THE HIGH COURT

[2011 No. 219 MCA]

IN THE MATTER OF CUSTOM HOUSE CAPITAL LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF REGULATIONS 157 AND 158 OF THE EUROPEAN COMMUNITIES (MARKETS IN FINANCIAL INSTRUMENTS) REGULATIONS 2007

AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012

AND IN THE MATTER OF THE INVESTOR COMPENSATION ACT 1998 ON THE APPLICATION OF THE OFFICIAL LIQUIDATOR

JUDGMENT of Ms. Justice Finlay Geoghegan delivered the 26th day of July 2017

1. This judgment is given on an application brought by Kieran Wallace, Official Liquidator of Custom House Capital Limited (in liquidation) ("the liquidator" and "CHC" respectively) seeking directions and determination of issues arising in the winding up by the Court of CHC. The application was heard by me sitting as an additional judge of the High Court pursuant to s. 2 (5)(a)(ii) of the Courts (Establishment and Constitution) Act 1961 as amended by s. 32 of the Court of Appeal Act 2014.

2. The application, not for the first time, raises difficult and unusual issues in this complex liquidation in which I have already delivered written judgments and made rulings and orders since 2011.

3. A list of issues were prepared in advance of the hearing but by reason of matters raised during the hearing and certain factual clarifications made the issues to be decided by the Court at the end of the hearing had changed. In summary the directions sought by the liquidator and applications pursued require a decision from the Court on three sets of issues which, whilst capable of being separately identified, are interconnected such that the conclusions reached on each have a bearing on the other. They are:

> 1. How should the liquidator distribute monies now standing to the credit of pooled bank accounts in which there is a shortfall by reason of misappropriations?
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> 2. How should the liquidator distribute monies he may recover from properties, funds or companies into which misappropriated monies were paid?
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> 3. What, if any, order may or should the Court now make pursuant to Regulations 157 and 158 of the European Communities (Markets in Financial Instruments) Regulations 2007 (S.I. 60 of 2007) as amended (MiFID Regulations) in relation to the liquidator's application to have recourse or rights against client money or financial instruments.

4. Prior to considering these issues it is necessary to set out briefly the background and position reached in the winding up of CHC at the date of the issue of this application, 1st March, 2017. A fuller background to the winding up of CHC is set out in a judgment delivered by me on 9th October, 2012 ([2012] I.E.H.C. 382) on a prior application of the liquidator.

5. CHC was a private limited company incorporated in 1997. Since 2007 it had been authorised under Regulation 11 of the MiFID Regulations to operate as an investment firm. It was also approved pursuant to the Pensions Act 1990 (as amended) as a PRSA provider and also as a Qualifying Fund Manager in relation to the provision of Approved Retirement Funds ("ARFs") and Approved Minimums Retirement Funds ("AMRFs").

6. Since 2009 the Central Bank had engaged with CHC by reason of concerns raised in the first instance that client monies were being invested without knowledge or consent in the Mezzanine Bond Fund of CHC. As early as April, 2010 the Central Bank gave certain directions which remained in force at the date of commencement of the winding up.

7. In July, 2011 the High Court, upon the application of the Central Bank, appointed two of its executives as inspectors pursuant to Regulation 166 of the MiFID regulations. They presented interim reports and then a final report to the Court on 19th October, 2011. The version of the final report which was authorised for publication has been before the Court in the winding up. The inspectors stated at para. 23 by way of general conclusion:

> "In the introduction to the Report, the scale of the misconduct of CHC was summarised, with the body of the Report providing more detail on specific issues. The exact sums of money taken directly and indirectly from clients by CHC and placed into property investments and/or used to meet other cash needs cannot be precisely stated without a detailed reconciliation of clients' holdings. However, it is clear that this amounted to in excess of €56m. This does not include the funds owed to Mezzanine Bond holders, which amount to an additional €10.4 million (exclusive of interest). There was a systematic and deliberate misuse of assets and cash belonging directly or indirectly to clients of CHC. This misuse was deliberately disguised by CHC through the use of false accounting entries and the issue of false and misleading statements to clients."

8. On 21st October, 2011 the High Court (Hogan J.) made an order on the application of the Central Bank pursuant to Regulation 172 of the MiFID Regulations that pursuant to the provisions of the Companies Acts 1963 – 2009, CHC be wound up by the Court and appointed Kieran Wallace as official liquidator of CHC. Mr Wallace, on the same date, was also appointed administrator of CHC for the purposes of s. 33A of the Investor Compensation Act 1998 as amended.

9. Prior to that, in early 2011 CHC had sought help from Horwath Bastow Charleton ("HBC") in relation to the management of its business. On 13th October, 2011 a sub-management agreement was entered into between CHC and Horwath Bastow Charleton Wealth Management (now Bastow Charleton Wealth Management Limited) ("BCWM") to manage the assets and business of CHC pursuant to a sub-management agreement. Following the winding up of CHC, a new sub-management agreement was entered into by the liquidator with BCWM pursuant to which BCWM as agent for CHC (in liquidation) has managed client assets previously managed by CHC. This agreement, with some amendments, remains in place.

Post winding up

10. The liquidator was and is faced with a highly complex and unusual situation in the winding up of CHC. The inspectors' report

records that in 2011 CHC had under its management or control client funds with an estimated nominal value of €1.1 billion. Further, those funds were held in many different types of investments. Added to that was the very significant misappropriation of client funds which the inspectors considered was deliberately disguised by CHC through the use of false accounting entries and the issue of false and misleading statements to clients.

11. The liquidator was nominated by the Central Bank. When he accepted his appointment he did not seek an indemnity in relation to his costs and expenses of the winding up. It became apparent to him some time after the commencement of the winding up that the assets of CHC, as distinct from client funds under its management or control, were in relative terms small.

12. The work required of the liquidator in this liquidation has broadly fallen into two parts. First, the normal work of an official liquidator in a winding up by the Court in relation to the assets and liabilities of the company and regulatory matters, ("company work"). The second is the unusual and highly complex work in relation to distribution of and disengagement of CHC from the client assets under its control or management ("client work").

13. In very broad terms the liquidator treated the client assets as falling into two categories; (1) those which were considered to be segregated and (2) those considered to be pooled. Within each there were again, broadly, three classes of client assets: investments in equities, in property and in cash or cash funds. Within each class there are differences in the type of asset as many are not directly held by clients but rather held through corporate entities such as companies or unit trusts or products appropriate to pension related investments including ARFs, ARMFs and PRSA products.

14. The scale of the potential fraud and misappropriation identified in the inspector's reports has both complicated and required significant reconciliation work by the liquidator prior to the distribution of client assets to or at the direction of those who appear entitled to same.

15. The liquidator in 2012 first addressed segregated client assets in equities and cash. By March 2012 he had completed reconciliation in relation to approximately 678 clients holding segregated assets. The liquidator sought a contribution to the cost of this work from 350 of those clients. Approximately 172 clients agreed to make the payments sought, and they benefitted in that those assets were promptly distributed. Other clients dissented and the liquidator brought an application to the Court which was heard on notice to the dissenting clients.

16. It is relevant to state, as is recorded in my judgment of October, 2012 there was no application to the Court Pursuant to the MiFID Regulations at that time Regulations 157 and 158 of the MiFID Regulations only came to the attention of the Court in the course of the application. .

17. In the 2012 application certain of the dissenting clients disputed the role of the liquidator in carrying out the reconciliation work in relation to client assets and in particular the extent of the reconciliation he considered necessary. That application only concerned equities and cash. In my judgment having referred to the principal obligations of an official liquidator in a winding up I concluded, insofar as relevant, as follows:

> "41. However, it appears to me that what is required of a liquidator to wind up the affairs of a particular company will always depend upon the nature of the business or other activity conducted by the company prior to the making of the winding up order. Having regard to the business of CHC, the obligation to wind up the affairs of CHC requires the Liquidator to engage in an orderly termination of the involvement of CHC in the investment and management of the client funds formerly under its control. A general description of such a task involves the return to the clients or transfer at their direction of the investments or cash to which they have a beneficial entitlement. The precise work done will depend, firstly, upon the nature of the investments and the contractual arrangements between CHC and the clients (which may have been terminated by the winding up order) and third parties. Secondly, it will depend upon what is required to be done to identify the investments or cash to which each client is beneficially entitled.
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> 42. On the facts herein, this task is complicated by two factors. First, the findings of the inspectors and the abuses disclosed in the final report to the Court, including the unauthorised removal of an estimated €56m of client funds and its unauthorised use in connection with property investments. Secondly, the fact that certain of the investments managed or held by CHC either as a Qualifying Fund Manager (in relation to ARFs and AMRFs) or in an approved PRSA product which may not, by their terms, be transferred to the client beneficially entitled or, if they were to be so distributed, would result in significant adverse tax consequences for the client in question. The orderly transfer of such investments from CHC to another appropriate authorised person or product required the involvement of the Liquidator.
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> 43. Accordingly, I am satisfied that the Liquidator is correct in the decision he made that as part of the winding up of CHC, he is obliged to arrange for the orderly distribution of client funds held in investment vehicles provided by or under the control of CHC, either to those beneficially entitled or, where appropriate, to a qualified person or product at their direction."

18. On the specific objection by the dissenting clients in that application to the necessity of the work done by the liquidator in relation to reconciliation of the segregated assets, and in particular certain pension products, I observed at para. 46 and 47 as follows:

> "46. The inspectors, in their report to the Court in the section dealing with segregated client asset accounts, state in their conclusions at para. 5.4:
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> > "In the view of the Inspectors, cash held by CHC on behalf of clients was invested in various CHC property funds without their knowledge or consent and contrary to mandates given by clients. There was a systemic and widespread practice within CHC of concealing this in the valuation statements issued to relevant clients. Valuation statements issued to relevant clients showed the full amount of cash that was supposed to be held for clients in the segregated client asset accounts in line with the clients' expectations and instructions.
> >
> > This practice was facilitated by the backing out of real transactions (transferring cash to property funds) that had taken place and fictitious cash holdings being substituted in their place. This appears to have occurred regularly on clients' cash accounts. In some instances where valuation statements were issued to clients and the backing out of transactions did not take place the clients raised queries with CHC. This led to further instances of backing out real transactions and replacing them with fictitious cash transactions to show a misleading cash position on client statements.

