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Case No: CR-2019-004876

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF ALLIED WALLET LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

AND IN THE MATTER OF THE FINANCIAL SERVICES AND MARKETS ACT 2000

AND IN THE MATTER OF THE ELECTRONIC MONEY REGULATIONS 2011

AND IN THE MATTER OF THE PAYMENT SERVICES REGULATIONS 2017

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

Date: 19/07/2022

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

Richard Fisher QC and Andrew Shaw (instructed by **Enyo Law LLP** for the Applicants

Hearing dates: 16 May 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

Insolvency and Companies Court Judge Burton :

1. The Joint Liquidators of Allied Walled Limited ("AWL") have applied to court for directions in relation to matters arising in the liquidation.

2. AWL was regulated by the Financial Conduct Authority ("FCA) in respect of those parts of its business that involved processing electronic payments for online businesses and for issuing electronic money in the form of pre-paid cards. In carrying out its electronic payment processing business, AWL was subject to the Payment Services Regulations 2017 ("PSR") and, for its prepaid card business, to the Electronic Money Regulations 2011 ("EMR"). Both Regulations required AWL to safeguard monies received from online merchants in its processing business or electronic money holders in its prepaid card business.

3. On 22 July 2019 the FCA presented a petition to wind up AWL and for the appointment of the Applicants as provisional liquidators. It was concerned that contrary to AWL's safeguarding obligations, it appeared to have been mixing funds received from merchants and card issuers with its own funds. The application for the appointment of provisional liquidators was granted on 23 August 2019, such appointment taking effect from noon on 27 August 2019. On 20 March 2020, a winding-up order was made and the Applicants were appointed as Joint Liquidators of the company.

4. The FCA's concern regarding AWL's failure to safeguard monies was well-founded. The Joint Liquidators have received claims far exceeding the assets available to meet them. It is clear that significant sums of money are missing and unaccounted for. They applied to the court for directions, whether, upon receiving "Relevant Funds" (as defined by regulation 20 of the EMR and regulation 23 of the PSR), the Regulations created a statutory trust of the funds, and (a) if so, whether there was an obligation to reconstitute the monies that should have been held upon trust; or (b) if not, how the asset pool arising under the safeguarding provisions of the Regulations should be applied in the event (which seemed inevitable) that there would be a shortfall against the claims of creditors.

5. Similar issues arose in the liquidation of ipagoo LLP, an electronic money institution authorised by the FCA and subject to the same safeguarding obligations under the EMR.

6. Regulation 24 of the EMR provides:

> "24 Insolvency events …
>
> "(1) Subject to paragraph (2), where there is an insolvency event
>
> … — (a) the claims of electronic money holders are to be paid from the asset pool in priority to all other creditors; and (b) until all the claims of electronic money holders have been paid, no right of set-off or security right may be exercised in respect of the asset pool except to the extent that the right of set-off relates to fees and expenses in relation to operating an account

> held in accordance with regulation 21(2)(a) or (b) or … 22(1)(b).
>
> "(2) The claims referred to in paragraph (1)(a) shall not be subject to the priority of expenses of an insolvency proceeding except in respect of the costs of distributing the asset pool.
>
> "(3) An electronic money institution must maintain organisational arrangements sufficient to minimise the risk of the loss or diminution of relevant funds or relevant assets through fraud, misuse, negligence or poor administration.
>
> "(4) In this regulation—
>
> '*asset pool*' means— (a) any relevant funds segregated in accordance with regulation 21(1); (b) any relevant funds held in an account accordance with regulation 21(2)(a); … (c) any relevant assets held in an account in accordance with regulation 21(2)(b); (d) any proceeds of an insurance policy or guarantee held in an account in accordance with regulation 22(1)(b) …
>
> '*insolvency event'* has the same meaning as in regulation 22; …
>
> '*security right'* means— (a) security for a debt owed by an electronic money institution and includes any charge, lien, mortgage or other security over the asset pool or any part of the asset pool …"

7. On 9 March 2022 in *Baker and Rowley v The Financial Conduct Authority, Re ipagoo LLP* [2022] EWCA Civ 302 the Court of Appeal upheld the decision of David Halpern QC sitting as a Deputy High Court Judge that the EMR do not create a trust of the Relevant Funds. The Court of Appeal held that pursuant to regulation 24 of the EMR, electronic money holders have an interest that "might best be analysed as a secured interest" over the asset pool which takes priority over the waterfall of payments prescribed by section 175 of the Insolvency Act 1986 ("IA1986"). The claims of electronic money holders rank ahead of the claims of ipagoo LLP's unsecured creditors and ahead of the costs of the liquidation, other than the costs associated with distributing the asset pool (which are expressly provided for at regulation 24(2) of the EMR). In order to achieve the safeguarding requirements of the relevant European Directive, the asset pool must be treated as not being limited to the assets which were properly safeguarded but should extend to include a sum from the company's general estate on liquidation equal to the Relevant Funds which ought to have been, but were not safeguarded.

