Neutral Citation Number: [2021] EWHC 1542 (Ch)

Claim No: CR-2021-000510

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 8 June 2021

Before:

ROBIN VOS
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

- -

ADRIAN HYDE
RICHARD TOONE **Applicants**
ADRIAN RABET
(Joint Administrators of BetIndex Limited)

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- -

LEXA HILLIARD QC (instructed by **Bird & Bird LLP**) appeared for the **Applicants**
ANTHONY DE GARR ROBINSON QC and **MICHAEL KOTRLY** appeared for **H&J Director Services 1 Limited** as representative of certain beneficiaries of a trust

Hearing date: 21 May 2021

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Approved Judgment

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

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 8 June 2021 at 10.30am.

DEPUTY JUDGE ROBIN VOS

INTRODUCTION

1. BetIndex Limited is a Jersey company. It carries on business as a betting operator and is regulated by the Jersey Gambling Commission and the UK Gambling Commission.

2. Following a letter of request from the Royal Court in Jersey, Deputy ICC Judge Kyriakides made an administration order on 26 March 2021 appointing the applicants as joint administrators of BetIndex.

3. In order to safeguard funds belonging to its customers, BetIndex maintained a separate client money bank account held for the benefit of its customers (of which there are approximately 280,000) under the terms of an express trust set out in a Deed of Trust dated 18 February 2020. At the date the administration order was made, the amount in that bank account was approximately £4.5 million which is now held by the Viscount's Office of the Royal Court in Jersey.

4. The administrators have made an application for directions under paragraph 63 of schedule B1 Insolvency Act 1986 for directions in relation to the distribution of the funds held subject to the trust. For reasons which will become apparent, the timing of any distributions and the way in which the amounts due to each customer are calculated will have an impact on the amount each customer receives.

5. I am acutely conscious that, whatever I decide, there will be winners and losers. However, the court's task is to determine objectively the correct interpretation of the trust deed and to make appropriate directions in the light of that. In this context, it is important to note that neither the administrators nor the representative mentioned below have any financial interest in a particular outcome. I am satisfied that, between them, they have properly put the competing arguments before the court.

PROCEDURAL BACKGROUND

6. The administrators' application was made on 30 April 2021. On 10 May 2021, ICC Judge Jones ordered that the application should be heard on an expedited basis before a High Court Judge. Judge Jones was satisfied that the joint administrators could put

forward arguments on behalf of those customers who would be better off if the date for calculating entitlements to the trust assets is 26 March 2021 (or earlier) and that a representative should be appointed under CPR Rule 19.7 to represent the interest of those customers who would be better off if the date for calculating such entitlements were some later date.

7. Judge Jones made an order on 11 May 2021 appointing the representative, H&J Director Services 1 Limited to represent those customers. Although he recognised that there are different sub-groups of customers who would be represented by H&J and who will be affected differently by the outcome of the application, he was satisfied that it was both just and proportionate for there to be a single representative to put forward the necessary arguments. One effect of this order is that all those customers will be bound by the decision of the court.

8. The order made by Judge Jones on 10 May 2021 included provision for publicising the proposed hearing on BetIndex's website and for receiving representations from any customers who wish to do so. A number of representations have been received which have been included in the bundle of documents prepared for the hearing and which I have reviewed. It is clear from those representations that there are opposing and strongly-held views based on the circumstances of each individual customer.

9. At the start of the hearing, I made on order under CPR Rule 19.7 appointing the administrators as representatives of those customers with an interest in arguing that the date for calculating the entitlements to the funds held subject to the trust should be the date of the administration order (26 March 2021) or earlier. Given the order already made by ICC Judge Jones for publicising this hearing and the positions which would be put forward at the hearing, I considered it would further the overriding objective of dealing with cases justly and at a proportionate cost to do so in order to ensure that the decision of this court would be binding on all customers in relation to the trust.

BETINDEX'S BUSINESS

10. BetIndex operates a betting platform under the name Football Index. It is a slightly unusual arrangement which, whilst clearly betting, is designed to have some similarities in appearance with buying and selling a portfolio of shares.

11. Customers are known as traders (I use both those terms in this judgment but they mean the same thing). A trader places a bet by buying a three year share in a football player. The winnings come in the form of dividends which are paid depending on the player's performance on the field and on the number of mentions they get in the media. Traders can sell their share in a player to another trader, the price of a share fluctuating as a result of the performance of the player (and therefore the likelihood of winning dividends).

12. BetIndex's income derives from the amount initially paid by a trader for a share as well as a 2 per cent commission charged when shares are sold by one trader to another.

13. Each trader holds an account with BetIndex. That account holds the shares in the players which they have purchased as well as a cash balance. The cash balance consists of money deposited by the trader which has not yet been used to place bets (i.e. to purchase shares in players), winnings in the form of dividends and the proceeds of sale of shares. Traders are free to withdraw cash from their account at any time. Dividends are typically credited to the trader's account the day after they become due although it can take longer than this.

14. Clause 11 of BetIndex's terms of use explain the protections in place in relation to a trader's cash balance and provides as follows:

"**11. YOUR FUNDS**

11.1. We are required under the terms of our British licence to inform you about what happens to funds which we hold on account for you, and the extent to which funds are protected in the event of insolvency, according the British Gambling Commission's rating system (which can be seen at http://www.gamblingcommission.gov.uk/for-the-public/Your-rights/Protection-of-customer-funds.aspx).

