Neutral Citation Number: [2026] EWHC 1093 (Ch)

Case No: BL-2022-000888

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

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

Date: 19 May 2026

BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY
(a company limited by guarantee)

Claimant

and

(1) ARGENTO WEALTH LIMITED
(2) DANIEL WILLIS

Defendants

- -
- -

Philip Hinks KC and **Lucas Jones** for the **Claimant**
The **Defendants** did not appear and were not represented

Hearing date: 30 March 2026
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JUDGMENT

This judgment was handed down remotely at by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Deputy Master Valentine:

1. The Claimant, a regulatory authority (the "**FCA**"), brought a claim against the Defendants alleging that (i) the First Defendant Argento Wealth Ltd ("**AWL**")

had contravened various provisions of the Financial Services and Markets Act 2000 ("**FSMA**") by engaging in two investment schemes described further below, and (ii) the Second Defendant Mr Daniel Willis (AWL's sole director and shareholder) was knowingly concerned in those contraventions. Those claims were adjourned generally on the terms of a Repayment Deed (the "**Repayment Deed**") which provided for certain monies to be paid over to the FCA. The FCA now applies for directions as to the distribution of those monies pursuant to s.382(3) of the Financial Services and Markets Act 2000 ("**FSMA**"), and/or CPR 64.2(a) and/or the Court's inherent jurisdiction.

BACKGROUND

2. The FCA's investigation related to two investment schemes in which the Defendants were involved. Those were:

   i) The "**EMB Scheme**" - AWL was appointed as a distributor for participating shares in a Cayman mutual fund called EMB Fund Ltd ("**EMB**"). Pursuant to the Distributor Agreement (defined below) AWL was to receive a fee for such services and EMB also agreed to invest 75% of the equity investments procured through AWL and its sub-distributors in "*trade programs managed by the Distributor [i.e. AWL]*", which was achieved through EMB advancing funds to AWL under the EMB Lender Agreement described below.

   ii) The "**AWL Loan Scheme**" - AWL received loan monies from investors on terms that those monies would be repaid with 25% interest per annum within a specified period, on substantially similar terms as in the EMB Lender Agreement.

3. Although this investigation led the FCA to bring a claim (the "**High Court Proceedings**"), the court has not made any findings. The High Court Proceedings proper have been adjourned generally by the Repayment Deed on terms that the Defendants make no admissions, and will be discontinued once the funds are distributed.

The EMB Scheme and Funds Recovered

4. The EMB Scheme came first chronologically, and AWL's promotion of it appears to have ceased in July or August 2021.

5. The FCA commenced an investigation on 31 August 2021 into the activities of AWL and Mr Willis (the Defendants) as well as two of EMB's directors, Mr Nicholas Henrys and Mr Robert Sweeney, and expanded that investigation on 28 March 2023 to encompass EMB itself. In addition, while the High Court Proceedings were ongoing in respect of the Defendants, the FCA's investigation broadened into a criminal investigation, and it is anticipated that a charging decision will be made concerning Mr Henrys and Mr Sweeney later this year.

6. According to the investigation, EMB may have dishonestly dissipated the funds which it raised from investors through the sale of participating shares, substantially for its directors' personal gain. Investors introduced to EMB by AWL and its sub-distributors paid at least USD 8,812,828.70 for EMB shares.

7. Pursuant to the terms of the Distributor Agreement dated 1 February 2021 between EMB and AWL (the "**Distributor Agreement**") at Section 2, AWL agreed to act as "Distributor" and EMB agreed to "*invest 75% of all investment from investors generated by the sub-distributors detailed in Schedule 2. The 75% is to be invested in trade programs managed by the Distributor. The investment will only be allocated once the premium on the FOI policy has been paid and as per the loan agreement signed between EMB Fund Limited/EMB Group Limited and the Distributor."*

8. Pursuant to this obligation EMB paid 75% of the amount raised by AWL and its sub-distributors, i.e. USD 6,609,621.53, to AWL under a loan agreement dated 15 February 2021 (the **"EMB Lender Agreement**"). As contemplated by the Distributor Agreement, AWL did arrange an FOI (Financial Offering Insurance) policy in respect of this loan, through a broker EC3 Brokers Ltd (the "**Insurance Broker**"). A payment of £452,480 was made under the EMB Lender Agreement to the Insurance Broker, to pay the premium for this FOI policy.