8. Whilst the Court of Appeal's judgment concerned only the EMR, I concur with the Joint Liquidators' submission that due to the similarity in the provisions of the EMR and the PSR, it will apply equally to Relevant Funds under both Regulations.

9. Several of the issues in respect of which the Joint Liquidators sought directions in the liquidation of AWL were resolved by the Court of Appeal's decision in *ipagoo*. The following remain outstanding:

i) As it is now clear that there is no scope for the Joint Liquidators to trace into the hands of third parties, assets that should have been safeguarded but were not, and that the deficiency in the asset pools must be made good from the general assets of the company, what costs should properly be considered to fall within the scope of regulation 24(2) of the EMR (and regulation 23(15) of the PSR) as the "*costs of distributing the asset pool*"?

ii) What date should be used to quantify foreign currency claims against the asset pools?

iii) As AWL was obliged to safeguard funds under two regulations, each requiring a separate asset pool, and as there will almost certainly not be sufficient non-safeguarded assets to be able to reconstitute those asset pools in full, how should such funds as are available, be applied between them?

The costs of distributing the asset pools

10. Mr Crooks' eleventh witness statement summarises the orders made for payment on account of remuneration and expenses pending determination of the status of the Relevant Funds. Those on account payments were made from one of AWL's bank accounts that was considered, in the event that the court were to find that the asset pools were subject to a trust, the least likely to contain traceable proceeds of the Relevant Funds (originating in the main from the company's unregulated software business).

11. At paragraph [92] of her judgment in the Court of Appeal, Asplin LJ said:

> "92. I should add that given the proper interpretation of "*asset pool*" includes relevant funds which have not been properly safeguarded, in order to achieve conformity with the purposes of the EMD, in my judgment, it is also necessary, as a consequence, to interpret "*costs of distributing the asset pool*" in regulation 24(2) so as to include the costs of making good the asset pool in circumstances where relevant funds, or some of them, have not been safeguarded. These are administrative costs associated with the asset pool itself. Such an interpretation falls within the breadth of the approach to interpretation approved by Lord Dyson JSC in Lehman [2012] Bus LR 667, para 131."

12. The broad approach to interpretation to which Asplin LJ referred, is the requirement that domestic legislation made for the purposes of fulfilling the requirements of EU law must, according to Lord Dyson JSC at paragraph [131] in *Re Lehman Brothers International (Europe)* [2012] Bus LR 667:

> " … be interpreted in accordance with the following principles: (i) it is not constrained by conventional rules of construction; (ii) it does not require ambiguity in the legislative language; (iii) it is not an exercise in semantics or linguistics; (iv) it permits departure from the strict and literal application of the words which the legislature has elected to use; (v) it permits the

> implication of words necessary to comply with Community law; and (vi) the precise form of the words to be implied does not matter."

13. Asplin LJ continued at paragraph [94] of her judgment in the Court of Appeal:

> "94. As Mr Watson stated in the additional written submissions which we requested from the parties after the hearing, regulation 24 creates a bespoke statutory regime in relation to the asset pool. The electronic money holders are granted rights over that pool in priority to other creditors by virtue of the express wording of regulation 24(1)(a). Those rights might best be analysed as a secured interest over the asset pool once it is interpreted in the light of the EMD. Further, in my judgment, that secured interest, like any other, applies before the waterfall under section 175 of the 1986 Act and stands outside it. There was no need to amend the 1986 Act, therefore, or for the EMRs to make express reference to it. The statutory regime under the 1986 Act applies after distribution has taken place under regulation 24.
>
> 95. It seems to me that regulation 24(2) is consistent with that analysis. It makes clear that the asset pool is intended to stand apart from the normal insolvency regime and should only bear the costs associated with distributing it (and as I have explained, if necessary, the costs of reconstituting it). The electronic money holders' claims are not to be subject to the priority of expenses of an insolvency proceeding."

14. How, then should the "*costs of distributing the asset pool*" including the costs of reconstituting it be interpreted in the liquidation of AWL? Mr Crooks' eleventh witness statement provides three possible scenarios, helpfully summarised in Mr Fisher QC's skeleton argument:

> "(1) As, with the benefit of hindsight, the only purpose of the provisional liquidation and liquidation of AWL can now be seen to have been to be investigate, ascertain, collect in and distribute its assets to asset pool creditors, all of the fees and expenses incurred by the Joint Liquidators are costs which are attributable to the administration and distribution of the asset pools and so (subject to approval by the creditors) are "*costs of distributing the asset pool*" for the purposes of the EMR and the PSR. This scenario would therefore include costs which are not directly related to the asset pool, such as assessing claims of non-asset pool creditors. However, it is inevitable that such costs will be incurred in the insolvency of an electronic money institution or a payment institution because the fact that there might be a shortfall on the asset pool is not something that is likely to be capable of being ascertained by the office-holders until they have carried out significant work, as has been the case with AWL; alternatively

> (2) The "*costs of distributing the asset pool*" includes the costs of administering and distributing the asset pools and the fees and expenses of the Joint Liquidators in undertaking work which, while not directly related to the asset pools, is necessary for the proper administration of the liquidation. That is to say, certain liquidation costs are necessary in order for there to be an asset pool scenario and for the liquidation to function. These costs are a pre-requisite for a scenario in which the asset pool can be made good and should therefore fall within the notion of "*the costs of distributing the asset pool*"; alternatively
>
> (3) The "*costs of distributing the asset pool*" are strictly limited to those costs which are directly attributable to the administration and distribution of the asset pool (including its reconstitution)."