> Within CHC this practice was managed and facilitated by the use of a flag system on CHC's internal systems whereby client accounts where such unauthorised transactions took place were flagged as 'Please contact Harry or Paul before running this valuation'. Further details are set out in Part B12.
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> It is also clear that a practice existed whereby money being held by CHC on behalf of specific clients was taken and used to fund shortfalls arising on CHC property funds. In circumstances where a request for cash from a client was received and that money had already been placed in a CHC property fund without his or her knowledge, the request to repay the cash was facilitated by taking money from other client cash accounts."
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> 47. The Liquidator, in his affidavit, also refers to the apparent unreliability of the internal accounting systems and records of CHC as disclosed by the inspectors' reports."

I then concluded:

> "48. Whilst I can understand that the dissenting clients who held equities and segregated cash accounts with stockbrokers may consider that this work was unnecessary as it did not tell them anything new, nevertheless, in my judgment, having regard to the facts referred to in the inspectors' reports and the practice within CHC of receiving initial investments into pooled client accounts and then paying the money out to a stockbroker or financial institution, the reconciliation process undertaken by the Liquidator was a reasonable and appropriate step for him to have taken prior to distributing or transferring equities and segregated cash accounts. His obligation, as part of the winding up of the affairs of CHC, is to facilitate or effect the transfer of investments or cash to or at their direction of those beneficially entitled. He had to be satisfied that it was the relevant client's money and not another client's money which had been transferred to the stockbroker or other financial institution from the pooled client account.
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> 49. The other aspect of the work undertaken related to the identification of the different nature of the investments and certain valuations and the clarification of tax positions arising from the nature of ARF, AMRF and PRSA products. This work also appears to be necessary for the orderly and appropriate transfer of such products."

19. I have set out the above in some detail as it probably informed the approach taken by the liquidator in the subsequent work done in the liquidation which is relevant to some of the issues in this application. In the intervening years I have not changed my overall view of the necessity for the liquidator to carry out reconciliation work prior to distribution by reason of the scale of the misappropriations within CHC. Insofar as I referred to the liquidator being "satisfied" as to a client's entitlement even to segregated assets, it has always been understood that this could only be on the balance of probabilities.

20. It is also relevant to the question of distribution to point out that on the 2012 application it was common case that CHC was not acting as trustee of the relevant segregated equities or cash funds. The contractual documents between the clients and CHC put before the Court expressly provided that CHC was not acting as a trustee and I stated at para. 67 "the relationship was a purely contractual one according to which CHC had a right and obligation to control and manage certain investments and funds". I did so in a context of distinguishing the factual position from that which was the subject of a judgment of the English High Court in *Re Berkeley Applegate (Investment Consultants) Limited* [1998] 3 All E.R. 71 upon which the liquidator was relying.

21. Whilst the application of the liquidator in 2012 was not brought pursuant to Regulations 157 and 158 of the MiFID Regulations, I did make certain observations in relation to same in the course of my judgment which also appears to have informed the subsequent approach of the liquidator.

2014 Application

22. The next significant relevant application on behalf of the liquidator was by a notice of motion returnable initially in March, 2014 seeking in total 22 reliefs a number of which were pursuant to the MiFID Regulations.

23. At the outset, it was determined that only three reliefs sought relating to the measurement and payment of the liquidator's legal costs, remuneration, fees and expenses would be pursued in a first in a first hearing. That was done on notice to a committee of clients (some of whom had been dissenting clients who participated in the 2012 application) (the "Committee") acting as *legitimus contradictor* with legal representation. It was also on notice to the Central Bank, Investor Compensation Company Limited ("ICCL") and the Pension Board. The ICCL were represented by solicitor and counsel and participated as one significant issue raised on behalf of the Committee related to an alleged overlap between work done by Mr Wallace as liquidator and as administrator appointed pursuant to the Investor Compensation Act 1998 as amended. The Central Bank and Pensions Board were represented by a solicitor and participated only to a limited extent.

24. That motion was heard primarily in October, 2014 with a short subsequent hearing in November and a written judgment delivered on 22nd December, 2014. In that written judgment, I reconsidered by reason of submissions made, the appropriateness of the reconciliation and distribution work being done by the liquidator as part of his work as liquidator in the winding up, and remained of the same view as previously expressed in my October, 2014 judgment.

25. In the course of that hearing, the liquidator gave oral evidence to which I referred in the judgment. I also expressed concern and was critical of the delays in the progress of the winding up notwithstanding the recognition of the very detailed and complex work required. I made a number of concluding remarks in that judgment at paras. 83 – 88 inclusive as it was the determination of only what was then the first part of a notice of motion seeking multiple reliefs, including under the MiFID Regulations which came before the Court exercising its supervisory jurisdiction in the winding up by the Court.

26. One further notice of motion was issued on 2nd February 2015 in relation to matters occurring subsequent to the written judgment of December, 2014. Accordingly, on 10th February, 2015, the Court made an order arising from the judgment of 22nd December 2014, and the notice of motion of 2nd February, 2015.

27. Prior to the making of that order, the Court was informed that the liquidator was not continuing with the balance of the application pursuant to the MiFID Regulations in relation to segregated client funds but would most likely make such an application in relation to pooled funds. Accordingly, the Court struck out the balance of the notice of motion dated 5th March, 2014, but without prejudice to the right of the liquidator to bring such an application in respect of pooled client funds.

28. The same order directed that any application pursuant to the MiFID Regulations in respect of pooled client funds should be issued and served no later than the 1st February, 2016. Further directions were also given in relation to the filing of future reports.

29. Whilst progress was made in the segregation and distribution of segregated client funds in 2015 and 2016, the anticipated notice of motion pursuant to the MiFID Regulations in respect of pooled client funds was not issued in 2016. There were further Reports made by the liquidator to the Court during 2016, as well as applications for directions and measuring costs. An order was made on 17th November, 2016 determining legal costs and remuneration fees and expenses of the liquidator and permitting certain payments on account.

30. In the intervening period amendments were made, with the approval of the Court, to the sub-management agreement with BCWM pursuant to which it continued to manage, as agent of CHC, client assets not yet distributed. Those assets included property investments held through what are termed the European Special Purpose Vehicles ("SPVs") and Destiny Unit Trusts. The contractual arrangements between CHC and those entities included payment of management fees to CHC. Under the sub-management agreement BCWM collected those fees and a percentage of the fees recovered was paid to the liquidator. The income and expenditure reports of the liquidator exhibited in this application indicate that such payments have to a significant extent funded the company and client work done by the liquidator in the winding up.

Current position in liquidation
31. The liquidator in his grounding affidavit sworn on 1st March, 2017 avers that at that date there remained client assets with a net value of approximately €173m to be distributed. That figure is an approximate valuation by reason of the fact that many of the assets relate to properties with fluctuating values. Further, assets with significant value are held by the European SPVs in which the individual properties are held in companies incorporated principally in Luxembourg. Depending upon how the client assets fall to be distributed there may be taxes payable and winding up costs of the individual companies to be incurred prior to distribution to clients of CHC.

32. At the hearing of the application in June, 2017 the liquidator gave oral evidence and indicated that he had by then distributed approximately €115m in value of segregated client assets.

33. The liquidator in his grounding affidavit has divided the remaining client assets into eight categories:

A.1 Non-Pooled (Segregated) Client Accounts

A.2 Pooled Bank Accounts

A.3.1 Destiny Funds: cash and equity (and other Funds)

A.3.2 Destiny Syndicated Property Funds

A.4 Commodity bonds

A.5 Mezzanine bonds

A.6 European Special Purpose Vehicles ("SPVs")

A.7 Destiny Non-Syndicated Funds (sub unit trusts)

34. The liquidator refers to categories A.2 to A.6 collectively as being the "Pooled Assets". The aggregate value of the pooled assets appears from his grounding and supplemental affidavits and submissions now to be in the order of €145-150m.

35. The non-pooled assets identified at A.1 and A.7 are stated in the submissions of 15th June, 2017 to have values of €5.1m and €26.3m respectively, which the liquidator continues to distribute. No orders are sought by the liquidator pursuant to the MiFID Regulations in relation to those classes of segregated client assets. The directions sought relate only to the pooled assets identified at A.2 to A.6. This approach by the liquidator is material to my decision.

Persons represented
36. The Central Bank had directions in place at the commencement of the winding up which restricted *inter alia* CHC (and BCWM as their agent) from giving information to clients in relation to their investments or entitlements. In general, those directions remained in place until 25th June, 2017. The liquidator, as he came to distribute segregated client assets, sought release from the directions in relation to specific clients. In addition, in the context of this application, he obtained release to provide information to those clients who had previously participated in the Committee, and certain other clients who appeared before the Court and indicated an interest in appearing or being represented on this application.

37. The liquidator through his solicitors assisted those clients who had appeared in Court in identifying which of the options he was presenting to the Court, both for the distribution of pooled bank accounts and the distribution of misappropriated monies recovered, would benefit the individual clients. Ultimately, in part by reason of potential conflicts between those clients appearing, it was determined that Mr Roger Day and Mr Tom Corr would be jointly represented by solicitor and counsel, Mr Michael Nugent would be separately represented by solicitor and counsel and Mr Eoin O'Cofaigh would appear representing himself. Mr David McHugh and Mr Michael Dempsey, investors in the same European SPV as Mr O'Cofaigh, supported his submissions.

38. In the course of the preliminary directions hearings in this application, two trusts, the O'Callaghan Trust and the Beades Trust, sought permission to participate and be represented. They were represented by a solicitor and counsel at the hearing and their interests and position are referred to below.

39. The Central Bank, the ICCL and the Pension Authority were each represented by a solicitor at the hearing. They did not participate save that the solicitor for the Central Bank informed the Court on the third day of the hearing i.e. 29th June 2017 that the Central Bank's directions had lapsed on 25th June, 2017 and it had decided not to renew them. This now enables the provision of information to the former clients of CHC be given by the liquidator or BCWM as appropriate. It also enables funds to be distributed without the need to obtain a release from the Central Bank which should reduce future costs for the liquidator.

40. A further matter to which I wish to refer is the collective desire expressed by or on behalf of all clients to have their investments or monies released as soon as possible from the control of CHC. Understandably it has been a recurring feature of all applications of concerns being expressed that the order to wind up CHC was made in 2011 and that client assets still remain under its control. Hence in considering the options presented, the time required to complete the necessary work for each is an important factor.