9. The terms of the EMB Lender Agreement provided for EMB to lend AWL up to £50 million at an interest rate of *"[25%] to be paid [quarterly]*" (the square brackets appear in the executed version of the loan). AWL was required to apply the sums borrowed only to "[*trade opportunities approved by the insurance company and associated costs*]" (Section 3.1, the square brackets

again appear in the executed version) and Section 10(g) says except with EMB's prior written consent the Borrower "*will only use the Loan for the purposes specified in this agreement*".

10. Pursuant to these arrangements, AWL received loan monies of EUR 4,190,929.11 in its account with TransferWise Ltd (the "**TW Receipts**"). The FCA investigation concluded that AWL did not apply those monies to any trade opportunities, but dissipated the TW Receipts on expenses or otherwise misappropriated them.

11. As of early 2024, only around £1.1 million of those c. EUR4.2 million TW Receipts remained, and there was also a small balance in another account held at TW in Mr Willis's name. The bulk of this remaining amount was transferred to the FCA pursuant to the Repayment Deed.

TW Residue – Subject to Criminal Restraint Order

12. As part of its criminal investigation, on 19 April 2023 the FCA obtained criminal restraint orders ("**CROs**") under s.40 of the Proceeds of Crime Act 2002 against Mr Henrys and Mr Sweeney, the directors of EMB, in Southwark Crown Court. The scope of the CROs expressly covered the TW Receipts. The CROs also order the assets of EMB be treated as the personal assets of Mr Henrys and Mr Sweeney. The CROs were varied on 13 March 2024 so that the remaining cash could be paid out to the FCA under the Repayment Deed described below, but those funds remain subject to the CROs while held in the FCA's holding account.

The AWL Loan Scheme and Funds Recovered

13. According to the FCA's investigation, the AWL Loan Scheme operated between 1 September 2021 and 21 June 2022. The AWL Loan Scheme was marketed partly on AWL's website, which advertised it as a "*Loan Note*" investment scheme involving a "*proprietary trading strategy*" and a "*globally diversified portfolio*". It was also marketed by a UK-registered company called Deviti Ltd ("**Deviti**"). AWL received loan monies from investors ("**AWL Lenders**") under loan agreements ("**AWL Lender Agreements**"), which provided that the loans would be repaid with interest at 25% per annum within a specified period. The AWL Lender Agreements, which are all in the same

form, say "*The Borrower must apply all amounts borrowed by it under the Loan towards [trade opportunities approved by the insurance company and associated costs]"* (Section 3.1, the square brackets appear in the executed version) and AWL agrees that "*other than with the prior written consent of the Lender … it will only use the Loan for the purpose specified in this agreement*" (Section 10(f)).

14. Most AWL Lenders paid their loan monies, totalling £2,282,880.14, into AWL's account with Starling Bank Ltd (the "**Starling Receipts**"). But two of them, 40Tree Management Ltd ("**40Tree**") and Lead7 Management Ltd ("**Lead7**"), made all or part (respectively) of their investments in cryptocurrency with an aggregate value of around £547,196.13 into cryptocurrency wallets (the "**Wallets**").

15. The FCA's investigation concluded that the funds so advanced were dissipated on business expenses or misappropriated by Mr Willis and Mr Peter Moat (AWL's Chief Financial Officer) and paid away to persons or entities associated with them, or in some cases used to fund "interest" payments made to other AWL Lenders. In particular, five AWL Lenders received payments totalling approximately £61,157.87 from a company called FIII Ltd, which shares a director with Deviti.

16. The FCA has been unable to recover the £547,196.13 of investments made by AWL Lenders in cryptocurrency paid into the Wallets. Of the original Starling Receipts of £2,282,880.14, the FCA has traced £841,763.42 into other accounts, and that amount has been paid over to the FCA pursuant to the Repayment Deed.