15. Mr Crooks exhibits a schedule with details of the time charges incurred by the Joint Liquidators (both in their current role and as provisional liquidators of AWL) on the basis of resolutions of the creditors and at rates agreed with the FCA to 19 January 2022. The schedule shows the total amount that would fall to be paid as the "*costs of distributing the asset pool*" in each scenario. Rounding the figures to the nearest thousand pounds, the summary table below illustrates how widely the figures differ:

	Scenario (1)	Scenario (2)	Scenario (3)
Recoverable costs	£1,595,000	£1,560,000	£940,000
Irrecoverable costs	-	£35,000	£655,000

16. Starting with Scenario 1 at paragraph 14 above, whilst it is correct to say that all of AWL's general assets must now be applied towards reconstituting the asset pools, I do not accept that this results in the entire purpose of its provisional liquidation and liquidation being to investigate, ascertain, collect in and distribute the company's assets to the asset pool creditors ("Pool Creditors"). Regardless of the existence of assets or the identity of the parties among whom they will be distributed, statute obliges liquidators to undertake a number of prescribed tasks. A distinction must be drawn between the purpose of a liquidation and its outcome.

17. In "*Goode on Principles of Corporate Insolvency Law*" fifth edition, at paragraph 1-40, Professor Goode describes the nature of winding up:

> "Winding up or liquidation, is a collective insolvency process leading to the end of the company's existence (dissolution). The principal role of the liquidator is to collect in and realise the assets, ascertain claims, investigate the causes of failure and, after covering the expenses of the liquidation, distribute

> the net proceeds by way of dividend to creditors in the order of priority laid down by the Insolvency Act and Insolvency Rules."

18. The court appointed the Applicants as provisional liquidators with the specific powers and duties set out in the court's order, broadly to take control of AWL's affairs and investigate matters of concern. The Applicants were then appointed as Joint Liquidators whereupon they were obliged to comply with the statutory duties imposed upon licensed insolvency practitioners undertaking that role. The outcome (by which I mean the identity of the class of creditors who will now benefit from the work undertaken by the provisional liquidators and Joint Liquidators) was determined when, during the course of the liquidation, the Court of Appeal clarified how the EMR should be interpreted. In my judgment, the history and intended purpose of the provisional liquidation and liquidation cannot be retrospectively redefined to say that, as a result of the effect of the Court of Appeal's judgment, the end necessitated all aspects of the means by which it was reached.

19. I consider it would be equally wrong, on the facts of AWL's provisional liquidation and liquidation, for this court to interpret "*the costs of* [reconstituting and] *distributing the asset pool*[s]" so narrowly as to be limited to the work undertaken, once the Joint Liquidators had been appointed, conducted their investigations and identified such assets as exist, to the costs of transferring the proceeds of those assets to the asset pools and distributing them.

20. An independent party with appropriate powers, experience and duties of accountability was needed to step into AWL's affairs to undertake sufficient investigatory work to reach that stage.

21. At paragraph [90] of her judgment, Asplin LJ stated:

> "It follows, therefore, that in order to fulfil the requirements of the EMD and in order to interpret the EMRs in conformity with the Directives, "asset pools" in regulation 24 must be given a wider meaning than merely such funds as have been so safeguarded. As the judge stated at [54] of his judgment, "asset pool" must also include a sum equal to such relevant funds which ought to have been but have not been safeguarded in accordance with regulations 21 and 22."

22. The effect of the Court of Appeal's decision was not therefore for the company's assets to be appropriated to the asset pool but rather, for a sum equal to the amount that should have been safeguarded, to be included in the asset pools. The company's assets would first need to be liquidated in order for such a sum to be realised. Where it is now clear that in all likelihood, the realised value of all of AWL's assets will need to be diverted towards making good the shortfall in the asset pools, using the words of Asplin LJ, in my judgment, almost all of the work undertaken to effect such realisations comprised or was "*associated with*" reconstituting the asset pools.