41. In the course of the hearing certain factual clarifications were sought by me from Counsel for the liquidator. There was in particular a lack of clarity in the factual basis for the contention that the contractual arrangements between CHC, clients and the European SPVs and Destiny unit trusts were such that the latter were client assets in relation to which the Court has jurisdiction to make an order pursuant to Regulations 157 and 158 of the MiFID Regulations. This resulted in a letter dated 29th June 2017 from McCann FitzGerald to the Court with further facts and explanations the truth of which the liquidator confirmed on oath when giving his evidence later that day.

42. Against that background and in the context of all facts and submissions put before the Court, including the oral evidence of the liquidator I now turn to consider the issues in the application.

Distribution of pooled bank accounts
43. There were 11 pooled bank accounts in operation by CHC at the date of liquidation. The liquidator has divided those under the following three headings:

- Three "Client Asset" pooled bank accounts
- "Destiny Client Savings" pooled bank account
- Seven other "Destiny" pooled bank accounts

44. The three client asset pooled bank accounts were maintained in the name of CHC with Bank of Ireland. They were: Client Asset Current Account, Client Asset Net Savings Account and Client Asset Gross Savings Account. It appears that all client monies received by CHC were initially placed in one or other of these accounts. The liquidator states that some client accounts have investment mandates that are discretionary but many do not.

45. CHC maintained what is termed "accounting segregation" in accordance with Client Asset Requirements imposed by the Financial Regulator in November, 2007 under Regulation 79 of MiFID and s. 52 of the Investment Intermediaries Act 1995. Each client's balance in the pooled accounts was separately recorded in the books of CHC and the account was reconciled on a regular basis. However, as disclosed by the Inspectors' Report, there was significant misappropriation from these three bank accounts estimated at €11.9m. The report indicates that cash held by CHC was invested in various CHC property funds without the knowledge or consent of the client and contrary to mandates given by the client. Further there was a systematic and widespread practice of concealing this misappropriation in the valuation statements issued to the relevant clients. The valuation statements showed the full amount of cash that was supposed to be held for clients in line with expectation and instructions. The practice was facilitated by manipulating the computer records of CHC and "backing out of" real instructions that had taken place and replacing them with fictitious client holdings. The client accounts were held on the Unity system of CHC. The above practice was managed and facilitated by the use of a flag system which identified the unauthorised transactions. There was a parallel system known as "Therefore" which recorded these. In addition to misappropriated monies being used to fund requirements of CHC property investments, they were also used to repay requested funds to clients whose own funds had been misappropriated.

46. The eight Destiny pooled bank accounts were in the name of M & F Finance Limited, a company distinct from but with common directors to CHC. It is not in liquidation. The eight Destiny pooled bank accounts were primarily used for holding funds on behalf of Destiny Syndicated Property Funds which were unit trusts. Thus the "clients" whose funds were in those accounts were primarily unit trusts rather than personal clients, though the liquidator's affidavit indicates they may have also included the latter. The principal misappropriations identified by the inspectors related to the Destiny Client Savings Account. The amount misappropriated is estimated to be €6.4m. For the most part it appears to be misappropriation of monies held on behalf of syndicated property funds as opposed to individual investors. The remaining seven Destiny pooled bank accounts were primarily used to receive rent from Destiny syndicated and non-syndicated property assets and to fund loan repayments and other expenses related to those assets or funds. The inspector's report indicates they did not appear to have the same level of misappropriation as the Destiny Client Savings account.

The liquidator provided the Court with Table 2 setting out the factual position in relation to the pooled bank accounts as known to him including the cash at bank as at December, 2016. It succinctly summarises the factual position which is relevant to the reasoning below:

TABLE 2
Pooled Bank Accounts

	No. of acc's	No. of clients	No. of transactions	Value of assets per Unity 000	Cash at Bank as at Dec 16 000	Mis-appropriated funds	Potential return of mis-appropriated funds from SPVs
Client Asset Current Account	1	2,126	20,784	222.0	222.0	Estimated for at €11.9 m*	Partial (currently estimated at 40% recovery overall)
Client Asset Net Savings Account	1	252	8,829	498.9	498.9		
Client Asset Gross Savings Account	1	1,050	42,545	5,713.4	5,713.4		
Destiny Client Savings Account	1	1,509	34,175	1.4	1.4	Estimated at €6.4 m*	
Destiny Property Current Account	1	1,105	13,635	2.9	4.8	TBD	
Destiny Rental Current Account	1	136	13,918	-2.9	16.4	TBD	
BOI (NI) Rental Account	1	173	3,810	189.9	2.1	TBD	

BOI (NI) Deposit Account	1	216	5,118	56.9	1.2	TBD	
BOI (NI) Current Account	1	208	19,632	439.7	19.3	TBD	
Destiny Cash Current Account	1	8	2565	-0.0	-0.0	TBD	
M&F Euro Account	1	361	4,212	599.1	56.1	TBD	
Total	**11**	**2,126**	**166,658**	**7,721.1**	**6,535.6**	**TBD**	**Partial**

** As per Inspectors' Report*

47. As appears from the above there is now a total of approximately €6.5m available for distribution to clients of CHC either directly, in the case of the three Client Asset Accounts, or indirectly via Destiny property funds in the case of the eight Destiny accounts. It is also relevant to note the significant differences in the number of clients, transactions and amounts available in the differing accounts. As appears approximately €5.7m is available in one single account with relatively small amounts available in other accounts for distribution between significant numbers of clients.

48. Whilst in the case of the three Client Asset Accounts and the Destiny Client Savings Accounts there may be further monies recovered in respect of the misappropriated funds, it is not submitted by any person that the liquidator should await the recovery of such funds to distribute the cash presently at bank. Thus it appears to me that the distribution options presented by the liquidator must be considered in the context of the facts relating to the cash currently in the bank and having regard to the number of clients potentially entitled and the number of transactions on each account.

49. The other facts which are relevant to the distribution options are the facts pertaining to the reconciliation required to be done for the different distribution options. The liquidator identified what he terms "simple reconciliation" and "detailed reconciliation".

50. Suffice to say that the simple reconciliation is a methodology similar to that used in the inspector's report and for which the liquidator indicates that he would also use the information obtained in the claims made by the clients of CHC for compensation from the ICCL. The liquidator deposes that by March, 2017 he had received 2,692 claims for compensation from the ICCL. He states at para. 31 of his grounding affidavit that each claim is supported by a detailed application form; in many cases by valuation statements and other correspondence issued by CHC and "when cross referenced with the Unity and Therefore systems, these claims are a further important source of evidence in corroborating client positions". The detailed reconciliation described would require a more in-depth review than carried out by the inspectors; involve tracing through bank statements, other fund accounts and other records both on the Unity and Therefore systems and contemporaneous correspondence and file records. The liquidator expresses doubt in his affidavit that even with a detailed reconciliation process he would obtain a fully reconciled position for each client's entitlement.

51. The liquidator has identified four modes of distribution, namely:

> 1. distribution from each pooled bank according to records kept by CHC on Unity. Unity was the computer system which maintained a record of the pooled client assets on a segregated basis in the books of the company ("Unity based distribution");
>
> 2. distribution according to the rule in *Clayton's* case ("*Clayton's* case distribution");
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> 3. distribution rateably according to the lowest intermediate balance rule ("LIBR distribution");
>
> 4. distribution rateably according to each client's claim on the pooled bank account ("*pro rata* distribution").

52. The liquidator has estimated the cost per client of doing the simple reconciliation in each of the 11 bank accounts at €229.30 per client (for Unity or *pro rata* distribution) and the detailed reconciliation at €448.60 if distribution was to be in accordance with *Clayton's* case and at €491.40 if the distribution option was to be in accordance with the Lowest Intermediate Balance Rule.

53. Where the liquidator refers to a client in each of the above in the case of the Destiny pooled accounts, it must be taken to include the relevant syndicated or non-syndicated property fund or unit trust.

54. The Court has had the benefit of written and oral submissions from counsel on behalf of persons who advocated for each of the above distribution methods. On behalf of the liquidator it was submitted that on the facts of this liquidation, having regard to the shared common misfortune of all clients who suffered misappropriations; the number of clients, number of transactions on each account, and the relevant cost, complexity and time required for the detailed reconciliation as compared with the simple reconciliation, that the *pro rata* distribution method should be directed.

55. The submissions on behalf of Mr Day and Mr Corr favoured distribution in accordance with the rule in *Clayton's* case or, alternatively, LIBR distribution. Fundamental to this submission was that it is the distribution method which best respects the proprietorial rights of the clients who gave their money to CHC for investment.

The submissions on behalf of Mr Nugent were in favour, firstly, of distribution in accordance with the Unity records or, secondly, *pro rata* distribution. The reason was primarily that these are the methods which would achieve a return to clients at the earliest possible moment in a cost efficient manner. This submission is particularly striking as Mr Nugent was informed in correspondence by the liquidator that he might benefit most personally from a distribution in accordance with *Clayton's* case or LIBR. The submissions made on his behalf in relation to the distribution of pooled bank assets are consistent with his overall approach of seeking the earliest possible disengagement of the liquidator and CHC from client assets with preferably none or minimal cost to the client assets.

56. In this jurisdiction, the starting point in a consideration of how client monies remaining in a pooled bank account in which there is a shortfall should be distributed appears to be whether the rule in *Clayton's* case should be applied. The so-called "rule" in *Clayton's* case (*Devaynes v. Noble* [1816] 1 Mer 572, (1816) 35 E.R. 767) is that the funds remaining in the account should be distributed upon the basis that the sums first paid in were first paid out of the account. It appears to derive from a presumed intention that the account was to be so operated. In *Re Diplock* [1948] Ch 465 at 554 Lord Greene MR said that it was a "rule of convenience based upon so-called presumed intention". In *Barlow Clowes International Limited v. Vaughan* [1992] 4 All ER 22 at p. 39 Woolf L.J. said "the rule need only be applied when it is convenient to do so and when its application can be said to do broad justice having regard to the

nature of the competing claims."