11.2. Your Cash Balance is held within a standalone trading account held in the name of BetIndex Limited and in reserve funds which we hold with our payment processors. This account is separate to BetIndex Limited's general trading account and is used for all of BetIndex Limited's users. Only trading deposits and withdrawals will be processed within this account. We have also put in place trust arrangements with

our bank to ensure funds in this account are distributed to customers in the unlikely event of insolvency. This means that steps have been taken to protect your funds but that there is no guarantee that all funds will be repaid in the event of insolvency. This meets the regulatory requirements for the segregation of user funds at the level: Medium Protection.

11.3. However, once you have purchased Shares, the applicable value of your Shares have been 'wagered' and are not stored in any account or otherwise protected as they are sums at risk."

15. Although the terms of use give the impression that deposits and withdrawals will be processed through the client account held under the terms of the trust, in fact such deposits and payments have in practice been made through BetIndex's general trading account. Instead, BetIndex carries out a regular reconciliation of client funds and, on a weekly or monthly basis, transfers an appropriate amount from its general trading account to the client account or from the client account to the trading account. The amounts to be transferred are calculated so that there is a buffer in the client account over and above the aggregate amount of the traders' cash balances at the relevant time. This ensures that, even though the transfers only take place periodically rather than on a daily basis, the amount in the client account would not fall below the amounts due to the customers (which would result in BetIndex being in breach of its licence conditions).

16. Due to BetIndex's financial position, it suspended the platform on 11 March 2021 and its licences were withdrawn. As part of this, BetIndex prevented traders from depositing any further funds, froze their ability to withdraw funds and prevented any further sales of shares between traders.

17. It is unnecessary for me to go into any detail about BetIndex's business model and the reasons for the administration order. One important point however is that, following the administration order, the contracts between the traders and BetIndex remain in place with the result that traders continue to be entitled to winnings in the form of dividends on an ongoing basis until the three year period of the share in the player which they have purchased expires.

18. At the time of making the application for the administration order, it has been calculated, that although the amount in the client account was approximately £4.5 million, the aggregate amount due to customers was about £3.2 million. No funds have been added to the client account since the platform was suspended on 11 March 2021. However, as a result of the ongoing entitlement to dividends, by 22 April 2021, the cash balances due to the customers exceeded the amount in the client account. Dividends continue to accrue at a rate of approximately £500,000 a month.

19. The strategy of the administrators is to enable the business to continue by agreeing arrangements with the existing creditors (a company voluntary arrangement) and to secure new funding based on a different business model. If the administrators are successful, they have estimated that the traders might recover approximately 20 pence in the pound in respect of their unsecured claims. This compares with an estimate of 8 pence in the pound if the company were to be put into liquidation.

20. The importance of the timing of any calculation of entitlements in respect of the funds held subject to the trust relates to the impact of the ongoing winnings in the form of dividends which continue to accrue. If the entitlement of the traders is calculated for example as at the date that the company was put into administration on 26 March 2021, all of the traders who were owed money at that point would recover the full amount due to them. On the other hand, those traders who had purchased shares more recently and were expecting to receive winnings over the next three years would recover much less from the trust assets as they may have had very little in the way of actual entitlements on 26 March 2021. They would however still have a claim as unsecured creditors in respect of their expectation of future winnings, but, as mentioned above, would potentially only recover 20 pence in the pound.

21. At the other extreme, if distributions and calculations are deferred until rights in respect of all outstanding shares expire in three years' time, those traders who have purchased shares recently are likely to be better off as they will share pro rata in the trust funds in respect of future dividends. I was not provided with any figures as to how much better off they would be compared to claiming as unsecured creditors of BetIndex. It is however clear that their claims would significantly exceed the funds held in the trust and so they would still need to make claims as unsecured creditors. Those traders who held cash balances at 26 March 2021 but only held a small number

of shares (or no shares) or whose shares were close to their expiry date would be worse off as, instead of getting the full amount of their cash balances paid to them, they would also only share pro rata in the available funds held by the trust and would have to claim as unsecured creditors in respect of any balance.

THE TRUST DEED

22. I turn now to the terms of the Trust Deed itself. The Deed is dated 18 February 2020 and is made by BetIndex. It is governed by English law.

23. The Deed extends to only three pages and a copy of the full document is contained in the appendix to this judgement. However, the key provisions are as follows:

"**Background**

(A) ….

(B) The Company wishes to put in place arrangements to provide 'medium' level protection for Customer Funds in accordance with the rating system of the British Gambling Commission. As a result it wishes to procure that the amount of the Customer Funds from time to time stands credited to the Client Bank Account in order to become Client Bank Account Monies."

"**1 Interpretation**

…

Customer: each person who has any entitlement against the Company in respect of any Customer Funds;

Customer Funds: the aggregate value of the funds from time to time held by the Company to the credit of its customers, including without limitation:

(1) cleared funds deposited with the Company by customers to provide stakes for, or to meet participation fees in respect of, future Bets;

(2) Bet winnings or prizes which the relevant customer has chosen to leave on deposit with the Company or for which the Company has yet to account to the relevant customer; and

(3) any crystallised but as yet unpaid loyalty or other bonuses in respect of any customer, in each case irrespective of whether the Company and the customer are party to any Bet;

….

Insolvency Event: any of the following procedures in relation to the Company:

(a) the making of a winding-up order;

(b) the passing of a resolution for voluntary winding-up;

(c) the entry into administration;

(d) the appointment of a receiver or manager of its property;

(e) the approval of a proposed voluntary arrangement (being a composition in satisfaction of debts or a scheme of arrangement);

(f) the making of any deed of arrangement for the benefit of creditors; or

(g) the conclusion of any composition contract with creditors;

…..