23. Approaching the matter from another angle, and bearing in mind that it is now clear that the general creditors of AWL are unlikely to benefit from any of the realisations made in the liquidation, on the basis that the asset pools stand apart from the

company's assets, a Pool Creditor could theoretically have applied, pursuant to Part 69 of the Civil Procedure Rules, for the court to appoint a receiver of the asset pools and arguably, in the absence of any other party administering them, of the assets needed to be realised to generate the funds to reconstitute them. Where asset pools have not been maintained as contemplated by the regulations, such a receiver would need to be given extensive powers even to start to be able to take the necessary steps to identify and reconstitute them. Such a receiver would need to be accountable for his actions, would be likely to require express powers to adjudicate the claims of Pool Creditors, and likely to be required to provide some form of bond or security. He would be empowered to liaise with the FCA (and any other, relevant, regulatory bodies) and, for transparency and accountability, to report to the company's other creditors. The court would almost certainly entitle him to recover the costs of his appointment and the work I have just described, from the asset pools.

24. In my judgment, the same approach should apply to the costs of appointing the provisional liquidators, their time preparing for and attending court, their work investigating AWL's affairs, identifying the claims of creditors (the significant majority of which are noted to be the claims of merchants for whom AWL provided payment processing services), liaising with the FCA and reporting to court. It should similarly apply to the costs of appointing the Joint Liquidators and the majority of the work they have undertaken. That work, whether performed by a liquidator, court-appointed receiver or even special manager (if one were to be appointed pursuant to section 177 of the IA1986) would necessarily have involved investigating the company's assets, seeking the directions of the court, liaising with the FCA and reporting to creditors.

25. However, I do not consider it is open to me, in the light of the Court of Appeal's judgment in *ipagoo* to interpret "*the costs of* [reconstituting and] *distributing the asset pool*[s]" in regulation 24(2) of the EMR and regulation 23(15) of the PSR, even applying the phrase "*associated with*", to include all of the costs incurred by the Applicants in performing their role as provisional liquidators and liquidators. The Court of Appeal was clear that the asset pool stands apart from the normal insolvency regime, immune from the general costs of the liquidation and that it "should *only* bear the costs *associated with* distributing it" (my emphasis):

> "The electronic money holders' claims are not to be subject to the priority of expenses of an insolvency proceeding."

26. In my judgment it would be inconsistent with the Court of Appeal's decision for this court to determine that the costs and expenses incurred in work that a liquidator must necessarily undertake but which does not relate, even on the unusual facts of AWL's liquidation, to reconstituting or distributing the asset pools (or reaching a point where they can be reconstituted or distributed) to be viewed as the costs associated with doing so. An example of such work is compliance by the Joint Liquidators with their statutory obligation to provide the Secretary of State with a report on the directors' conduct. The fact that, with the benefit of hindsight, it is now clear that the asset pools must be reconstituted and the chosen route to do so is via the provisional liquidation and subsequent appointment of the Joint Liquidators, does not render all of the work that they are obliged to perform, necessarily associated with reconstituting and distributing the pools.

27. Consequently, in my judgment, Scenario 2 above applies, save that my interpretation of the categories of work that falls on the payment side of the line, may be slightly narrower than contemplated by Mr Crooks. He includes in Scenario 2, the cost of the Joint Liquidators' compliance with all statutory and regulatory requirements in relation to the liquidation. I consider that only those costs that relate to effecting the appointments, reporting to the court, and all other tasks that were performed in order to identify and then take such steps as the Joint Liquidators now know must be taken to make good the deficiencies in the asset pools, as well as reporting to creditors on the fruits of their labours and liaising with the FCA, should fall within the provisions of regulation 24(2) of the EMR and 23(15) of the PSR as "*the costs of distributing the asset pool*".

28. I have looked closely at those items excluded by the Liquidators in arriving at the figure shown as irrecoverable under Scenario 2 in the table at paragaph 15 above. They have, in my judgment, rightly excluded the costs associated with their investigations into AWL's non-regulated business (including ownership by AWL of intellectual property rights in the payment platform) and dealing with trade, expense and preferential creditors. I also note that the Liquidators have claimed less than 50% of the total time spent by them since appointment as provisional liquidators on "Dealing with employees". It seems likely that their work identifying the asset pools will have necessitated working with AWL's employees to understand the movement, allocation and limited safeguarding of money within AWL, but it is not clear to me why "Pension issues" and "Payroll matters" have also been considered part of their work associated with the asset pools. The amounts in question are not large against the total fees incurred, but I shall ask counsel to address me on these points when handing down this judgment.

29. £184 has been allocated to "conduct reports" and £14,616 to statutory reporting. Again, I shall invite submissions on these items when handing down this judgment but it currently seems likely that some of the reports falling within these headline terms, should more accurately be considered as part of the work that a liquidator is obliged by statute to perform but which, adopting the approach I have set out above, properly falls to be considered as the general costs and expenses of the liquidation, rather than associated with reconstituting and distributing the separate, asset pools.