57. It was considered, although not applied on the facts, by Budd J. in *Shanahan's Stamp Auctions Limited v. Farrelly* [1962] IR 386 in a factual context which has some similarities to the present in that there was a second mixing after initial pooled bank account in the purchase of stamps. More recently it was considered by Laffoy J. *in Re Money Markets International Stock Brokers Limited* [1999] 4 IR 267. Laffoy J. referred to the decisions in Shanahan Stamp Auctions, to criticism of the rule by Keane J. writing in Equity and the Law of Trusts in the Republic of Ireland (2nd Ed., October 2011) at para 20.13, and to its analysis by Woolf L.J. in *Barlow Clowes International Limited v. Vaughan* [1992] 4 All ER 22 and she then stated at p. 276:

> "The conclusions I draw from the authorities are that, as far as this Court is concerned, in the case of a current account such as the account in issue here where trust funds sourced from various beneficiaries are mixed or pooled in the account, it is settled law that as a general proposition the rule in *Clayton's* case is applicable in determining to whom the balance on the account belongs. However, the application of the rule may be displaced in the particular circumstance of a case, for instance, if it is shown or to be inferred that it does not accord with the intention or the presumed intention of the beneficiaries of the trust funds."

58. In that case, on its facts, Laffoy J. decided in favour of the applicant upon the basis that, as she stated whether "it is the case that the rule in *Clayton's* case is applicable" or even if the rule were not applicable, in her view "the equity of the applicant is superior to the equity of any other client creditor with an equitable claim against the monies in the account so that the applicant cannot be bound by a rateable distribution assuming such distribution would do justice among the other client creditors *inter se*. …."It was hence unnecessary for her to decide whether she should apply the rule in *Clayton's* case.

59. In considering the potential application of the rule in *Clayton's* case to the distribution of the monies remaining in the pooled bank accounts in CHC the analysis in the judgments of the English Court of Appeal in *Barlow Clowes*, and in particular that of Woolf L.J. referred to by Laffoy J., has been of considerable assistance to me as it appears to have been to Murphy J. in *W & R Morrogh* [2007] 4 IR 1 in which he considered on the facts of that case the rule should be displaced in favour of a *pari passu* distribution. Murphy J. concluded that the equities between the competing claimants to the account were equal and that the principle "equality is equity" should apply i.e. a *pro rata* or *pari passu* distribution.

60. It is unnecessary by reason of the conclusions I have reached below to examine further whether the rule should be regarded as continuing to apply in this jurisdiction beyond the situation in the case from which it derived, namely competing claims between a customer and the bank on a running or current account. As observed by Keane J. in *Equity and the Law of Trusts in the Republic of Ireland* (2nd Ed., October 2011) at para. 19.41 following the judgment in W & R Morrogh and having regard to its reasoning it is difficult to see what remains of the rule but until such time as "the Supreme Court gives the rule the ultimate *coup de grace*, however, it is safer to treat it as not entirely removed from our law."

61. Accordingly, I have concluded that I should consider the rule in *Clayton's* case as potentially applicable to this distribution, and hence consider on the facts whether it should be displaced in favour of another method of distribution.

62. The first such other method is the LIBR distribution method proposed in the alternative on behalf of Mr Day and Mr Corr, which is also known as "*pro rata* sharing on the bases of tracing" or the "rolling charge" or "North American approach", appears now to be the presumptive rule applied by the Canadian courts in place of the rule in *Clayton's* case: see *inter alia*, *Ontario Securities Commission v. Greymac Credit Corp.* (1986) 55 O.R. (2d) 673 (ONCA) affirmed by the Supreme Court of Canada (1988) 65 O.R. (2d) 479 (SCC), [1988] 2 S.C.R. 172; *Law Society of Upper Canada v. Toronto-Dominion Bank* (1998) 42 O.R. (3d) 257 (ONCA); *Boughner v. Greyhawk Equity Partners Limited Partnership (Millennium)* (2012) (ONSC) 3185; 111 O.R. (3d) 700 affirmed by Ontario Court of Appeal (2013) (ONCA) 26; *Easy Loan Corporation v. Wiseman* [2017] A.B.C.A. 58. In *Easy Loan Corporation* the Court of Appeal of Alberta, having conducted a review of the legal principles and Canadian case law relating to (i) the rule in *Clayton's* case, (ii) LIBR and (iii) the *pro rata* approach, concluded at para. 57:

> "LIBR is the general rule for allocating funds among innocent beneficiaries when there is a shortfall in a trust account or in an account that has been impressed with a constructive trust by operation of law. There are two exceptions: LIBR is unworkable or the beneficiaries expressly or impliedly intended another method of distribution."

63. The essence of LIBR is that a beneficiary tracing into a commingled account is limited to the lowest balance in the account following their contribution. The ability to trace anything more than the lowest balance is lost because any subsequent increase in funds would come from a funding source other than the beneficiary seeking to trace.

64. The Court has been referred to the comments of both Dillon L.J. and Woolf L.J. in *Barlow Clowes International* to the effect that the application of the LIBR, (which they referred to as the "North American solution" or "rolling charge") should produce a fairer result but on the facts of that case the costs involved would have been out of all proportion even to the sizeable sums which were involved (Woolf L.J. at p. 35 and Dillon L.J. at p. 33).

65. The legal submission on behalf of the liquidator is that it would similarly be a mistake to direct a LIBR distribution on the facts of this case. The submission points out that in two of the leading Canadian cases where LIBR distribution was actually applied, the number of claimants and transactions were relatively small. In *Greymac* the question was how commingled funds should be distributed among two innocent parties where there were insufficient funds to pay both in full. In *Greyhawk* the question arose in respect of a fraudulent investment scheme involving 24 investors. In *Easy Loan Corporation* the Alberta Court of Appeal in its judgment stated:

> "40. It is self-evident that calculating the lowest balance in the account for each beneficiary's contribution is not workable or practical if the commingled account has many contributors, supporting records are unavailable or incomplete or the timeframe in question is lengthy. These problems do not arise in this case.
>
> 41. Indeed, the proof is in the pudding. Counsel for one of the respondents calculated the lowest intermediate balance for each beneficiary and the proportion that each balance comprised of the Frozen Funds, all to the satisfaction of the chambers judge who personally signed the Order. No respondent disputes the amount."

66. The liquidator's submission also draws attention that *in Law Society of Upper Canada* the Ontario Court of Appeal held that LIBR was "too complex and impractical" for a case with *inter alia* more than 100 claimants (see *Law Society of Upper Canada v. Toronto-Dominion Bank* (1998) 42 O.R. (3d) 257 at para. 24.

67. On the facts of this application, to take one bank account, namely the Client Asset Gross Savings Account, which has

approximately €5.7m for distribution prior to recovery of misappropriated funds there are 1,050 clients and the number of transactions estimated at 42,545. As already stated the cost per client of carrying out the reconciliations required to operate LIBR are more than double the cost of carrying out a simple reconciliation and are higher than those for a *Clayton's* case distribution. It is not in my view a method which is appropriate or practicable on the facts of this application notwithstanding certain attractions over the rule in *Clayton's* case.

68. Unity was the computer record keeping system by which CHC recorded the amount standing to the credit of each client in respect of funds in the pooled account. The liquidator has estimated the reconciliation costs of a Unity based or a *pro rata* distribution to be the same. The amounts recorded in relation to each client on Unity at the date of commencement of the winding up depended, in addition to investment of funds actually made and authorised withdrawals for the purpose of investing the client's funds legitimately elsewhere, upon a happenstance that a person within CHC chose to allocate to an individual client's account on the Unity system a debit in respect of an unauthorised and wrongful withdrawal from the pooled fund. These wrongful debits were not disclosed to clients. Distribution in accordance with the Unity system only falls to be compared with a *pro rata* distribution. There is in my view no reason in logic, justice or fairness in favour of distribution in accordance with the Unity system rather than a *pro rata* distribution. A *pro rata* distribution accords with the real state of affairs, namely the client monies actually paid into the account and not lawfully withdrawn. Unity would take into account totally arbitrary and wrongful decisions made by or on behalf of CHC to notionally debit particular clients' nominal accounts with misappropriations.

69. In this jurisdiction, on the facts of this winding up, the real issue is therefore whether the Court should direct distribution in accordance with the rule in *Clayton's* case or a *pro rata* distribution, i.e. rateably according to each client's claim on the account.

70. I have concluded that the facts of this winding up are such that the rule in *Clayton's* case should not be followed for the purposes of distribution as it would not just amongst the clients or claimants nor convenient. As outlined above, the rule in *Clayton's* case is based upon a presumed intention as to how the bank account would operate in first paying out the monies which were first paid in. It is not suggested that the contractual documents between clients and CHC support any such presumed intention. On the contrary, funds were being given to CHC for investment purposes, some with a discretionary mandate and others with a specific mandate. The funds were to be used for investment purposes in accordance with the relevant client mandate. The timing of the transfer of the funds out of the account to the relevant investment would *inter alia* depend upon the mandate and investment vehicle.

71. This is an application by a liquidator for directions as to how he should distribute funds in 11 pooled bank accounts. Four of those bank accounts have in excess of 1,000 clients each, one having in excess of 2,000 clients. There are very significant numbers of transactions on most accounts as appears from table 2.

72. The equities between all client claimants appear equal. They all suffered the shared misfortune of monies being misappropriated from the pooled sums in the account which included their monies. There is nothing on the facts which suggest that any client or group of clients has a greater equity to the return of monies than other clients.

73. The *pro rata* distribution is the one which appears to do justice as between all the claimants on the pooled bank accounts by treating each claimant in an equal manner. I have carefully considered the fact that CHC maintained through the Unity system a separate notional account of the amount of each client's claim on the fund, but by reason of the wrongful basis or reason for which the entries in those accounts were made, and the fact that those entries were not disclosed to the clients, it does not give to those clients which the Unity system wrongly records as having a greater claim on the fund any greater equity than a client whose Unity entry discloses a smaller sum by reason of misappropriations.

74. The fact that the *pro rata* system will only require a simple reconciliation at lesser cost than a distribution in accordance with the rule in *Clayton's* case is an added reason as distinct from the principal reason for which it appears to me that the justice of the situation requires a *pro rata* distribution.