1.2 Any phrase introduced by the terms including, include, in particular or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms."

"2. **Deed of Trust Holding and Related Undertakings**

2.1 The Company hereby irrevocably declares that it holds all right, interest and title that it possesses at any time to the Client Bank Account Monies on trust for:

2.1.1 the Customers according to their entitlement to Customer Funds and pro rata to such entitlement to the extent that there is any deficiency; and

2.1.2 as to any balance remaining after (and only after) all claims of the Customers have been finally and irrevocably paid in full, the Company itself.

2.2 Where there is an Insolvency Event:

2.2.1 the claims of Customers are to be paid from the Client Bank Account Monies in priority to all other creditors; and

2.2.2 until all the claims of Customers have been paid in full, no right of set-off or Security Right may be exercised in respect of the Client Bank Account Monies except (if agreed with the relevant bank) to the extent that the right of set-off relates to fees and expenses in relation to operating the Client Bank Account."

INTERPRETING A TRUST DEED

24. It is clear that the same principles apply when interpreting a trust deed as apply to the interpretation of a contract. Lord Neuberger summarised the principles in *Marley -v- Rawlings* [2015] AC 129 [at 19] as follows:

> "When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions."

25. He confirmed [at 20] that the same approach should be applied to wills (which is what he was dealing with in that case):

> "When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context."

26. The same principles have been applied in relation to trusts in a number of subsequent cases (see for example *First National Trustco (UK) Limited -v- Page* [2019] EWHC 1187 [at 68-70]; *Millar -v- Millar* [2018] EWHC 1926 (CH) [at 17-23]; *Fafalios -v- Apodiacos* [2020] EWHC 1189 (Ch) [at 31-33]; and *First National Trustco (UK) Limited -v- McQuitty* [2020] EWCA Civ 107 [at 30-33]).

27. One point I should note at this stage is that each customer has entered into an agreement with BetIndex which includes the terms of use mentioned above. A customer's contractual rights against BetIndex will of course be different to any rights they may have under the terms of the trust. I am concerned only with any rights in relation to the trust although the trust must be interpreted taking into account the terms of use as part of the circumstances known to BetIndex at the time it made the trust.

THE ISSUES TO BE DETERMINED

28. The key issues raised by the administrators' application are as follows:

    28.1 Should the trust assets be distributed now or should this only be done once all of the rights in relation to the existing shares expire (in just under three years' time)?

    28.2 If the funds should be distributed now, what is the date at which the entitlements of the customers should be calculated?

    28.3 Should the calculation of a customer's entitlements take into account potential future dividends?

    28.4 If there is a surplus, should it be paid to BetIndex or retained in the trust to meet future obligations to its customers?

WHEN SHOULD THE FUNDS BE DISTRIBUTED AND ON WHAT DATES SHOULD ENTITLEMENTS BE FIXED?

29. Both parties agree that the interests of the customers in the trust fund vary on a daily basis as the amount of their "Customer Funds" changes. This is clear from clause 2.1.1 of the Trust Deed which provides that the trust assets are held on trust for "the Customers according to their entitlement to Customer Funds".

30. This does not of course matter as long as BetIndex is solvent and customers are paid what they are owed when they make withdrawals from their accounts. It is however necessary to fix a date when the entitlements of the customers are to be calculated in circumstances where there is not enough money to go round as clause 2.1.1 goes on to

provide that the trust funds are held for the Customers pro rata to their entitlement to Customer Funds to the extent that there is a deficiency.

31. The problem in this case is that, on the face of it, there is no mechanism in the Trust Deed for fixing the date at which the entitlements should be calculated in these circumstances.

32. The administrators submit that funds should be distributed as soon as possible based on entitlements as at 26 March 2021 (the date of the administration order). The representative however submits that distributions and entitlements should be deferred until all winnings in respect of the existing shares have been quantified in approximately three years' time or that, if distributions are to be made now, the entitlements should be fixed at the date of the distribution and not the date of the administration order.

33. Ms Hilliard QC, representing the administrators, relies primarily on clause 2.2 of the trust deed which provides as follows:

> "2.2 Where there is an Insolvency Event:
>
> 2.2.1 the claims of Customers are to be paid from the Client Bank Account Monies in priority to all other creditors;"

34. She submits that, read in the light of the purpose and the context of the trust this means that once an Insolvency Event occurs (in this case, the entry into administration) the trust funds should be distributed to the customers who have entitlements at that time. She relies on the use of the present tense "are" in clause 2.2.1 which, she suggests, strongly indicates that it is only those customers who have an entitlement at the date of the Insolvency Event who should receive payments out of the trust assets.

35. In support of this submission, Ms Hilliard draws attention to the purpose of the trust as set out in Recital (B) of the Trust Deed. This explains that the trust is intended to provide "medium" level protection for funds belonging to customers in accordance with the rating system used by the British Gambling Commission. The British

Gambling Commission's "insolvency rating system and advice note for operators" defines [at 3.5] "medium protection" as follows:

> "customer funds are kept in accounts separate from business accounts; and arrangements have been made to ensure assets in the customer accounts are distributed to customers in the event of insolvency."

36. The focus therefore, says Ms Hilliard, is on the protection of customer funds in the event of insolvency which points to the date of the relevant Insolvency Event as being the relevant date for calculating entitlements.