30. Turning to the issue of the out-of pocket expenses incurred by the Applicants, it is clear from Mr Crooks' witness statement that the larger portion comprises legal fees. In each of their remuneration applications to court to date, the court's order entitled the Applicants to pay their expenses in full. I see no reason for those orders to be revisited. Mr Crooks' witness statement summarises separately the costs incurred since the date of the last order by reference to the same scenarios outlined at paragraph 14 above. Reviewing each item set out in the schedule he has provided, I consider that the Joint Liquidators have correctly excluded, from Scenario 2, those expenses incurred in dealing with AWL's non-regulated business and their strategy and planning work in respect of the claims of non-priority creditors. Beyond that, and subject to any further minor adjustments in relation to the matters that I propose to discuss with counsel when handing down this judgment, I consider that all of the expenses allocated in Mr Crooks' expense schedule to Scenarios 1 and 2 correctly fall to be paid as costs associated with the reconstitution and distribution of the asset pools.

31. I am not blind to the fact that excluding from payment the costs and expenses that are considered to refer only to the claims of general creditors and to steps that the liquidators are obliged to take, but which cannot be said to be associated with the asset pools, is an unattractive conclusion for the court to reach. In every liquidation there are a number of tasks that statute requires the office holder to undertake. The effect of my judgment is that any office holder appointed to an insolvent electronic money institution or payment institution would be obliged to carry out those tasks and to incur fees and expenses in doing so, for which, in the event of an ultimate shortfall in the asset pool(s), they would not be paid and reimbursed. My decision consequently provides diminished incentive for practitioners to accept such appointments. The FCA identified this as a risk before the Court of Appeal, but it was not sufficient to persuade the Court to find the asset pools to be subject to a trust. Mr Fisher raised it afresh, before me, as a material consideration when construing the phrase "*the costs of distributing the asset pool*". His submissions focussed on the consequences if this court were to determine that Scenario 3 applies. However, absent prospective office holders being assured that they will be paid for complying with their statutory duties in some other way, I consider it holds considerable force also in the version of Scenario 2, which I have found to apply.

32. The risk of insolvency practitioners not being paid for the work they undertake is not novel. In 2004, in *Buchler and another v Talbot* [2004] 2 WLR 582 (generally known as *In Re Leyland Daf*) the House of Lords decided that the general costs of winding up a company were not payable out of the proceeds of assets secured by a crystallised floating charge. Their Lordships found that there were two distinct funds, actually or potentially administered by different office holders and subject to different statutory regimes, with different definitions of preferential debts. Lord Hoffmann noted that whilst there were two separate funds, where a liquidator realises assets forming part of the debenture-holder's fund, it was right that the debenture-holder should pay the costs of realisation (*In re Regent's Canal Ironworks Company* (1875) 3 Ch App 411). But he emphasised that it was not Parliament's intention, when giving the claims of preferential creditors priority over the claims of debenture holders, that the debenture holders should thereby also become liable to meet the general costs of the winding up.

33. In the same case, Lord Millett considered the potential consequences of their Lordships' decision where, due to a shortfall in the sums due to the debenture holder, there are no remaining "free" assets:

> "Like the debts due to the ordinary unsecured creditors these would remain unpaid. But so they would before 1897: James LJ had already drawn attention to the fact that those who render services to an insolvent company or person frequently find that they have to go without payment, a result which did not strike him as unjust: see the Regents Canal case 3 Ch D 411, 426. If this was a hardship, it was not one which the 1897 Amendment Act was intended to remedy. Its purpose was to provide a secondary fund for the payment of the preferential debts, not to relieve liquidators by making new provision for the payment of the costs of a winding up at the expense of the holder of a floating charge."

34. The repercussions of legislation giving rise to unattractive outcomes was more recently recognised by the Supreme Court in *The Joint Administrators of Lehman Brothers Limited* v *Lehman Brothers International (Europe) (In Administration) and others* [2017] UKSC 38 where Lord Neuberger expressed his lack of enthusiasm for concluding that statutory interest, which would otherwise have accrued during the period of administration, would not be payable to creditors in a subsequent, solvent liquidation. The Court found that David Richards J's conclusion at first instance:

> "produced a coherent, if unattractive and quite possibly unintended, outcome, which paid proper, if reluctant, regard to the applicable provisions of the 1986 Act and the 1986 Rules".

35. The consequences of the House of Lords' decision in *Re Leyland Daf* was reversed less than two years later by section 1282 of the Companies Act 2006 which inserted a new section 176ZA into the IA1986 so that property subject to a floating charge may now, where necessary, be used to fund the general expenses of winding up in priority to the floating charge holder (and any preferential creditors entitled to be paid out of that property). This reinforces my view that it is for the legislature, not the judiciary, to "fill the gaps" that have been found to arise in the EMR and PSR.

Quantification of foreign currency claims

36. Neither the EMR nor the PSR provide any guidance on the approach that should be taken to converting (i) the funds held by the Joint Liquidators in various foreign currencies, and (ii) the various foreign currency claims of AWL's Pool Creditors.