75. The final matter which appears to me relevant is that it is to be hoped and anticipated that the liquidator will recover a portion of the misappropriated monies. The monies currently standing to the credit of the bank accounts and those which may be recovered for the benefit of the claimants on that account should be distributed in the same manner. The *pro rata* distribution is the simplest and most cost effective and least time consuming way of doing this and is the most just, or perhaps more properly stated to be the least unjust, method of distribution of the total monies now standing to the credit of the pooled accounts and which may be recovered for their benefit.

Distribution of recovered misappropriated monies

76. The liquidator puts forward two options for the distribution of recovered misappropriated monies. These became known in the application as Recovery Option 1 and Recovery Option 2. To understand these it is necessary to reconsider briefly in summary how the misappropriations took place.

77. Misappropriations were made not only from pooled bank accounts but also from certain bonds and unit trusts which held cash. In many instances but not in all the monies were transferred either to Destiny syndicated property funds or the European SPVs. Some misappropriated monies were simply used for repaying clients where the return of monies they were seeking had been already misappropriated. There were, it would appear, also misappropriations made from certain property funds to other property funds. In many instances the Unity system recorded the Destiny fund or European SPV to which the misappropriated monies were transferred. However the liquidator has stated that this is not so in all instances as in particular in relation to the European SPVs there were transfers made to foreign lawyers and foreign banks intended for a SPV the relevant European SPV benefiting was not recorded in Unity. Nevertheless, the liquidator also considers that the European SPVs and the Destiny syndicated property funds appear to have reasonable records of misappropriated monies received by them. There are differences in some instances between the amounts recorded in each place.

78. The fact that most of the misappropriated monies were transferred to property funds (Destiny or European SPVs) and the difference in performance of those funds or properties means that certain of those funds which received misappropriated monies now have no net value and there will be no recovery either for legitimate investors or in respect of misappropriated monies. However there are other funds in which there is a net value and there will be at least a partial recovery of misappropriated monies.

79. The liquidator in his grounding affidavit at para. 257 (with figures very slightly altered in the supplemental affidavit) explains that the Inspectors' findings in their report of receipt of approximately €44m by the European SPVs of misappropriated monies is based upon their accounts. This was computed based on the total non-bank funding to each SPV, less the investment funding validly invested in the SPV (by way of share capital and zero interest loans) as recorded by each SPV. However the misappropriated monies

recorded on Unity as received by the same European SPVs set out at Table 22 of the liquidator's grounding affidavit shows a significantly lower figure in the order of €13m with differences in the individual accounts. The liquidator explains this by reference to the monies advanced to Luxembourg lawyers; to the German banks; and from one SPV to another, none of which are booked on Unity. He also refers to the possibility that certain monies advanced from the Destiny Client Savings Account may be incorrectly recorded on Unity.

80. Recovery Option 1 would seek to have recovered misappropriated monies returned to the source of the misappropriation. The liquidator explained the nature of the detailed reconciliation which would be required such that each amount misappropriated could be returned to its probable source and the cost of same.

81. In Recovery Option 2 all recovered misappropriated monies would be pooled and returned to those accounts, unit trusts and other funds from which there were misappropriations *pro rata* to the total misappropriations from each such account, unit trust or fund. It does not require identification of the particular source of the recovered monies.

82. The liquidator explained in his affidavits, and I accept, that the reconciliations required for Recovery Option 2 are lesser, simpler, and would according to his estimates result in a saving in relation to the SPVs of approximately €467,000 in costs. The liquidator recommends to the Court Recovery Option 2. He confirmed this recommendation in his oral evidence following the factual clarifications made during the hearing. No client represented or appearing submitted in favour of Recovery Option 1. Submissions were made on behalf of Mr Day and Mr Corr in favour of a third option whereby a separate fund would be created into which all recovered misappropriated monies would be put and then those clients who might have an entitlement would be given a shareholding/unit in that fund. Whilst I have considered this it does not appear to be a cost effective and efficient practical option where misappropriated monies are recovered by a cash distribution from a SPV or Destiny fund.

83. Leaving to one side the costs and time involved, it is helpful to consider the end result for clients of each option. As already stated, the recoverable misappropriated monies are principally in Destiny syndicated property funds and European SPVs. The liquidator has helpfully set out the position in each in Tables 4 and 7 respectively which are appended to this judgment. As appears therefrom there are significant differences for the recoverability of misappropriated monies. For example, the Destiny property fund whose property was Los Colados in Spain received an estimated €20m in misappropriations and now has a zero net value and hence no possibility of recovery. By contra-distinction four European SPVs which held property known as Parkstadt Center and Hotel are estimated to have a net value as at December 2016 of €38.8m with estimated equity investment of €32.33m and misappropriated monies of €0.3m. Hence there will be significant recovery of the misappropriated monies paid to these European SPVs. Those Parkstadt properties have now been sold and the figures may be slightly different. Nothing turns on the precise figures. They are the European SPVs in which Mr O'Cofaigh invested. The Court was told that the monies are currently on deposit in this jurisdiction under the control of the directors of the SPVs.

84. In Recovery Option 2 all those clients who suffered by reason of misappropriated monies will benefit from the recovery from Parkstadt. If Recovery Option 1 was to be applied not all would benefit. Rather, those clients with claims either on the bank account or the unit trust or fund from which monies were misappropriated but put into Los Colados, might ultimately recover nothing whereas those clients who, it might be said were "lucky" to have their monies misappropriated into Parkstadt would recover at least in part.

85. Where the misappropriations occurred without knowledge or disclosure to the clients of CHC and without, on the evidence before me, any knowledge to be inferred to the clients of CHC which might have enabled them prevent such misappropriation, it appears to me that all the clients who suffered by reason of the wrongful misappropriations have equal equities to participate in the recovered misappropriated monies irrespective of where the monies were used or sent. The distribution to each client should not, it appears to me, depend upon the happenstance as to the fund into which their misappropriated monies were wrongfully transferred by CHC.

86. Whilst the Court should have regard to potential proprietary claims of the clients and the principles in relation to tracing this is not an application by an individual client who is able to identify a particular sum of money and trace it into a particular property. Rather it is the liquidator seeking directions from the Court as to how he should distribute those recovered misappropriated monies taken out of a pooled bank account or fund in a way which is least unjust and in the sense that it does justice between clients whose equities are equal.

87. In *Foskett v. McKeown & Ors*. [2001] 1 AC 102 Lord Millett in a majority opinion in the House of Lords considering the position of a beneficiary where a trustee wrongfully used trust monies as part of the cost of acquiring an asset, distinguished between the position of an innocent beneficiary and contributor as against the wrongdoer and any person claiming through him and other innocent contributors. Of the latter he stated at p. 132:

> "Innocent contributors, however, must be treated equally inter se. Where the beneficiary's claim is in competition with the claims of other innocent contributors, there is no basis upon which any of the claims can be subordinated to any of the others. Where the fund is deficient, the beneficiary is not entitled to enforce a lien for his contributions; all must share rateably in the fund.
>
> The primary rule in regard to a mixed fund, therefore, is that gains and losses are borne by the contributors rateably…"

88. In CHC all clients are innocent contributors. The level and nature of the misappropriations are so widespread and complex that it appears to me that to treat all clients equally *inter se*, the recovered misappropriated monies should be pooled and returned to the accounts, unit trusts and other funds *pro rata* to the total misappropriations from each such account, unit trust or fund. Thereafter, in accordance with the direction on pooled accounts they will be returned to the clients *pro rata* to their claims on pooled accounts, or the unit trust or fund.

89. Hence for those reasons I have concluded that Recovery Option 2 is the option which does justice or achieves the least unjust result between the relevant clients of CHC all of whose equities appear equal in relation to the misappropriations. It is also the one that can be carried out in a shortest space of time is simpler and hence more cost effective. Finally this direction also provides for a consistent approach to clients of CHC who suffered a shared misfortune, being treated equally where their equities are equal.

90. It is important to emphasise that the direction being given by the Court in relation to the distribution of recovered misappropriated monies only applies if and when the liquidator receives from a SPV or Destiny fund a payment in respect of misappropriated monies received by it from CHC. It is not a direction which authorises or requires the liquidator to take any particular steps in relation to a SPV or Destiny fund to which misappropriated monies were paid. This was an issue during the hearing. The clients object to any direction which would authorise or require the liquidator to procure the realisation of properties in a SPV or Destiny fund. I understood from the liquidator that it is accepted that such realisations are a matter for the directors or an investment manager of the relevant

SPV or Destiny fund. Further that once the Court rules on his MiFID costs application that he intends to take steps to disengage CHC from the property funds. This will require him to be satisfied that management fees are paid up to date and any claim for misappropriated monies (as reconciled and agreed by him) is fully acknowledged and provided for by the SPV or Destiny fund. This approach is consistent with the clients' desire that there not be a forced sale in advance of the time when it is commercially desirable. The expiry of Central Bank directions also assists this approach.

91. Finally on this issue I wish to make clear that this direction does not necessarily include recovery of monies lent by the Mezzanine Bond to SPVs of Destiny finds. The liquidator stated in evidence those advances require further investigation. Nor does it apply to the funds of the Beades or O'Callaghan Trusts.

MiFID costs

92. This application is made pursuant to regulations 157 and 158 of the MiFID Regulations. These provide:

> "Regulation 157
>
> (1) No liquidator, receiver, administrator, examiner, official assignee or creditor of an investment firm shall have or obtain any recourse or right against client money or client financial instruments or documents of title relating to such financial instruments received, held or paid on behalf of a client by an investment firm, until all proper claims of clients or of their heirs, successors or assigns against client money and client financial instruments or documents of title relating to such financial instruments have been satisfied in full.
>
> (2) Notwithstanding paragraph (1), a liquidator, receiver, administrator, examiner or official assignee may have recourse or right against client money or client financial instruments or documents of title relating to such financial instruments received, held or paid on behalf of a client by an investment firm in respect of such reasonable expenses as are incurred -
>
> (a) in the carrying out of their functions under these Regulations or under the Investor Compensation Act 1998, or
>
> (b) in the distribution of client money and financial instruments to clients of the investment firm where the assets of the investment firm have been exhausted.
>
> Regulation 158
>
> (1) A liquidator, receiver, administrator, examiner or official assignee shall apply to the Court before seeking recourse or right against client money or client financial instruments or documents of title relating to such financial instruments received, held or paid on behalf of a client by an investment firm under Regulation 157(2) and the Court shall determine the matter and make such order as the Court sees fit.
>
> (2) For the purposes of Regulation 157 and this Regulation, an investment firm is deemed to hold client money where -
>
> (a) the money has been lodged on behalf of a client of the firm to an account with a credit institution or relevant party in the name of the firm or of any nominee of the firm, and
>
> (b) the firm has the capacity to effect transactions on that account.
>
> (3) For the purposes of Regulation 157 and this Regulation, an investment firm is deemed to "hold" client financial instruments where the firm -
>
> (a) has been entrusted by or on account of a client with those instruments, and
>
> (b) either -
>
> (i) holds those instruments, including by way of holding documents of title to them, or
>
> (ii) entrusts those instruments to any nominee,
>
> and the firm has the capacity to effect transactions in respect of those instruments.
>
> (4) In this Regulation:
>
> "nominee" means a person acting on behalf of an investment firm as nominee, custodian, or otherwise, and includes an eligible custodian and a nominee company, and
>
> "relevant party" means an exchange, clearing house, intermediate broker, OTC counterparty or investment firm."