37. Ms Hilliard notes that Recital (B) goes on to record that the amount of Customer Funds "from time to time" should be reflected by the amount held in the client account and therefore subject to the terms of the trust. In her view, this reinforces the argument that the entitlement of the customers to share in the trust assets should be measured at the date of the relevant Insolvency Event.

38. Ms Hilliard recognises that there could be more than one Insolvency Event in accordance with the definition contained in the Trust Deed. However, this does not, she suggests, affect the interpretation of clause 2.2.1 which simply fixes the date for ascertaining the entitlement to any funds held in the client account as being the date of the first Insolvency Event.

39. Mr de Garr Robinson QC on the other hand argues on behalf of the representative that, if Ms Hilliard's interpretation of the Trust Deed is correct so that entitlements are to be calculated as at the date of the administration order on 26 March 2021, this would be an afront to common sense and fairness as it would mean that the "surplus" of over £1 million held in the client account at that date would be paid to the company in circumstances where, in reality, there is no surplus at all given that the amounts now owed to customers exceed the amount held subject to the terms of the trust.

40. Although customers who are still owed money following the distribution of the trust assets would be able to claim against the company as unsecured creditors, Mr de Garr Robinson makes the point that not all of the creditors of the company are customers so that some of the funds held by BetIndex will be shared with those other creditors. He does however acknowledge that the overwhelming majority of creditors (both in

number and in terms of the overall amount owed to creditors) are in fact the customers.

41. Mr de Garr Robinson agrees with Ms Hilliard that the commercial purpose of the trust is to protect client funds in the event of the insolvency of the company. Indeed, he goes further than Ms Hilliard and submits that, whilst customers have a contractual right as against BetIndex to withdraw funds which are held on their behalf, they have no right to make a direct claim as beneficiaries of the trust. This, he says, is apparent from clause 2.1.1 of the Trust Deed which makes it clear that the trust assets are held for the benefit of the customers collectively rather than individually and that customers may not get back all of their money if there is a deficiency.

42. Based on this, Mr de Garr Robinson submits that the Trust Deed anticipates that payments will only be made out of the trust assets after an Insolvency Event has occurred.

43. Mr de Garr Robinson also stresses the distinction between a customer's contractual rights against BetIndex and any rights in relation to the trust. A customer has a right under their contract with BetIndex to withdraw their cash balance at any time. However, the cash balance held in a customer's account might be different to the amount of their "Customer Funds" for the purposes of the Trust Deed. This is because the Customer Funds include dividends which have been earned even if they have not yet been credited to the customer's cash balance (normally a day or so after the dividend becomes due or, in some cases, possibly longer).

44. Mr de Garr Robinson notes that this distinction between a customer's contractual rights and their rights in relation to the trust are reflected in a way in which the arrangements are operated in practice. No deposits or withdrawals are made by or to a customer direct from the trust assets. Instead, deposits and payments are made to and from BetIndex's general trading account. On a periodic basis BetIndex then calculates the net position in relation to Customer Funds and either tops up the client account or makes a withdrawal from the client account. Mr de Garr Robinson argues that, on this basis, the arrangements depend for their commercial effect on no direct payments being made to the customers from the trust assets in the absence of an Insolvency Event.

45. Turning to the Trust Deed, Mr de Garr Robinson's submission is that none of the provisions of the Trust Deed fix a specific date for the calculation of the entitlements to the trust assets. Looking first at clause 2.1, this contains no suggestion for any date for ascertaining such entitlements. As far as clause 2.2 is concerned, this explains what happens "where" there is an Insolvency Event not "when" there is an Insolvency Event. It is, he says, therefore just a condition which must be satisfied before any payments can be made to customers not a stipulation as to the timing at which any entitlements are to be calculated. There is, he submits, nothing in the plain wording of clause 2 which fixes the date for the calculation of any entitlements as being the date of an Insolvency Event and, he suggests, there is no good reason for reading such words into the Trust Deed.

46. By way of illustration, Mr de Garr Robinson imagined a situation where a receiver had been appointed in relation to a specific property held by BetIndex or a short term cashflow issue which had resulted in the making of an administration order. In both of these situations, Mr de Garr Robinson suggested that, if BetIndex was able to continue to carry on its business, there is no reason why it should not continue making payments to and from the client account held under the terms of the trust and that there is no reason why the terms of the trust should trigger an automatic entitlement to distributions at the date of the Insolvency Event. Instead, the trustee should have the ability to defer payment.

47. Bearing all of this in mind, the question which Mr de Garr Robinson poses is whether a reader of the Trust Deed who is aware of all of the relevant background circumstances would understand it as requiring entitlements to be fixed at the date an Insolvency Event occurs. He submits they would not.

48. Mr de Garr Robinson accepts that, if he is right, there is nothing in the provisions of the trust deed which determine on what basis the trustee ever has power to pay out the funds held subject to the trust, nor on what basis the trustee should decide what date should be fixed to make the relevant calculations. Mr de Garr Robinson however submits that this would be a decision which the administrators would have to take bearing in mind both the duties of the company as trustee and also their own duties as administrators.

49. On this basis, Mr de Garr Robinson concludes that the effect of clause 2.2.1 is simply to dictate how funds should be applied when distributions are made rather than saying anything about the time at which those distributions should in fact be made or the date on which the entitlements of customers should be fixed. This would be a decision left to the administrators based on all the relevant circumstances.

50. Assuming Mr de Garr Robinson is right that clause 2.2.1 does not require an immediate payment to customers on the occurrence of an Insolvency Event, he submits that the natural reading of that clause is that, as and when distributions are made, the distributions should be made on the basis of the entitlements which the customers have at the date of the distributions.