The Repayment Deed

17. After commencement of the High Court Proceedings against AWL and Mr Willis and prior to the filing of their Defences, both Defendants gave undertakings in lieu of interim injunctions to preserve their assets, subject to customary exceptions permitting spending on ordinary living expenses and legal advice and representation.

18. The FCA asserts that the balances in the Defendants' identified UK bank accounts were obtained as the result of their alleged FSMA breaches and are the traceable proceeds of the Starling Receipts and TW Receipts. Rather than risk

the dissipation of those funds on living and legal expenses, the FCA sought to have the claim adjourned on the terms of the Repayment Deed, which was embodied in a consent order of Master Pester dated 9 February 2024. This provided for all funds (in excess of an agreed sum for legal and living expenses) held in the Defendants' bank accounts and those of associated persons, which the FCA had identified as being derived from the Starling Receipts and TW Receipts (respectively the "**Starling Residue**" and the **"TW Residue**") to be transferred to an FCA holding account pending distribution under s.382(3) of FSMA.

19. In Section 2.7 of the Repayment Deed, the FCA agreed to take "*such steps as it considers appropriate, including such application to the High Court as may be necessary, to distribute on a just and fair basis the monies received into the FCA Account from the Schedule B Accounts* [i.e. Starling Residue and TW Residue] *to the persons who may be entitled thereto. Following distribution of the monies received into the FCA Account the High Court proceeding shall be discontinued without any order as to costs*." AWL agreed at Section 2.8 to take reasonable steps to procure repayment of sums held by third parties up to the total amount owed by it "*to EMB and the lenders who participated in the Loan Note scheme*" and to pay any such sums to the FCA, to "*be distributed by the FCA in accordance with any applicable High Court order concerning distribution of such moneys to person entitled thereto and the FCA shall seek the Court's guidance in the absence of such an order*."

20. The Starling Residue now stands at £841,763 and the TW Residue at £1,046,488.

21. The FCA seeks directions as to what should be done with those amounts collected pursuant to the Repayment Deed.

PRELIMINARY MATTERS

22. Prior to turning to distribution, there are two preliminary matters to be dealt with.

Dispensation with Service

23. Firstly, the FCA seeks an order of the Court dispensing with service of their application on the Defendants pursuant to CPR 6.28(1). In order to exercise

this power, the Court must be satisfied that there exist "good reasons" for doing so, which is to be contrasted with the "exceptional reasons" required by CPR 16.6 to dispense with service of a claim form: see *FCA v Exall [2023] EWHC 1130 (Ch)* at [9], *FCA v Bright Management Solution Ltd [2024] EWHC 1200* (Ch) at [13].

24. In both those cases, in applications similar to the present, the Court dispensed with service of the application on a subset of the defendants. In those cases, as in the present, the defendants were parties to the Application only because they were defendants to the underlying claim which had been determined (in the case of *Exall*) or determined in part and settled in part (in the case of *Bright*) and they had no claim on the funds for which distribution guidance was sought and as such were not "effective respondents" to the application. In those cases, in addition, there was a difficulty in serving the relevant defendants because they could not be located or, in the case of the company defendants, had been dissolved and serving them would have required restoration to the register. It was found there was in those circumstances good reason to dispense with service on those defendants.

25. Here, there is no particular difficulty in serving the Defendants. However, as in *Exall* and *Bright*, the FCA says the Defendants are not the "effective respondents" to the application. I am not convinced that, as the FCA argued, they have "no interest" in how the funds are distributed; in practical terms although they will not recover the funds they may have an interest in how they are distributed as the recipients' potential claims against them are affected by this distribution, but they have a lesser interest than those who will potentially receive distributions of these monies, none of whom are respondents to this application. The Defendants have been informed about the application and invited to comment just as the potential recipients have been. In the circumstances I consider there is good reason to dispense with service, and it is fair to do so.

Basis for Distribution Order

26. The FCA applies for a distribution order pursuant to s.382(3) of FSMA, and/or CPR 64.2(a) and/or the Court's inherent jurisdiction.