93. This is the first such application brought pursuant to Regulations 157 and 158. They are not easy provisions to interpret or apply. Nevertheless, the Court has not been assisted in this application by lack of clarity in the facts upon which the directions were being sought by the liquidator and the change in position taken by him or on his behalf in relation to certain matters.

94. First, in relation to the different classes of client assets identified in the grounding affidavit, the liquidator in his replying submissions of 15th June, 2017 clarified that he was not seeking any order to be entitled to have recourse to the remaining segregated client assets not distributed included in categories A.1 and A.7. The liquidator was then seeking an order which might permit him to have recourse to pooled client assets in categories A.2 to A.6.

95. Similarly, at the commencement of the oral hearing the submission made on behalf of the liquidator was that all the assets in categories A.2 to A.6 were assets in relation to which the Court could make an order under Regulations 157 and 158, and that the

liquidator was seeking an entitlement to have recourse to all such client assets. However in the course of the hearing, following questioning from the Court concerning the factual position in relation to the precise relationship of CHC with, in particular, the European SPVs, counsel on behalf of the liquidator indicated to the Court, correctly, that he was not in a position to pursue a submission on the facts before the Court that in relation to the SPVs there are "client financial instruments or document of title relating to such financial instruments" which were or are "received, held or paid on behalf of a client" by CHC within the meaning of Regulation 158(1) and 157(2). There were no detailed facts before the Court which would permit the Court to make any such determination.

96. Queries were also raised during the hearing, regarding the lack of information in relation to the relationship between CHC and Destiny unit trusts in particular by reason of the involvement of M&F Finance Limited in such entities. That is a company distinct from CHC which is not in liquidation. Again a question arises as to whether in relation to the Destiny unit trust the assets which fall to be distributed to the clients of CHC are ones in relation to which the Court may make orders under Regulation 157 and 158. Issues were also raised in elation to client assets which were pension products.

97. Leaving to one side the question as to the categories of client assets against which the Court might authorise the liquidator to have recourse, the first question which arises is whether on the facts now before the Court the Court may consider making an order pursuant to Regulation 158(1) by reason of the terms of Regulation 157(2)(b) which only permits a liquidator to have recourse to client assets" *"where the assets of the investment firm have been exhausted"*.

98. I accept the submission made on behalf of the liquidator that, in order for the jurisdiction given to the Court by Regulation 158(1) to be used in a way which enables an orderly winding up to be conducted by a liquidator, which involves distribution of client money and financial instruments, it must be interpreted as meaning that the Court has jurisdiction to make orders under Regulation 158(1) when a liquidator establishes on reasonable evidence that as a matter of probability the assets of the investment firm being wound up may be exhausted prior to meeting some or all of his reasonable expenses incurred in the distribution of client money and financial instruments. Whilst the Court may only permit the liquidator to have recourse to or a right against client money or client financial instruments where it is satisfied assets of the investment firm are exhausted, the application to the Court provided for under Regulation 158(1) and the jurisdiction given to the Court by that provision does not appear dependent on a proof at that time of the exhaustion of assets. Rather it is a precondition to the liquidator seeking recourse or right against the client money or client financial instruments. The jurisdiction given to the Court as to the form of orders which may be made is broad. It shall "determine the matter and make such order as the Court sees fit".

99. That jurisdiction appears to include, for example, the making of orders which would permit a liquidator when distributing client assets (which are monies) to retain a specified percentage or sum until such time as the final picture in relation to the assets of the company in liquidation and costs and expenses of the liquidator in relation to the winding up, including the distribution of client assets, becomes clear. Such an order should probably only be made where the court considered it may, if exhaustion of company assets occurs and the liquidator has relevant reasonable expenses not discharged, permit recourse to such client assets. It also permits the Court to decide, whether it would or would not grant an order permitting recourse to certain client assets in the event exhaustion is proved as is required by this application

100. Accordingly I am satisfied that the Court may now entertain this application by the liquidator, determine the application he currently makes to the Court, and also make such order as the Court sees fit.

101. The more difficult questions are what orders if any the Court should now make on the facts of this application and current position in the winding up.

102. The liquidator set out in Table 1 in his grounding affidavit the projected cash flow position as at 24th February, 2017 in relation to both income and expenditure up until 2020. In broad terms that indicates that if the Court were to direct the least costly reconciliation options (as is now done) that he estimates there would still be a projected shortfall of €1.2m in relation to what he estimates will be his reasonable remuneration and expenses to complete both the distribution of client assets and the company work in the liquidation. He submits that these estimates indicate that the assets of CHC will be exhausted and that the Court now has jurisdiction to make what is in substance a conditional order in his favour pursuant to Regulation 158(1). Without making any findings about the probable level of reasonable expenses or work required to be done, I am satisfied that the company assets may be exhausted prior to completion of all work in the liquidation particularly in relation to the recovery of misappropriated monies.

103. The liquidator seeks an order of an entitlement to have recourse to certain or all of the client assets within Classes A.2 to A.6. Insofar as many of those assets are not in liquid form it still is unclear to me how the liquidator envisaged he might have recourse to those assets. No submission was made as to how he might have an entitlement to do so. The Court was referred to Regulation 12 of the Investor Compensation Act 1998 (Return of Investor Funds or Other Client Property) Regulations 2015 (S.I. No. 407/2015) which provides for sales by a liquidator with the sanction of the Court. However it is agreed that these regulations do not apply to the winding up of CHC.

104. The principal submissions made on behalf of Mr Day and Mr Corr were to the effect that any application pursuant to Regulations 157 and 158 was premature. They contend that the remaining reconciliations and distributions are simpler than envisaged by the liquidator and that the Court should not be satisfied that the liquidator has established that there will necessarily be a shortfall such that the Court should regard the assets of CHC as likely to be exhausted. The submissions made on behalf of Mr Nugent are detailed and consider the jurisdiction given to the Court by Regulations 157 and 158 of the Regulations which were made for the purposes of giving effect in the State to Directive 2004/39/EC of the European Parliament and of the Council of 21st April, 2004 on Markets in Financial Instruments, as amended, and Directive 2006/73/EC of 10th August, 2006 as regards organisational requirements and operating conditions for investment firms and defined terms for Directive 2004/39/EC. The submissions made on behalf of Mr Nugent also object to the Court making any order which would enable the liquidator have recourse to any client monies or financial instruments having regard to a number of factual matters.

105. Mr O'Cofaigh, understandably, as a lay person did not make submissions on the proper interpretation of Regulations 157 and 158 or on this aspect of the liquidator's application.

106. I wish to consider first the legal basis upon which objection is made on behalf of Mr Nugent to any order permitting the liquidator to have recourse to client monies or financial instruments. Ms Donnelly, BL, on his behalf submits in accordance with undisputed authority that as the MiFID Regulations are made for the purpose of implementing the Directives they must be interpreted and applied "as far as possible in the light of the wording and purpose of the directive" to achieve the result of the Directive, see *inter alia* Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* EU:C:1990:395 and *Nathan v. Bailey Gibson Limited* [1998] 2 IR 162.

107. She also submits, correctly in my view, that the primary and overriding objective of Directive 2004/39/EC is to protect client assets (see Recitals (26),(31) and (71)). Article 13.7 of the MiFID Regulations states:

> "An investment firm shall, when holding financial instruments belonging to clients, make adequate arrangements so as to safeguard clients' ownership rights, especially in the event of the investment firm's insolvency, and to prevent the use of a client's instruments on own account except with the client's express consent."

108. It follows from this, she submits, that recourse to client assets to discharge reasonable expenses of liquidators in distributing same must be a measure of last resort. In this connection she also refers to judgments in this jurisdiction to similar effect: *Re W. & R. Murrogh* [2007] 4 IR 1 at p. 34 in relation to s. 52(5)(a) of the Stock Exchange Act 1995 and *Home Payments Limited and the Companies Act: Leahy* [2013] IEHC 507 in relation to trust monies.

109. Further she submits, again correctly in my view, that whilst exhaustion of client assets is a precondition to an order in favour of the liquidator that he have recourse to client assets it is not determinative that under Regulation 158(2) that such an order should be made. It only follows that the Court has discretion to make such an order and that the onus is on the liquidator to demonstrate to the Court that recourse to client assets is warranted and that he must put before the Court sufficient information and justify the making of the order in the context of the overarching objective of protection of client assets.

110. Finally she drew attention to the English Practice Direction, *Practice Statement: The Fixing and Approval of The Remuneration of Appointees* (2004), setting out guiding principles which has been endorsed by the English courts in cases such *as Hunt v. Yearwood – Grazette* [2009] EWHC 2112 (Ch) and *Brook v. Reed* [2011] EWCA Civ 331; [2012] 1 W.L.R. 419. As pointed out by Richards J. in the Court of Appeal in Brook at para. 44, that Practice Direction "is not an attempt to create a new set of principles, but a convenient means of gathering together in one place the principles to be derived from the Insolvency Rules and authority, including the most recent at that time, the judgment of Ferris J in *Maxwell*."