37. The Court of Appeal held that the Relevant Funds are not subject to a trust but that the asset pools stand apart from those of the company, so that electronic money holders are granted rights over that pool in priority to other creditors by virtue of regulation 24(1)(a) of the EMR, which rights "might best be analysed as a secured interest over the asset pool"

38. The definition of security in section 248(b)(i) is wide: "any mortgage, charge, lien or other security". Secured creditors:

    i) have both a right of action against the property taken as security and a financial claim against the company;

    ii) need not prove in a winding up to recover what is due to them. If they choose to lodge a proof before the security is realised, they should estimate its value and prove for the balance. They may, with the permission of the court or agreement of the liquidator, subsequently alter the value ascribed to the security;

    iii) if they omit to disclose the security in their proof of debt and prove instead for the whole of the debt, are deemed to have surrendered their security for the general benefit of the company's creditors (unless, on application to court they are relieved of such a consequence, such relief being available where the court is satisfied that the omission was the result of an honest mistake or inadvertence).

39. In my judgment, Asplin LJ's statement that the Pool Creditors' interests "*might best be analysed as* a secured interest over the pool" (my emphasis) does not amount to a determination that in every case they should be treated as having a secured interest; rather that the nature of their interest could be viewed, in some ways, as analogous to a secured interest. I find support for this conclusion in the following:

    i) Regulation 24 of the EMR provides that where there is an insolvency event, the claims of electronic money holders are to be paid from the asset pool in priority to all other creditors and that until the claims of electronic money holders have been paid, no security right may be exercised in relation the asset pool. It notably does not refer to any *other* security right being exercised in relation to the pool;

    ii) The Pool Creditors have no right, individually to take control over the asset pools. It would be neither practical, nor in the best interests of the Pool Creditors for the provisions summarised at 38(ii) and (iii) above to apply to their claims. This is not surprising as neither the IA1986 nor the Insolvency (England and Wales) Rules 2016 ("IR2016") contemplate circumstances arising where, absent the intervention of a security trustee, security is held for a large number of claimants each owed different amounts and in some cases, in different currencies. They provide no mechanism for secured creditors to be obliged to lodge proofs, nor for the liquidator to adjudicate upon claims, inter se, of those creditors who benefit from security held collectively on their behalf.

40. Taking into account

    i) the terms used in the EMR and PSR which expressly refer to pool claimants having a priority interest; and

    ii) the approach which the Court of Appeal determined must be taken to make good AWL's failure to comply with their safeguarding obligations,

    in my judgment, whilst the Pool Creditors' interest in the asset pools bears some similarities with those of a secured creditor, it is more closely comparable with the priority rights afforded to creditors entitled to share in the prescribed part – a ringfenced fund that section 176A of the IA1986 mandates be set aside and made available to satisfy unsecured debts on realising assets covered by a floating charge (such fund to be calculated as a percentage of the value of the company's property which is subject to a floating charge). In a compulsory winding up, pursuant to Rule 7.108(3) of the IR2016, the expenses associated with the prescribed part must be paid out of the prescribed part. Like the asset pools, the fund comprising the prescribed part stands apart from both the company's general assets and those which are subject to valid security, and it bears none of the costs of the company's general liquidation.

41. Viewed in this way, whilst from some angles, as stated by Asplin LJ, Pool Creditors' rights might best be viewed as analogous to those of secured creditors, in my judgment the better analogy is for them to be regarded as unsecured creditors, whose claims are to be met from a specified fund, set aside from the company's general assets (to which recourse will be made to meet any deficiencies in the pool) which claims take priority over those of all other creditors. Pool Creditors are thus obliged

to prove for the amounts due to them in order to pursue their priority claim and the provisions in the IR2016 for liquidators to adjudicate upon claims and to fix their value apply.

42. It follows from this that where a Pool Creditor's claim arises in a foreign currency, Rule 14.21 of the IR2016 applies and the Joint Liquidators must convert all such debts into sterling at a single rate for each currency determined by the Joint Liquidators by reference to the exchange rate prevailing on 20 March 2022 when AWL entered liquidation.

43. In case I am wrong in failing to give sufficient weight to the Court of Appeal's reference to electronic money holders having a secured interest in the asset pools, I shall consider whether, if treated as holding such an interest, I would have arrived upon a different date for the conversion of Pool Creditors' foreign currency claims.

44. I start by reflecting on the reason why, in a liquidation, creditors' foreign currency claims are converted as at the date of commencement of the winding up. According to *In re Dynamics Corporation of America* [1976] 1 WLR 757 it is because that is the point at which assets are notionally, simultaneously realised and distributed among creditors.

45. The realisation of security involves no notional distribution at the point in time when a company enters an insolvency regime. Rule 14.15 of the IR2016 entitles a secured creditor, with the agreement of the office holder or the permission of the court, at any time to alter the value which it puts on its security in a proof. Similarly, if a creditor seeks to enforce a judgment or charging order, a foreign currency claim would be converted as close as possible to the date of payment.

46. However, where, as is the case with AWL, so many creditors are entitled to share in the security, not only would the court need to direct some procedure to require them to lodge some form of written claim but also *some* date would need to be arrived upon to convert foreign currency claims in sufficient time to enable those distributing the security among claimants efficiently and fairly to perform their obligations.