27. Section 382 of FSMA provides:

> *"(1) The court may, on the application of the appropriate regulator or the Secretary of State, make an order under subsection (2) if it is satisfied that a person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement, and—*
>
> *(a) that profits have accrued to him as a result of the contravention; or*
>
> *(b) that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.*
>
> *(2) The court may order the person concerned to pay to the regulator concerned such sum as appears to the court to be just having regard—*
>
> *(a) in a case within paragraph (a) of subsection (1), to the profits appearing to the court to have accrued;*
>
> *(b) in a case within paragraph (b) of that subsection, to the extent of the loss or other adverse effect;*
>
> *(c) in a case within both of those paragraphs, to the profits appearing to the court to have accrued and to the extent of the loss or other adverse effect.*
>
> *(3) Any amount paid to the regulator concerned in pursuance of an order under subsection (2) must be paid by it to such qualifying persons or distributed by it among such qualifying persons as the court may direct.*
>
> *[…]*
>
> *(8) "Qualifying person" means a person appearing to the court to be someone—*
>
> *(a) to whom the profits mentioned in subsection (1)(a) are attributable; or*
>
> *(b) who has suffered the loss or adverse effect mentioned in subsection (1)(b)."*

28. In this case the Court has not made an order under Section 382(2). The amount in question has been paid to the regulator voluntarily by the Defendants under the Repayment Deed to put an end to the High Court Proceedings against them in which such an order was sought. The first question is whether Section 382(3) is engaged to allow the Court to give directions as to the distribution of the monies held by the FCA.

29. In *FCA v Paradigm Consultancy SA* [2019] EWHC 3648 (Ch) the High Court answered this question in the affirmative. In that case the FCA had not obtained an order under Section 382(2) but presented a winding-up petition against the defendant company and then obtained the distributable funds by way of

dividend declared by the liquidator. Mr John Kimball QC, sitting as a Deputy Judge of the High Court, said at [42]:

> *"It seems to me the obvious and proper way to interpret s.382(3) is in all cases where the FCA or the regulator concerned properly receives money arising out of a claim under s.383(2)* [sic: an error for s.382(2)] *and then proposes to make a distribution to qualifying persons, the court may approve, or has jurisdiction to approve, that distribution."*

30. The circumstances of this case are sufficiently analogous to those in *Paradigm* so that the funds received in both cases can be said to have been obtained by the FCA "*in pursuance of an order under subsection (2)*" giving that language a purposive reading as the Court did in *Paradigm*. As such I am satisfied that the Court has jurisdiction to direct how the monies held by the FCA as contemplated by Section 382(3) FSMA.

PROPOSALS FOR DISTRIBUTION

31. The principles governing the Court's exercise of its jurisdiction under s.382(3) were summarised by Master McQuail in *FCA v Exall [2023] EWHC 1130 (Ch)* at [15], drawing on the earlier decisions of Mr David Halpern QC in *FCA v Anderson [2014] EWHC 363 (Ch)* and Mr John Kimbell QC in *Paradigm*:

> *"(i) the court should have regard to the purpose of the order for disgorging profits or compensating for loss which is to compensate those affected by the contraventions consistent with the FCA's regulatory objective of the protection of consumers: Anderson at [9] and Paradigm at [30(a)];*
>
> *(ii) where there is a shortfall between the losses suffered by "qualifying persons" and the FCA's recovery and where the underlying facts have not been fully established or agreed the court has to do its best and that will generally be on a rough-and-ready basis: Anderson at [4-5] and Paradigm at [30(b)-(c)];*
>
> *(iii) any method of distribution should be as simple as possible consistent with being fair and having regard to the expense of the available options: Anderson at [13] and Paradigm at [30(f)];*
>
> *(iv) the Court should be satisfied that (a) the FCA has taken reasonable steps to identify all the persons who are potentially within the definition of qualifying person; (b) to identify their losses and (c) the proposal is reasonably fair having regard to the sum available for distribution and the FCA's limited resources: Paradigm at [32].*"

32. I gratefully adopt that summary. However, these principles presuppose that there is discretion as to how the funds should be distributed in the interests of justice. In this case, however, the FCA's primary position is that the terms of the loan agreements pursuant to which AWL was originally paid the monies gave rise to a *Quistclose* trust, in favour of the relevant AWL Lender in respect of the Starling Receipts and in favour of EMB in respect of the TW Receipts. If they are correct about this, the Starling Residue falls to be shared among the AWL Lenders (except that the AWL Lenders who advanced their loans in cryptocurrency would not be interested in these funds to that extent) and the TW Residue is held for EMB, albeit the FCA would not seek to release the TW Residue from the CROs until liability to pass on these funds to its investors or otherwise is determined following any criminal proceedings that are brought against Mr Henrys and Mr Sweeney.