111. One of the guiding principles referred to by counsel clearly derives from the judgment of Ferris J. in Maxwell: Mirror Group Newspapers plc. v. Maxwell (No. 2) [1998] 1 B.C.L.C. 638, [1998] B.C.C. 324, namely that the remuneration of a liquidator should reflect "the value of the service rendered by [the liquidator] not simply reimburse [the liquidator] in respect of time expended and cost incurred." In *Maxwell* Ferris J. had stated: "Remuneration should be fixed, so as to reward value, not so as to indemnify against costs…" This principle had been cited with approval by Laffoy J. in the High Court in *Re Redsale Frozen Foods Limited (in receivership)* [2007] 2 I.R. 361 and followed and applied by me in *Re Mouldpro International Limited (in liquidation)* [2012] IEHC 418.

112. Whilst those principles apply to fixing the amount of remuneration of a liquidator, they are also of relevance it appears to me in determining whether the court should, pursuant to Regulations 157 and 158, permit a liquidator to have recourse to client assets.

113. There is one further principle referred to by counsel for Mr Nugent which I applied in the judgment delivered in the matter of *Home Payments Limited (in liquidation)* [2013] IEHC 507. That judgment concerned an application by joint liquidators *inter alia* that their remuneration and costs associated with reconciliation and distribution of customer monies held in trust by the company in liquidation could properly be charged to or deducted from the customer funds. I determined that it was permissible to do so following the approach of the High Court in England in *Re Berkeley Applegate (Investment Consultants) Limited* [1988] 3 All E.R. 71 and subsequent judgments. A second question then arose relating to the relative priority between the payment of the remuneration, costs and expenses of the liquidators for company work and client work in relation to the reconciliation and distribution of client funds out of the assets of the company.

114. In that case the liquidators sought an order pursuant to s. 244 of the Companies Act 1963 that the costs and expenses incurred in the liquidation in relation to company work should in effect be given priority for payment out of the assets of the company. I refused that application whilst acknowledging that the Court had a discretion under s. 244 of the 1963 Act in the case of an insufficiency of assets to satisfy liabilities to make an order for the payment of costs, charges and expenses incurred in the winding up "in such order of priority as the court thinks just." I concluded on the facts of that case that both sets of costs and expenses, for company work and client work should be paid with equal priority out of the assets of the company. The practical effect was that the liquidators were left with a portion of the remuneration which had been assessed and allowed in relation to the company work incapable of being met out of the assets of the company. It also had the effect of reducing the amount which they were permitted to deduct from the client assets for client work as a portion of this was paid out of the assets of the company.

115. This is a winding up to which s. 244 of the Act of 1963 applies, and similarly the Court has a discretion as to the order of priority in which costs, charges and expenses incurred in the winding should be paid out of the assets of CHC. At present there does not appear to me any basis upon which company work should be given any priority such that it be fully discharged out of company assets.

116. It is also necessary to emphasise that a person appointed as liquidator is entitled to have his reasonable remuneration determined by the Court in accordance with established principles and to have that remuneration paid out of the assets of the company in accordance with the priority given to the costs and expenses in a winding up by the Companies Acts, the Rules of Court and decided case law. Nevertheless, save in the exceptional circumstances where recourse is permitted to client assets, the ability of a liquidator to recover the amount of his reasonable remuneration fixed by a court is dependent upon the availability of assets of the company unless he has secured at the time of his appointment an indemnity from a third party. That was the position, of which the liquidator was aware, at the time he accepted his appointment as liquidator of CHC, and the position became clearer still following the judgment delivered in October, 2012.

117. There is one further principle which having regard to the above principles should guide a court in exercising the discretion given it by Regulation 158 of the MiFID Regulations . It must be exercised in a manner which is just and fair as between clients. This appears to follow for the same reasons as are earlier set out relating to the pro- rata distributions that persons who suffer a shared misfortune which affects their money or assets should be treated equitably inter se in relation to recovery. Any order permitting a deduction from client assets to discharge liquidation expenses reduces the amount recovered by a client .

Conclusion

118. I have concluded that the only order which should now be made pursuant to Regulation 158 of the MiFID Regulations is one which would enable the liquidator, if exhaustion of company assets is proved, to have recourse to client assets in the form of recovered misappropriated monies which become available for distribution to clients, such recourse should be limited to discharge of some or all of his reasonable expenses in relation to necessary reconciliation, recovery and distribution of such misappropriated monies. Subject to that exception I have concluded that no order should be made for the purpose of enabling or permitting the liquidator (in the event of an ultimate proof of exhaustion of company assets) to have recourse to any other of the client assets

identified in classes. A.2 – A.6 in his grounding affidavit. My reasons are primarily the following.

119. The liquidator brings this application in 2017 having been appointed in 2011 and becoming aware shortly thereafter of the paucity of company assets as distinct from client assets. By early 2012 he was aware of the problems facing him in relation to the discharge of his reasonable remuneration and expenses in connection with the work to be done to achieve an orderly winding up of CHC.

120. He correctly, as I have repeatedly said, decided that reconciliation and distribution of client assets formed part of the work which he was obliged to do as liquidator of CHC. He decided to do this work and made his first application in 2012 seeking to be permitted to obtain some remuneration by deduction from one class of segregated client assets and was unsuccessful. That application was not pursuant to Regulations 157 and 158.

121. He brought a further application in March, 2014 which included an application pursuant to Regulations 157 and 158 but ultimately did not proceed with same.

122. In the meantime he has reconciled and distributed segregated client assets in the order of €115m. There are segregated assets valued at approximately €30m remaining to be distributed. It appears that the reconciliation work in relation to same has been done. In this application the liquidator is not seeking any order that he be entitled to have recourse to any client segregated assets. He is only seeking to have recourse against one type of client assets, namely those which have been described as "pooled assets".

123. Notwithstanding that the client assets in categories A.2 – A.6 inclusive are termed "pooled assets", I would observe that on the information provided to me by the liquidator and the clients appearing, it is not clear to me that in respect of all categories each individual client's asset is significantly different to a segregated asset. I take as an example the interest of Mr O'Cofaigh in the European SPVs, Parkstadt Hotel SA and Parkstadt Center SA. In respect of each of those Luxembourg companies, he produced share certificates purportedly issued by each company showing him to be the holder of a specified number of shares and appearing to be signed by Mr Cassidy as a director of the company concerned. He also produced loan note certificates, again purportedly issued by each of the companies and signed by Mr Cassidy specifying that he is "the owner of a receivable against" the company concerned. I am also aware that the liquidator produced, by way of supplementary information, copies of the share register of the two other Luxembourg companies involved in this property fund, namely Parkstadt SA and Parkstadt Investor SA showing registrations in September, 2015 of CHC as the shareholder in those companies but with specified numbers which suggest a nominee holding for an individual client . I am not determining in any way that Mr O'Cofaigh's current relevant assets are the shares or loan notes in respect of which he produced the certificates. I am simply referring to these facts to demonstrate the lack of clarity in relation to the nature of the asset held by each individual client and the potential that each client has as an asset that might be considered to be somewhat similar to a segregated asset, namely an entitlement to a specified number of shares in a Luxembourg company or companies or to be a creditor of such a company in a specified amount. The claim of a client on a pooled bank account is I recognise different in nature.

124. The relevance is, however, that the liquidator decided in 2014 to distribute the remaining segregated client assets without seeking any order which would permit him to have recourse to any of the segregated assets then being distributed. There does not appear to me to be any objectively justifiable basis upon which the Court could now in general distinguish between those clients whose assets under management with CHC were considered to be segregated assets and those clients whose assets under management by CHC have been termed "pooled assets" insofar as the relevant client asset is not a claim to misappropriated monies .

125. All clients of CHC have suffered one common misfortune in the sense that an order for the winding up of CHC has been made; the affairs of CHC were subject to directions given by the Central Bank since at least 2010 and the clients have not had access to their remaining client assets by reason, in part, of those directions and the need for reconciliation and distribution of the assets to be conducted by the liquidator. If the Court were now to make any order which would ultimately permit the liquidator to have recourse against the assets in categories A.2 – A.6 inclusive which are now available for distribution to the clients entitled following any necessary reconciliation in relation to those assets, those clients would be treated differently and less favourably than were the clients who either have already had their segregated assets distributed to them or whose segregated assets still require to be distributed. Those clients got or are getting their assets without any deduction for liquidator's expenses.

126. For the reasons set out earlier, the equitable principles that clients or investors who share a common misfortune should be treated equally by a rateable distribution also appear to me to be principles which should, in addition to the other principles cited, govern the exercise of discretion in the making of any order pursuant to Regulation 158. The clients, whose assets fall within classes A.2 – A.6 inclusive, should be treated, in relation to any potential deduction from those assets available now for distribution, in the same way as those clients whose assets were considered to be segregated assets. This latter class suffered no deduction in the net value of the assets available for distribution by reason of costs. It cannot, it appears to me, be said that the work which the liquidator must do in reconciling and distributing the pooled assets currently available to those entitled brings any different value to the clients in question than the value brought by the work done for the clients who held segregated assets. What the liquidator is doing in each situation is determining whether the client is entitled to identified assets remaining under the control or management of CHC which are now available for distribution to the client and organising the relevant distribution.

127. In reaching this conclusion I have considered carefully the submission that the misappropriation of monies from certain of the pooled assets such as the pooled bank accounts and Destiny funds and their payment into certain SPVs and Destiny funds may make the reconciliation work of the entitlement of each individual client to those assets more difficult than was the position in relation to segregated assets from or to which there do not appear to have been misappropriations. However that fact of itself does not appear to me to justify distinguishing between, in global terms, the position of clients who held segregated assets and those whose client assets have been termed pooled assets. As the facts in Tables 4 and 7 attached disclose, there are certain Destiny Syndicated Property Funds and European SPVs into which there were no misappropriated monies placed. Hence, at very minimum, the reconciliation and distribution work for the clients having an interest in those funds or European SPVs cannot be distinguished from the position of the clients who were entitled to segregated assets. Should the clients entitled to interests in those funds be differentiated from those with an interest in SPVs or Funds to which misappropriated monies were paid? I think not . A different approach to recovered misappropriated monies, is however justified as set out below.

128. The final reason to which I wish to refer is the fact that many of the European SPVs and Destiny Syndicated Property Funds have continued during the course of the liquidation to pay management and other fees to CHC in accordance with their contractual arrangements with CHC. Whilst a portion of that income has been retained by BCWM pursuant to the sub-management agreement, a portion of it has been received by CHC. The liquidator in his supplemental affidavit has set out the receipts in the liquidation from 21st October, 2011 to 31st March, 2017. This indicates that, since commencement of winding up contractual management fees from European SPVs and Destiny Syndicated Property Funds in the order of €1.9m have been received whilst the contractual management fees from segregated properties and segregated miscellaneous assets were in the order of €0.6m. As appears since the

commencement of the winding up, the European SPVs and property funds have contributed the greater part of the income to the liquidation which in part has been and will continue to be used to discharge the liquidator's fees for company work and in part in respect of the work done on segregated assets.