47. In *Re Nortel Networks UK Limited* [2017] EWHC 1429 the company's administrators sought the court's directions to inform potential claimants that any claim, not yet made, to be paid as an expense of the administration must be notified to the administrators using a prescribed form on or before a specified date. Paragraph 99 of Schedule B1 to the IA1986 provides for an administrator's remuneration and expenses to be charged on and payable out of the company's property of which the administrator had custody or control immediately before he ceased to be administrator, and for such amounts to be payable in priority to any floating charge, and by necessary implication, in priority to any unsecured debts. Snowden J (as he was) noted that the company's administrators could not simply resort to the provisions of Part 14 of the IR2016, which enable administrators to call for proofs of debt and make distributions to persons who have proved for their debts. Those provisions relate only to unsecured debts and not to the claims of expense creditors which are protected by the statutory charge. Expense claims cannot be quantified at the date when the company entered administration because an administration expense is, by definition, a liability incurred during the course of the administration. For the same

reasons, the mechanism for imposing a cut-off date for unsecured creditors' claims, did not apply.

48. Snowden J referred to the decision of David Richards J (as he was) in *In Re WW Realisations 1 Ltd* [2011] BCC 382, where administrators sought directions authorising them to make a payment to a second tier of secured creditors without making provision for certain expense claims that might be advanced by landlords and local authorities unless such claims were made by a cut-off date to be notified to them in writing. David Richards J explained why he was satisfied that the court had jurisdiction to make such an order on an application by a liquidator or administrator for directions, and stated that he saw no reason why it should not be exercised in relation to expense claims, as well as provable debts.

49. At paragraph [25] of his judgment, David Richards J stated:

> "Of course, the interests of expense claimants must be properly protected, but equally there must be a limit to the time in which the proper working out of administration and liquidation is delayed while those claimants decide whether to lodge claims. In my judgment, in this case they have already had good opportunity to lodge their claims, and provided that they are notified of the effect of my order and provided that the final cut-off date for claims is not less than 28 days after a further letter is sent, it seems to me that the proper balance will be struck between the interests of the proper working out of the administration and liquidation on the one hand and the protection of these creditors on the other."

50. In *Nortel,* Snowden J considered whether giving and thereby imposing directions on the expense creditors would illegitimately (i) extinguish their rights or vary the statutory waterfall, or (ii) amount to judicial legislation. At paragraph [82] of his judgment, he determined that imposing such directions would not extinguish any legal rights:

> "I recognise, of course, that by authorising a distribution of assets to other claimants, the directions potentially affect the available fund from which any expense claims can be satisfied if and when they are finally asserted. That is because any late expense claimants will not participate in any earlier distributions of assets and will not be able to disturb distributions that have already been made or provided for. But latecomers will still be entitled to assert their expense claims and "catch up" if and to the extent that this is possible through subsequent distributions of any remaining assets. "

51. He continued, at paragraph [87]:

> "In these circumstances, it seems to me that it is possible as a matter of jurisdiction for the court to give directions under paragraph 63 of Schedule B1 for a regime that involves a distribution to unsecured creditors under paragraph 65(3) of

> Schedule B1, even though that carries a risk that, at the end of the administration, insufficient assets might have been retained to enable a late expense claimant to be paid under paragraph 99(3) of Schedule B1. The question of whether it would be appropriate as a matter of discretion to give those directions is a different matter, which I shall address below."

52. At paragraph [92], Snowden J concluded, on the question of discretion, that the directions order he had by then made, properly balanced the need to protect the interests of expense creditors who had not yet asserted a claim, against the need to minimise any further delay in concluding the administrations.

53. The claims of Pool Creditors arose by reason of contracts entered into with AWL before it entered liquidation. To that extent they clearly differ from the claims of administration expense creditors whose claims arise after the date of administration. However, if it is correct to say that the Pool Creditors' claims take the form of a secured interest in the asset pools, they bear other similarities with administration expense creditors whose claims are protected by the statutory charge. Like the claims of administration expense creditors, the Pool Creditors' claims must be protected and a workable solution must be arrived upon to facilitate consideration of their value and a workable date for conversion of those advanced in a foreign currency.

54. Whilst it could be argued that as foreign currency claims to the asset pools have not yet been converted, there is no justification for deploying such a historic date as the date of liquidation, Mr Crooks explains, in his eleventh witness statement the significant practical difficulties that would arise if the court were to direct an approach which more closely aligns with the enforcement of a judgment or a charging order, that Pool Creditors' foreign currency claims be converted as close as possible to payment:

> "For example, valuation of non-sterling claims only at the date of distribution would make it impossible to value such claims with certainty until that date was reached and the exchange rate known. Until that date, therefore, the JLs could not: (i) confidently value such claims for voting purposes; or (ii) calculate the extent of the shortfall on either asset pool, so as to establish the extent of the duty to make good such shortfall. Furthermore, if such claims were valued at the date of distribution, insolvency office holders would be exposed to complaints and litigation from creditors who considered that the office holders' choice of distribution date had prejudiced the creditors' interests."

