "Member" within the fund rules, not "subscriber"

(3) Additional Issue 1B: As another way of putting Claim Form Issue 1, on what date did (or will) termination and, if different, dissolution of the Fund occur within the meaning of the Fund Rules?

A: 31 March 2021

(4) Claim Form Issue 2: Does a person who suffers an insolvency event have their membership of the Fund terminated automatically? If not:

a. what further steps would be sufficient to terminate a person's membership of the Fund; and

b. if the Federation, or the Claimant, is entitled to terminate such membership, should it do so (or decline to do so) prior to any distribution of the monies from the Fund?

A: Automatic whilst the fund was in existence. The fund terminated on 31 March 2021.

(5) Additional Issue 2A: Would the termination of an insolvent (or any) party's membership now (or in the future) affect (i.e. remove) their entitlement to a distribution from any surplus in respect of the Fund?

A: It is the status of the member at the termination of the fund that is relevant. Only those members who were still members as at 31 March 2021 are entitled to participate in the distribution.

(6) Claim Form Issue 3: In accordance with the answers to questions 1 and 2, are any of the following entitled to participate in any distribution:

a. E Realisations 2020 Limited (in administration) (formerly Everest Limited)

b. Cheam Windows Limited (in liquidation)

c. Designs 49 Ltd (in liquidation)

A: None of the above are entitled to participate in any distribution: they were not members of the fund on 31 March 2021.

(7) Additional Issue 3A: In accordance with the answers to questions 1 and 2, are any of the following entitled to participate in any distribution:

a. The Crown (as successor in title to Cheadle)

b. Anglian (as assignee of HPAS Limited)

c. Disign House Maidstone Limited.

A: b and c are entitled to participate.

a. The material date is 7 September 2020, when it entered administration. It was not a member of the fund on 31 March 2021 and is not entitled to participate in any distribution.

(8) Additional Issue 3B: If and to the extent that the Fund Rules exclude (or purport to exclude) insolvent entities from participating in any distribution:

(a) are such Rules *ultra vires* the Fund's Memorandum and Articles and/or

outside the authority of the Fund's directors to adopt (Massey1 §19(1))?

A: The fund rules are not ultra vires.

(b) are such Rules void as being contrary to public policy under the anti-

deprivation rule (Massey1 §19(4))?

A: The arrangement is not contrary to public policy.

(9) Additional Issue 3C: Does an insolvent entity that was a "person subscribing to the Fund" within the meaning of clause 3(3) of the Claimant's Memorandum of Association remain as such notwithstanding its insolvency; (b) is any surplus in respect of the Fund held on trust for the persons subscribing to the Fund, including any insolvent party; and/or (c) is an insolvent party that is "a person subscribing to the Fund" in any event entitled to participate in any distribution pursuant to clause 3(3) of the Claimant's Memorandum of Association

A: This goes back to the status of the member at termination on 31 March 2021.

SECOND GROUP OF ISSUES: MISSED PAYMENTS

7. Issues relating to Missed Payment issues:

(1) Claim Form Issue 4: Are Members who have missed quarterly payments:

a. entitled to participate in any future distribution;

b. entitled to participate in any future distribution, but only upon terms (and

what should such terms be); or

c. not entitled to participate in any future distribution.

A: a and b. The Members are entitled to participate in the future distribution but prior to the final distribution their subscriptions must be fully paid up to 31 March 2021. It is incumbent on the claimant to state what quarters have been missed.

(2) Additional Issue 4A: Are Members who have missed quarterly payment entitled to participate in any future distribution under the Fund Rules as a matter of construction and/or pursuant to clause 3(3) of the Claimant's Memorandum of Association on the basis that they are "person[s] subscribing to the Fund"?

A: They are entitled to participate being "person(s) subscribing to the Fund" per clause 3(3) of the Memorandum.

(3) Claim Form Issue 5: How far back should the Fund look when considering whether quarterly payments have been missed:

a. To June 2012, when the last interim distribution was made to Members; or

b. To April 2014 (the earliest date from which the Claimant has reliable records of missed payments);

c. To some other date (and, if prior to 2007, on what basis); or

A: b. That is the earliest date from which the claimant has reliable records.

(4) Additional Issue 5A: Given that the Fund does not have records which go back to the inception of the Fund permitting it to identify where members have missed quarterly payments, does the lack of data (in particular as to individual quarterly payments prior to 2014) mean that some other solution is appropriate to ensure fairness between classes of member

A: No, there is inevitably some unfairness between the treatment of non-paying parties and missed payment parties. However it would be unprincipled to distinguish between non-paying parties and missed payment parties.

(5) Additional Issue 5B: Should a distinction be made between "Missed Payment

Parties" and "Non-Paying Parties"?

A: No. The key is whether they are Members at the date of termination of the fund, so it does not matter whether they are classed as "Missed Payment Parties" or "Non-Paying Parties".

(6) Additional Issue 5C: How should factual uncertainties about whether payments have been missed be taken into account?

A: Where the claimant has no evidence to demonstrate that payments have been missed for any particular quarter (post April 2014), the Member is assumed to have paid.

(7) Additional Issue 5D: Do questions of proportionality have a part to play (as between the quantum of any missed payments and the share of any distribution foregone)?

A: They are relevant to the question of construction: when testing the consequences of a particular construction the court will look at the commercial outcome.

THIRD GROUP OF ISSUES: CUSTOMER CLAIMS

9. Issues relating to Customer Claims:

(1) Claim Form Issue 6: What sum, if any, should be retained by the Claimant, and for how long:

a. To meet any customer claims;

A: £40,753.89. The claimant should contact the 16 known persons who have claims totalling £40,753.89 giving them a final opportunity to: make a claim; submit documents to support a claim; or use their vouchers or a 80% cash equivalent thereof. The time period of 3 months to do so is reasonable.

The claimant is entitled to distribute the balance of the fund but should do so under the protection of a Benjamin order.

If any amount remains from the sum of £40,753.89 the claimant is entitled to distribute that, the Benjamin order should make provision for this later distribution. Subject to how long the claimant requires to process and pay any of the claims distribution should take place as soon as practicable after that period.