33. The first question, therefore, is whether the Starling Receipts and the TW Receipts were advanced pursuant to a *Quistclose* Trust.

QUISTCLOSE TRUST

Legal Principles

34. A *Quistclose* trust, a species of resulting trust, can arise when A makes funds available to B to enable B to pursue some particular purpose. A may charge interest for making those funds available, but he also retains beneficial interest in those funds pending their proper application, with B having only the power to apply them to the specified purpose. As set out in the leading modern authority on this type of trust*, Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164 per Lord Millett at [68-69]:

> "*a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce…*
>
> *When the money is advanced, the lender acquires a right, enforceable in equity, to see that it is applied for the stated purpose, or more accurately to prevent its application for any other purpose. This prevents the borrower from obtaining any beneficial interest in the money, at least while the designated purpose is still capable of being carried out*"

35. In the commercial context, where it is common to set out in the agreement the use(s) to which proceeds will be put, the Court should bear in mind Lord Millett's words at [73-74]:

> "*A Quistclose trust does not necessarily arise merely because money is paid for a particular purpose. A lender will often inquire into the purpose for which a loan is sought in order to decide whether he would be justified in making it. He may be said to lend the money for the purpose in question, but this is not enough to create a trust; once lent the money is at the free disposal of the borrower*.
>
> *The question in every case is whether the parties intended the money to be at the free disposal of the recipient.*"

36. In that case, in which a solicitor holding funds undertook to hold them until released to the client for the acquisition of property, the test for creation of a trust was met because, at [75] "*Mr Sims undertook that the money would be used solely for the acquisition of property and for no other purpose; and was to be retained by his firm until so applied. It would not be held by Mr Sims simply to Mr Yardley's order; and it would not be at Mr Yardley's free disposition*." (emphasis in the original)

37. The question is whether, objectively speaking, the parties intended the funds to be at the free disposal of the borrower or limited to use for a particular purpose.

Analysis

The Terms of the Loans

38. The FCA submitted that the terms of the EMB Lender Agreement and the AWL Lender Agreements (collectively, the "**Loan Agreements**") are such that a *Quistclose* trust arose in favour of the Lender when the monies were advanced. Those agreements are all in the same standard form. In particular:

    i) Under the heading of "*Purpose*" in Section 3, the agreements all say "*The Borrower must apply all amounts borrowed by it under the Loan towards [trade opportunities approved by the insurance company and associated costs]*". The square brackets appear in the text of each executed loan agreement as shown. The term "the insurance company" is not capitalised, not defined and not used elsewhere in the Loan Agreements themselves.

ii) In addition, each agreement contains an undertaking by the Borrower AWL in Section 10 that "*it will only use the Loan for the purpose specified in this agreement*;"

39. The agreements all expressly state that the headings of the various provisions "*are inserted for convenience only and shall be ignored in construing this agreement*." I therefore ignore the fact that the use of proceeds provision is headed "Purpose", but it is still clear that the undertaking language is intended to constrain the use of the Loan to the ends set out in the agreement.

40. In this case, the business of AWL was, or was purported to be, investment in trade opportunities (necessarily involving payment of associated costs). If the Loan Agreements had included only this constraint on the use of the proceeds of the loans, I would have had no hesitation in concluding that therefore the money was advanced to AWL to be freely at its disposal (provided always that it is applied in the conduct of its business, described in this most general way).

41. However, here the Loan Agreements' language narrows the class of trade opportunities in which the funds could be invested into those "*approved by the insurance company*". This language is also a positive obligation, to invest in trading opportunities so approved and associated costs. The question that has to be answered, then, is whether this evidences an intention that the funds advanced could not be applied by AWL generally within its business, i.e. could not be freely disposed of.