51. Mr de Garr Robinson's position therefore is that the administrators are free to distribute the trust funds at whatever point they think appropriate.

52. Their decision should however, he suggests, be informed by the requirement that payments of any surplus to the company can only be made in accordance with clause 2.1.2 "after (and only after) all claims of the Customers have been finally and irrevocably paid in full". Mr de Garr Robinson submits that it should be inferred from this that no distributions should be made until all of the entitlements of the Customers have been crystalised. Whilst he accepts that "claims" refers to claims in respect of "Customer Funds", he argues that the use of the word "claims" in clause 2.1.2 in contrast to the use of the word "entitlements" in clause 2.1.1 supports this interpretation. In effect, this means waiting for three years until 11 March 2024 when all dividends will have accrued in respect of the outstanding shares (no shares having been issued after that date).

53. Mr de Garr Robinson recognises that possible objections to this conclusion are that customers would have to wait three years before getting any of their money back, contrary to the strongly expressed views of both the UK and the Jersey Gambling Commissions and that it is perfectly possible that the company may go into liquidation if it is unable to reach an agreement with its creditors which would leave any remaining entitlements under the existing contracts up in the air and could potentially delay the dissolution of the company.

54. His proposed solution to this is for the trust funds to be distributed now but to interpret the word "claims" to include contingent claims – i.e. anticipated winnings/dividends which have not yet accrued. In this context, he notes that the company believes that it is able to make reasonably accurate forecasts of future dividends over the lifetime of the shares.

55. It is clear that the purpose of the trust is to protect client money in accordance with the requirements of the UK Gambling Commission. Recital (B) confirms this and that the intended level of protection is "medium".

56. As both parties have mentioned, the UK Gambling Commission's "notes for operators in relation to the segregation of customer funds" sets out in paragraph 3.5 a ratings system which it says "must be applied". The description of "medium protection" is that:

> "Customer funds are kept in accounts separate from business accounts; and arrangements have been made to ensure assets in the customer accounts are distributed to customers in the event of insolvency."

57. Whilst I accept that clause 2.2.1 of the Trust Deed could be interpreted simply as requiring the funds held in the trust to be used to pay customers rather than other creditors, in my judgment, the correct interpretation is that it imposes a requirement for the Trust Fund to be used to pay customers who have a crystalised entitlement at the date the Insolvency Event occurs. It does not however require the distribution to be made immediately. As Mr de Garr Robinson points out, that would be impractical. However, in accordance with the requirements of the UK Gambling Commission, the payments should be made as soon as it is practical to do so.

58. There are a number of reasons for the conclusion I have come to.

59. First, looking at the Trust Deed itself, it would be surprising if there were no mechanism at all for determining when the entitlement to the funds held in the trust should be ascertained which is, in substance, what Mr de Garr Robinson suggests. There is no specific power given to the trustee in relation to this and so, if the Trust Deed itself does not itself determine the relevant date there is, on the face of it, no ability to make distributions at all. It would be very odd if the terms of the Trust

Deed left such a significant gap. This leads to the conclusion that part of the purpose of clause 2.2.1 is to fix the date at which the claims of the customers are to be ascertained and to require the trust assets to be distributed in accordance with those claims.

60. This conclusion is supported by the fact that the trust was put in place to provide medium protection as defined by the UK Gambling Commission which, as mentioned above, requires that customer funds (ie the amounts owed to customers) should be held in separate accounts and that the assets in those customers' accounts are distributed to customers in the event of insolvency. This conveys an expectation that what should be distributed is the amounts held in the customer accounts at the date of the relevant Insolvency Event based on what is owed to the customers at that point and that distributions should be made as soon as possible after the relevant Insolvency Event.

61. It is also supported by BetIndex's own terms of use which state at 11.2 that "we have also put in place trust arrangements with our bank to ensure funds in this account are distributed to customers in the unlikely event of insolvency.". Again, this indicates that the purpose of clause 2.2 is to fix the date for the calculation of the amounts due to customers and to require those amounts to be paid out.

62. Further, it is more consistent than the alternatives suggested by Mr de Garr Robinson with the way in which the client account arrangements were operated whereby payments were made into the account based on the amounts actually due to customers from time to time. Recital (B) confirms that the amount held in the client account was intended to reflect the amount of the funds due to customers from time to time. No further assets have been added to the client account since the platform was suspended. Common sense therefore dictates that the amount held in the client account (and therefore in the trust) was intended to represent the sums which were due to customers at that time and not any amounts which may have become due after that. Funds representing dividends which were accrued after the suspension of the platform have been retained by the company in its own general trading account.

63. Of course, in this case, fixing the calculation date as the date of the administration order does mean that the entitlement to the funds held by the trust will include

dividends which have accrued after the date of the suspension of the platform on 11 March 2021 up to the date of the administration order on 26 March 2021 and in respect of which no transfers have been made into the client account held subject to the terms of the trust.

64. This is not however in my view a reason for rejecting the proposition that clause 2.2.1 fixes the calculation date as the date of the relevant Insolvency Event. This is because the date of the administration order is the earliest date after the suspension of the platform which, under the terms of trust, could possibly be the date when entitlements should be fixed. There was no suggestion from either party that any provision in the Trust Deed could be interpreted as requiring the entitlements to the trust fund to be calculated as at any date earlier than the date of the first Insolvency Event. Whilst Ms Hilliard did suggest in her skeleton argument that the calculation date should be taken to be 11 March 2021, no reasons were given supporting this argument and, indeed, the skeleton argument concluded that "there is nothing significant about the 11 March 2021". It is not a point which Ms Hilliard pursued at the hearing.