129. Insofar as the pooled bank accounts from which there were most misappropriations are concerned I recognise that there may be additional reconciliation work required but it appears from the liquidators oral evidence that such work will also be part of the necessary reconciliation work to enable the liquidator locate and recover the misappropriated monies and when recovered be distributed *pro rata* in accordance with the direction earlier given. The reasonable expense of such work forms part of what may ultimately be permitted to be recovered from the pool of misappropriated monies prior to distribution.

130. I would add that in the course of the hearing it became clear that in respect of certain of the pooled assets, in particular the property funds which did not receive misappropriated monies, the further work required to disengage CHC from its contractual or other relationship may be limited and following the expiry of the Central Bank directions, less than anticipated. It is to be hoped that what is termed "distribution" but which in reality may be only a termination or transfer of the contractual relationship of CHC with the Destiny Unit Trust or European SPV to another investment manager may be achieved expeditiously and with less expense than estimated by the liquidator. The liquidator in his oral evidence indicated that this should be capable of being done prior to the end of 2017.

131. There is, however, a distinction it appears to me, to be made in respect of the work which the liquidator will now do in necessary additional reconciliation and other work to recover for the benefit of certain clients misappropriated monies transferred into European SPVs and Syndicated Property Funds and other unit trusts. Those monies are not now available for distribution to the clients with a potential entitlement to same. These clients have suffered between themselves a second common shared misfortune not suffered by other clients of CHC insofar as monies entrusted by them to CHC have been misappropriated and used for purposes which they never authorised. The recovery of these monies from their ultimate destination is additional work which the liquidator has undertaken to perform as part of the distribution of client assets in the winding up of CHC. It will undoubtedly be of significant value to the clients insofar as it is successful. If the liquidator does not undertake this work the individual clients or possibly groups of clients would have to attempt to make claims against the relevant European SPVs or Destiny Property Funds with a view to recovering monies. This would be, I recognise, an almost impossible task. This is additional work to the work which required in the distribution of assets which are now available and under the control of CHC.

132. How and when the liquidator may recover these monies will depend upon the circumstances of the relevant European SPV or Destiny fund. In certain instances the SPV or fund may be in a position to transfer a sum of money to the liquidator at the same time as it is distributing cash to the clients entitled as in the case of the Parkstadt companies where the properties have already been realised. In other instances, as discussed in the course of the hearing, the liquidator may initially have to reach agreement as to when and how either monies or property representing the misappropriated monies will be transferred to him. No direction has been sought or is being given on this application as to how this should be done . It may vary between different SPVs or Destiny Funds.

133. Once the misappropriated monies are recovered by the liquidator or he has reached agreement with the relevant European SPV or Destiny Fund in a manner which acknowledges the right of CHC on behalf of the clients concerned to receive at some point in the future a distribution which represents the value distributable in respect of those monies it appears as a matter of probability that CHC will then be deemed to hold client money or client financial instruments within the meaning of Regulation 158 (2) or (3) such that orders may be made, if on the facts then available, the Court considers it appropriate to give the liquidator recourse to or a right against such monies or financial instruments in respect of such reasonable expenses as he may incur in the necessary additional reconciliation, recovery and distribution of misappropriated monies.

134. The present estimate is that there is approximately €27.8m recoverable in respect of misappropriated monies. It is not appropriate at this stage to indicate what sum or percentage might be withheld from a distribution of such recovered monies on account prior to a final order under Regulation 158. That will have to be the subject of a further application.

135. Accordingly, I have concluded that the Court should now grant a declaration that it is satisfied that in the event that the assets of CHC are exhausted without discharge of the reasonable expenses of the liquidator incurred in the work done necessary for the reconciliation, recovery and distribution of misappropriated monies that the Court will make an order pursuant to Regulations 157 and 158 permitting the liquidator to have recourse to recovered misappropriated monies (or financial instruments representing sums due in respect of misappropriated monies) to discharge some or all of such reasonable expenses of the liquidator. Both the amount of the reasonable expenses potentially covered by this declaration and the percentage of same in respect of which recourse may be permitted remains for decision on a future application

136. In order to give effect to this declaration, it also appears necessary to direct that henceforth the liquidator should keep a separate record of the expenses incurred by him in such necessary reconciliation, recovery and distribution work of misappropriated monies.

137. The final issue on MiFID costs related to the assets to which different expenses were to be charged –"costs options 1 or 2" . In the light of the limited right of recourse potentially permitted by this judgment, and having regard to the decision reached on the method of distribution of recovered misappropriated monies, I have concluded that recoverable expenses should be charged against the pool of recovered misappropriated monies before their *pro rata* distribution.

138. By reason of these conclusions it is unnecessary for me to consider and determine whether all of the assets listed in the classes A.2 – A.6 are within the type of assets in respect of which the Court could have ultimately made an order pursuant to Regulation 158. Nor is it necessary to decide whether such an order may be made in relation to pension products such as PRSAs or ARFs. Finally it is not necessary to decide, at this point, whether the jurisdiction given the Court by Regulation 158 includes making an order which would permit a liquidator to sell a client asset to give effect to a right of recourse.

O'Callaghan and Beades trusts

139. The Governor and Company of Bank of Ireland, as trustee of a trust known as the O'Callaghan trust, and Noel Murphy and Jeanne Cullen as co-trustees of a trust known as the Beades Trust, sought to intervene, put evidence before the Court and make submissions in this application. However, ultimately it was accepted by counsel on their behalf that they did not have any application before the Court upon which the Court could make a determination in this application for directions by the liquidator.

140. Each of the trusts appear to have suffered a similar fate. In respect of each trust the Governor and Company of Bank of Ireland had been a trustee of the trust prior to 2009 or 2010. On differing dates Bank of Ireland resigned as trustee and a company ARF Management Limited (ARF) was appointed as a trustee of the trust. At that time ARF shared a registered office with CHC and had directors in common with CHC, including Mr Cassidy who appears to have managed ARF. Its business was to provide trusteeship

services including the administration of trust funds.

141. The evidence adduced on behalf of each trust indicates that significant sums of money which belonged to each trust were, it would appear, transferred to certain of the European SPVs and other funds established by CHC.

142. The primary concern of the current trustees of each of the trust was to ensure that any direction given by the Court in this application would not prejudice the claims which each trust is seeking to make in an attempt to recover in whole or in part monies which they consider were misappropriated from the trusts and which they may be capable of tracing into certain of the European SPVs and other funds managed by CHC.

143. Correspondence has been exchanged with the liquidator who has acknowledged the probability of certain monies appearing in the accounts of European SPVs having originated in the trusts. I do not consider that any order made or direction given pursuant to this judgment prejudices in any way the position of any claim which either trust is seeking to pursue. I have expressly stated that the direction to be given in relation to distribution of recovered misappropriated monies does not in terms apply to the trust claims. In the course of the hearing I made clear that it remains a matter between the trusts and the liquidator in the first instance to ascertain whether agreement can be reached in relation to the claims being made by the trusts. If and when any agreement is reached, as this is a winding up by the Court it may be open to the liquidator to seek sanction from the Court for any compromise reached. It is an unusual situation insofar as the claims are not being made by the company in liquidation but rather by client assets which remain under the control or management of the liquidator of CHC. In any application for approval of a compromise, consideration would have to be given as to whether some other party affected by the compromise would have to be put on notice.

Conclusions

144. For the reasons set out in this judgment in summary the conclusions which I have reached on the issues before the Court are as follows.

> 1. The monies standing to the credit of pooled bank accounts should not be distributed in accordance with the so-called rule in Clayton's case as it would be neither just amongst the clients or claimants on those accounts nor convenient on the facts. On the facts of this liquidation the pro rata distribution is the one which appears to do justice as between all the claimants on the pooled bank accounts. The equities between all appear equal. They all suffered the shared misfortune of monies being misappropriated from the pooled sums in the account. There is nothing on the facts which suggests that any client or group of clients has a greater equity than other clients to the return of monies remaining in the accounts.
>
> 2. It follows that a direction will be given that the monies remaining in the pooled bank accounts and the Destiny pooled accounts should be distributed by the liquidator pro rata to the claim of each client or account holder.
>
> 3. All recovered misappropriated monies should be pooled and returned to those accounts, unit trusts and other funds from which there were misappropriations, pro rata to the total misappropriations from each such account, unit trust or fund.
>
> 4. I have concluded that the only order which should now be made pursuant to Regulation 158 of the MiFID Regulations is one which would enable the liquidator, if exhaustion of company assets is proved, to have recourse to client assets in the form of recovered misappropriated monies which become available for distribution to clients, such recourse should be limited to discharge of some or all of his reasonable expenses in relation to necessary reconciliation, recovery and distribution of such misappropriated monies. Subject to that exception I have concluded that no order should be made for the purpose of enabling or permitting the liquidator (in the event of an ultimate proof of exhaustion of company assets) to have recourse to any other of the client assets identified in classes. A.2 – A.6 in his grounding affidavit.
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> 5. The Court will, accordingly, now grant a declaration that it is satisfied that in the event that the assets of CHC are exhausted without discharge of the reasonable expenses of the liquidator incurred in the work done necessary for the reconciliation, recovery and distribution of misappropriated monies that the Court will make an order pursuant to Regulations 157 and 158 of the MiFID Regulations permitting the liquidator to have recourse to recovered misappropriated monies (or financial instruments representing sums due in respect of misappropriated monies) to discharge some or all of such reasonable expenses of the liquidator. Both the amount of the reasonable expenses potentially covered by this declaration and the percentage of same in respect of which recourse may be permitted remains for decision on a future application
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> 6. In order to give effect to this declaration, it also appears necessary to direct that henceforth the liquidator should keep a separate record of the expenses incurred by him in such necessary reconciliation, recovery and distribution work of misappropriated monies.

145. I will hear the parties in relation to the need for any further consequential directions or orders having regard to this judgment and in relation to costs.