55. In my judgment, the most appropriate date for the court to select for the conversion of Pool Creditors' foreign currency claims, is the date of the winding-up order. Applying this date would ensure that not only would the Joint Liquidators avoid incurring costs attempting to navigate around the difficulties described by Mr Crooks, but also that creditors with both a claim against the asset pool and an unsecured claim would have each claim converted on the same date. The consistency of that approach is attractive.

56. Adopting the date on which the winding-up order was made also strikes me as consistent with Regulation 24 of the EMR that provides:

> "*where there is an insolvency event* (a) the claims of electronic money holders are to be paid from the asset pool in priority to all other creditors" (emphasis added).

This suggests to me that not only are the asset pools identified at the date of the insolvency event but so too should the claims of the electronic money holders. Viewed in this way, the EMR imposes its own cut-off date for quantifying the value of the claims against it.

57. I am satisfied that the imposition by the court of such a date would not impermissibly interfere with the Pool Creditors' proprietary right to a share of the asset pools. The effects of the decisions of David Richards J in *WW Realisations* and Snowden J in *Nortel* was that some expense creditors, with the benefit of the statutory charge under paragraph 99 of Schedule B1 to the IA1986, if tardy in pursuing their claims, may end up not being paid. But this was an acceptable price to pay in striking a proper balance. In my judgment, selecting the date on which the winding-up order was made would similarly strike the correct balance between enabling the Joint Liquidators to administer and properly deal with the claims of AWL's Pool Creditors and other creditors and the protection of Pool Creditors' rights.

58. In summary, I consider that if the Pool Creditors' claims are analysed simply as priority claims to be met from a designated fund, the currency conversion provisions of the IR2016 will apply and foreign currency claims will be converted as at the date of the winding-up order. But if I am wrong in that analysis, and they should properly be regarded as having a secured interest in the asset pools, in balancing the need to protect their claims with the practical realities of permitting the Joint Liquidators to proceed in a viable, cost-efficient manner, I would, for the reasons I have given, also direct that they convert Pool Creditors' foreign currency claims as at the date of the winding-up order.

Dividing non-safeguarded assets between the asset pools

59. As there will almost certainly not be sufficient non-safeguarded assets to be able to reconstitute each asset pool in full, the Joint Liquidators seek directions as to how such funds as are available, should be applied between them.

60. Mr Fisher QC again helpfully provided three scenarios:

> "(A) The estate assets are shared equally between both asset pools (because both asset pools have a claim of equal priority);
>
> (B) The estate assets are shared in proportion to the shortfalls on each asset pool i.e. the estate assets are shared rateably by reference to the size of the shortfall suffered by each asset pool. Thus, if the EMR asset pool had suffered a 50% deficiency, and the PSR asset pool only a 25% deficiency, the general assets would be shared 2:1 in favour of the EMR;

> (C) The general assets are paid to each asset pool in an amount which seeks to equalise, insofar as possible, the dividend that the creditors of each will be receiving. Thus, if the PSR asset pool was suffering a materially larger shortfall, the general assets would be treated as forming part of the PSR asset pool to the extent necessary to equalise the dividends that EMR and PSR creditors would receive, and thereafter be paid so that the % dividend recovery remained the same.

61. Regardless of whether Pool Creditors' rights take the form of secured claims or, as I have found to be the case, a priority right to payment from a specified pool of assets, neither the EMR nor the PSR provide any guidance on the division of the limited assets that are available between each pool. It is rare for secured interests to rank equally and when they do, there is usually an agreement addressing the secured creditors' entitlement to exercise their rights and the waterfall of payments to be applied on realisation of the secured assets. Counsel's extensive research failed to reveal any applicable authority in this area.

62. In my judgment, and in the absence of any other identifiable principles, the court should apply the equitable maxim, "equality is equity" which results in scenario B presenting the approach which the court should direct the Joint Liquidators to take. In the event of one asset pool being significantly larger than the other (as seems likely in AWL's liquidation), Scenario A would result in creditors of one asset pool receiving, without any apparent justification, a significantly higher percentage return on their claim than those claiming against the larger asset pool. Similarly, scenario C would be likely, disproportionately, again with no apparent justification, to benefit those creditors of the asset pool with the most striking shortfall. This might be justified, if I could discern in the regulations or Directives any apparent intention to equalise the protection given to creditors where an entity conducts business subject to both the EMR and PSR. I cannot.

63. Scenario B reflects and perpetuates the proportionate misfortune suffered by creditors of each pool. Responsibility for any unfairness they suffer lies at the door of AWL's directors with whom they chose to contract, rather than arising as a result of what would, in my judgment, be an unprincipled and arbitrary decision of this court. Consequently, applying the principle that equality is equity, I shall direct that such assets as are available to reconstitute the asset pools should be divided between them rateably by reference to the shortfall suffered by each pool.

Conclusion

64. I invite counsel, at the hand down of this judgment, to address me on the costs elements highlighted at paragraphs 28 and 29 above and to provide a draft order.