65. It is apparent that, when calculating how much should be transferred into the client account, BetIndex added a contingency and so it could be said that, to an extent, the amount in the account included an allowance for amounts which would become due to customers in the future. However, this was a matter of practicality given that BetIndex had decided to make its calculations and transfers on a weekly or monthly basis rather than doing so on a daily basis as, it might be said, is envisaged by the UK Gambling Commission's guidance. This does not in my view therefore affect the basic principle that the amount held in the trust account broadly reflected the amount due to customers at any given moment in time. It is certainly not enough to tip the balance in favour of an interpretation which leaves the date of fixing the entitlement to the trust assets up in the air.

66. Whilst I accept Mr de Garr Robinson's submission that there is a distinction between the customers' rights under their contract with BetIndex and any rights which they may have under the Trust Deed, this does not, in my view, have any bearing on whether, under the terms of the Trust Deed, the date at which any entitlement to the funds held in the trust should be calculated is the date of an Insolvency Event (or some later date). Indeed, Mr de Garr Robinson accepts that the ability to make

payments out of the trust is triggered by the occurrence of an Insolvency Event. The only difference is whether that also fixes the entitlements of the customers or whether those entitlements should be calculated (as Mr de Garr Robinson suggests), when any distributions are in fact made, effectively at the discretion of the trustees.

67. I also do not accept that the possibility of one or more further Insolvency Events is inconsistent with the interpretation of clause 2.2.1 as requiring entitlements to be calculated on the occurrence of an Insolvency Event. Bearing in mind that the purpose of the trust arrangement is to hold funds which are due to the customers at any particular moment in time, it is perfectly logical for customer entitlements to be fixed at the date of the relevant Insolvency Event.

68. However, it follows that, if this is the case, the amount of the trust funds available for distribution should be the amount of the trust funds held at the date of the relevant Insolvency Event. If, after the occurrence of an Insolvency Event, further payments were made into or out of the client account which is held subject to the trust, this would reflect changes to the amounts due to the customers after the first Insolvency Event. If there were a second Insolvency Event, there would need to be a second calculation as at the date of that later Insolvency Event which took account of any increase in the trust assets since the date of the first Insolvency Event and any change in the balances due to customers between the two Insolvency Events. Whilst I accept that the calculations may not be straightforward, it would not be an impossible task.

69. The alternative interpretation suggested by Mr de Garr Robinson is not attractive. It results in the trustee having no guidance as to when the funds which are held subject to the trust should be distributed, nor when the entitlements should be fixed. This would put the trustee and, in this case the administrators, in an almost impossible position as any date which they might pick as being the calculation date would be entirely arbitrary and would provide benefits to some customers and disadvantages to others. In the absence of an express power given to the trustee to determine such a date, this supports an interpretation which relieves the trustee of any such obligation.

70. The fact that entitlements are to be calculated at the date of the administration order does not mean that payments should have been made on that date. It is quite normal for the terms of a trust to fix an entitlement at a particular date (say, when a

beneficiary reaches 25 or on the death of a prior beneficiary). There will normally be administrative steps which need to be taken before any distribution can be made such as realising the trust assets, paying liabilities and verifying the amounts due and the identity of the beneficiaries. I do not therefore read clause 2.2.1 as requiring payments to be made immediately even though the date for calculating the amounts due has passed. The payments should however be made as soon a practically possible.

SHOULD THE CALCULATION OF AMOUNTS DUE TO CUSTOMERS TAKE ACCOUNT OF FUTURE DIVIDENDS?

71. The definition of "Customer Funds" in the trust deed refers to funds "held by the company to the credit of its customers". It then goes on to give a non-exhaustive list of such funds which reflect a similar list in clause 4.1.1 of the UK Gambling Commission's "licence conditions in relation to segregation of funds". It is quite clear that each of these three examples comprise funds which either belong to the customer or which have become due to the customer and do not include bettings that might arise in the future.

72. Although clause 1.2 of the trust deed provides that the meaning of general words is not to be limited by any examples which follow, the fact that the general words refer to sums held "to the credit of" the customers is a strong indication that it is only intended to include sums actually due to customers and not funds which might become due in the future.

73. As noted above, Mr De Garr Robinson places an emphasis on a reference to "claims" as opposed to "entitlements" in clauses 2.1.2 and 2.2.1. He does not seek to argue that the definition of "Customer Funds" includes future dividends but suggests that claims can include claims in respect of future dividends which, when they become due will comprise Customer Funds.

74. In my view, the trust deed is clear on this point. What is to be paid out to customers under clause 2.1.1 is their entitlement to Customer Funds or, if there is a shortfall, an amount which is proportionate to their Customer Funds. Despite the strong wording of clause 2.1.2, the reference in that clause and in clause 2.2.1 to "claims" must be read in this context and must therefore mean claims in respect of Customer Funds which are due at the date the calculation is made. It would strain the language of the

trust deed beyond breaking point to interpret the reference to "claims" as somehow requiring possible future Customer Funds to be brought into account.

75. Given my conclusion on this point and in relation to the date for calculating the customer entitlements, I do not need to address Mr de Garr Robinson's suggested alternative method for calculating the value of possible future dividends.

WHAT SHOULD HAPPEN TO ANY SURPLUS?

76. The administrators believe that any surplus should be paid to BetIndex in accordance with clause 2.1.2 of the trust deed.

77. Mr de Garr Robinson suggests that such a result would be remarkable and that, in circumstances where further dividends have already accrued so that there is now in fact a deficit between the amounts owed to customers and the amounts held in the trust, a reasonable person would expect the whole of trust funds to be distributed to customers.

78. Whilst I have some sympathy with this argument, it is inconsistent with what I have found to be the correct interpretation of the trust deed.

79. The effect of clause 2.2 is to fix the point in time at which the entitlement of customers is to be ascertained. That entitlement is to "Customer Funds" which does not include future dividends.

80. Whilst, under clause 2.1.2, BetIndex is only entitled to any surplus after all "claims of the customers" have been paid full, in the light of clause 2.1.1, the reference to "claims" must be understood as being a reference to claims in respect of Customer Funds rather than, for example, future contingent claims in respect of dividends which have not yet accrued.

81. The purpose of the trust is to safeguard funds which were owed to customers at the date of insolvency and not any funds which may become due after that date. Again, this is supported by the fact that the amounts held in the client account were intended, broadly speaking, to represent the amounts due to customers at any given moment in time and that no further funds have been added to the client account after the date of the administration order. The fact that further amounts have become due to customers

after the date of the administration order cannot give the customers in question any greater rights in respect of those amounts simply because there is a surplus in the trust in circumstances where the terms of the trust require the amounts due to the customers to be fixed at the date the Insolvency Event occurs. As mentioned above, the position might of course be different if further funds had been added to the client bank account after the date of the administration order, but that is not the case here.

82. This is in my view consistent with paragraph 11.3 of BetIndex's terms of use which states that "once you have purchased Shares, the applicable value of your Shares have been "wagered" and are not stored in any account or otherwise protected as they are sums at risk.". In a similar way, possible winnings in respect of those shares which have not arisen at the time of the Insolvency Event are also at risk in that they have not yet become due and so are not covered by the protections conferred by the trust arrangements.

COSTS

83. The administrators ask for an order that the costs of the application both in relation to the administrators and the representative should be paid out of the trust assets.

84. The court of course has a general discretion in relation to costs under CPR Rule 44.2.

85. Ms Hilliard referred to the decision of Hildyard J in *Lehman Brothers International (Europe) (in administration) – Waterfall II (Tranche C)* [2018] EWHC 924 (Ch) who confirmed [at 7] that:

> "there is equally no doubt that, by analogy with developed practice in the context of litigation to resolve contested issues in a deceased's or insolvent's estate, where the proceedings have in effect been sponsored by the estate administrator, and the parties' involvement has in effect been as contributors to a necessary judicial enquiry… the court has been disposed to depart from the general "costs following the event" principle and allow costs as an expense in the relevant process of administration".

86. In the context of trusts, the normal practice in non-adversarial proceedings is for costs to be paid out of the trust assets (see *In re Buckton* [1907] Ch 406 at 414) whether the

proceedings are brought by the trustee or by some other party (in this case the administrators).

87. I am satisfied that these principles apply in this case. The application was necessary in order to determine who is entitled to the trust assets and how those entitlements should be calculated. The application was therefore necessary for the administration of the trust and the costs of all parties are necessarily incurred for the benefit of the trust as a whole. The costs of both the administrators and the representative should be paid out of trust assets on an indemnity basis, such costs to be assessed if not agreed.

ADMINISTRATORS' FEES IN RELATION TO THE ADMINISTRATION OF THE TRUST

88. The administrators also apply for an order that any fees incurred by them in relation to the administration of the trust assets (as opposed to the assets belonging to BetIndex) should be paid out of the trust assets and not out of the company's own assets.

89. In support of this, Ms Hilliard refers to two related decisions. The first is re *Berkeley Applegate (Investment Consultants) Limited (No.2)* [1998] 4 BCC 279. Having made an extensive review of the authorities, Edward Nugee QC (sitting as a Deputy High Court Judge) concluded [at 290-291] that:

> "the authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of it being exercised include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in re *Marine Mansions Co* and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in *Scott v Nesbitt*); and the fact that the work has been of substantial benefit to the trust property and to the persons interested in equity (as in *Phipps v. Boardman*)."

90. The judge went on to confirm that the inherent jurisdiction of the court:

> "extends to making an allowance for costs incurred and skill and labour expended by those who have acted without obtaining prior authority of the court."

91. The second case is re *Berkeley Applegate (Investment Consultants) Limited (No.3)* [1989] 5 BCC 803. Peter Gibson, J confirmed [at 805D-G] that expenses incurred by a liquidator in administering trust assets were outside the scope of s.115 Insolvency Act 1986 and should be paid out of the trust assets in priority to the assets of the company.

92. The equivalent of s.115 Insolvency Act 1986 as far as administration is concerned is contained in rules 3.50 and 3.51 of the Insolvency Rules 2016. The broad effect of these provisions is the same as s.115 Insolvency Act 1986 and so Ms Hilliard submits that the same principles apply in this case as those set out in *Berkeley Applegate*.

93. Ms Hilliard did not make any detailed submissions in relation to these cases. I note however that Mr Nugee QC in *Berkeley Applegate No.2* referred to the principle as one which applied where a person "seeks to enforce a claim to an equitable interest in property". However, given his reference to the decision of the Court of Appeal in *re Duke of Norfolk's Settlement Trust* [1982] Ch 61, I do not understand him as laying down a principle that the inherent jurisdiction of the court extends only to authorising remuneration where a claim is made by beneficiaries to give effect to their equitable interests given that, in that case, there was no claim by the beneficiaries. Indeed the judge in *Berkeley Applegate* confirmed [at 291] that:

> "what the Court of Appeal held in that case was that, if the increase of the trustees' remuneration was beneficial to the trust administration, there was an inherent jurisdiction to require the beneficiaries to accept, as a condition of effect being given to their equitable interests, that such an increase in remuneration should be authorised."

94. In a similar way, although the beneficiaries are not, in this case, seeking to enforce their beneficial interests in the sense that no beneficiary has made a claim, the purpose of the work done by the administrators in relation to the trust is undoubtedly intended to give effect to the equitable interests of the beneficiaries. Although the court of

appeal in that case was dealing with the remuneration of the trustee, it is hard to see why the same principles should not apply where the work is done by someone other than the trustee. It is therefore in my view appropriate to make a declaration that the administrators are entitled to be paid their fees and expenses for dealing with the trust assets and administering the trust out of the trust assets.

CONCLUSION

95. For the reasons set out above, I agree with the interpretation put forward by Ms Hilliard on behalf of the administrators. In accordance with clause 2 of the trust deed, the entitlements of Customers are fixed by reference to their Customer Funds as at 26 March 2021. The trust funds should be distributed as soon as possible. They should be used first to pay each Customer's entitlement to "Customer Funds" as at 26 March 2021. This would include dividends which have accrued up to that date even if they have not been credited to the Customer's account. Any surplus should be paid to BetIndex.

APPENDIX

THIS DEED OF TRUST is dated 18 February 2020 and is made by **BETINDEX LTD**, incorporated and registered in under the laws of Jersey with company number RC119040 and having its registered office at Maxwell Chambers, 35-39 Colomberie, St. Helier, Jersey JE2 4QB (the **"Company"**).

Background

(A) The Company carries on a licensed gambling business in respect of which it holds Customer Funds on behalf of its customers.

(B) The Company wishes to put in place arrangements to provide 'medium' level protection for Customer Funds in accordance with the rating system of the British Gambling Commission. As a result it wishes to procure that the amount of the Customer Funds from time to time stands credited to the Client Bank Account in order to become Client Bank Account Monies.

(C) The Company wishes to declare itself as trustee of the Client Bank Account Monies for the benefit of the Customers.

(D) All capitalised expressions used above have the meanings ascribed to them below.

1. **Interpretation**

1.1 In this Deed of Trust, the following words and expressions shall have the following meanings:

Bet: any bet, wager, game of chance or skill or any other form of gambling or gaming contract, in each case between the Company and a Customer;

Client Bank Account: an account of the Company with the Initial Bank with account number 780391 and shall also include any other account opened with the Initial Bank or any other credit institution in substitution for or by way of supplement to such account for the receipt and holding of the amount of Customer Funds;

Client Bank Account Monies: any monies from time to time standing to the credit of the Client Bank Account;

Customer: each person who has any entitlement against the Company in respect of any Customer Funds;

Customer Funds: the aggregate value of the funds from time to time held by the Company to the credit of its customers, including without limitation:

(1) cleared funds deposited with the Company by customers to provide stakes for, or to meet participation fees in respect of, future Bets;

(2) Bet winnings or prizes which the relevant customer has chosen to leave on deposit with the Company or for which the Company has yet to account to the relevant customer; and

(3) any crystallised but as yet unpaid loyalty or other bonuses in respect of any customer, in each case irrespective of whether the Company and the customer are party to any Bet;

Initial Bank: NedBank Private Wealth Limited;

Insolvency Event: any of the following procedures in relation to the Company:

(a) the making of a winding-up order;

(b) the passing of a resolution for voluntary winding-up;

(c) the entry into administration;

(d) the appointment of a receiver or manager of its property;

(e) the approval of a proposed voluntary arrangement (being a composition in satisfaction of debts or a scheme of arrangement);

(f) the making of any deed of arrangement for the benefit of creditors; or

(g) the conclusion of any composition contract with creditors; and

Security Right means any charge, lien, mortgage or other security.

1.2 Any phrase introduced by the terms including, include, in particular or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms.

2. **Deed of Trust Holding and Related Undertakings**

2.1 The Company hereby irrevocably declares that it holds all right, interest and title that it possesses at any time to the Client Bank Account Monies on trust for:

2.1.1 the Customers according to their entitlement to Customer Funds and *pro rata* to such entitlement to the extent that there is any deficiency; and

2.1.2 as to any balance remaining after (and only after) all claims of the Customers have been finally and irrevocably paid in full, the Company itself.

2.2 Where there is an Insolvency Event:

2.2.1 the claims of Customers are to be paid from the Client Bank Account Monies in priority to all other creditors; and

2.2.2 until all the claims of Customers have been paid in full, no right of set-off or Security Right may be exercised in respect of the Client Bank Account Monies except (if agreed with the relevant bank) to the extent that the right of set-off relates to fees and expenses in relation to operating the Client Bank Account.

2.3 No Security Right or other right or interest of any kind shall be created or allowed to exist in favour of the bank operating the Client Bank Account or any other person in respect of any of the Client Bank Account Monies.

3. **Perpetuity Period**

The perpetuity period for the purposes of the trusts hereby created shall be 125 years.

4. **Severance**

If any provision or part-provision of this Deed of Trust is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this clause shall not affect the validity and enforceability of the rest of this Deed ofTrust-

5. **Governing law**

This Deed of Trust, and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims), shall be governed by, and construed in accordance with the law of England and Wales.

This document has been **executed** as a **deed** and is delivered and takes effect on the date stated at the beginning of it.