The Meaning of the Terms

42. There is an initial difficulty, in that reading the contract on a standalone basis, it is not possible to say what "the insurance company" is. However, in connection with their issuance of the EMB Loan and the AWL Lender Agreements, AWL did take out two Financial Offering Insurance (FOI) policies, one with Allianz and one with Everest Re (the "**FOI Policies**"). Those seem to have been the only insurance relevant to the Loan Agreements, and were specifically referenced in marketing materials for the AWL Loan Scheme and EMB shares. Those policies have since been avoided by the insurers, but by their terms they provided insurance to AWL in respect of "Securities Claims" against AWL and its directors in respect of specified "Financial Offerings"

defined by reference to a schedule. The Allianz policy references the EMB Lender Agreement, as does the Everest Re policy, but I understand that the Everest Re policy was endorsed to include reference to the AWL Lender Agreements. I therefore take "the insurance company" to mean Allianz and/or Everest Re, in each case depending on which insurer underwrote the policy covering the relevant Loan Agreement as a Financial Offering.

43. So the Loan Agreements express the objective agreement of the parties that AWL would apply the funds advanced by the Lenders into trade opportunities approved by Allianz or Everest Re, as applicable, and associated costs.

44. There is more than one way to interpret this contractual language. It could mean that AWL could not invest the money unless the particular "trade opportunity" it sought to buy (or with which the costs were associated) was first approved by the insurance company. This is the more natural meaning in the abstract, but is harder to reconcile with the surrounding context of these Loan Agreements including the terms of the FOI Policies themselves. Alternatively, it could mean what Mr Henrys of EMB later indicated he understood it to mean – i.e. that the insurance company had approved the universe of trading opportunities in which AWL invested as part of its diligence process prior to underwriting the FOI policy, so that when AWL made investments as part of its general business in furtherance of its purported proprietary trading strategy they were in trade opportunities approved by the insurance company.

45. In the first alternative, the Lenders would have been advancing money that could not be freely disposed of by AWL as part of its general business (albeit that it is still a stretch to say it was advanced "to enable" AWL to invest in approved opportunities), but in the second the Lenders were advancing money to be freely disposed of by AWL as part of its business, although they did this on the basis of a misunderstanding that this was approved by an insurance company.

46. The contractual language has to be the best indicator of the parties' intentions. As Lord Justice Briggs said in *Bellis v Challinor* [2015] EWCA Civ 59 at [60] "*Usually, the question whether the essential restrictions upon the transferee's use of the property have been imposed (so as to create a trust) turns upon the*

true construction of the words used by the transferor." Where there is ambiguity in the language and this and other terms cannot be understood purely from reading the contract alone (nor does the contract have any "entire agreement" or other contractual language purporting to require it to be read on a standalone basis), certain extrinsic evidence should be taken into account in the context of determining the true construction of the contractual language.

47. Here the fact the language includes the term "the insurance company" without defining it, includes the unspecific language of "associated costs" and appears in square brackets in the executed versions of these agreements suggests to me that it was placeholder language that the parties never properly turned their minds to before executing their agreements. However, it is still binding contractual language and in all the circumstances, I have reached the view that the second of these interpretations is the better interpretation, for the following reasons.

48. *Firstly*, the language of the purported specific purpose is vague and generic. As discussed above, "the insurance company" has no intrinsic meaning and has to be identified through external means. It may also be that the EMB Loan Agreement was subject of both the Allianz and Everest Re FOI policies so it is unclear whose approval was relevant in that case. There are also less obvious problems with the meaning of the rest of the, extremely generic, language of this "purpose". Would a "trading opportunity" for example include market making in a particular asset, and would "associated costs" of approved trading opportunities include AWL's overhead costs which do not owe any of their existence to any particular opportunity. A *Quistclose* trust does not necessarily require the same specificity of purpose as set out for example in *Re Diplock* [1948] Ch 465*,* as one of the cryptocurrency AWL Lenders, 40 Tree argued. All that is required, as Norris J summarised the test in *Bieber v Teathers Ltd* [2012] EWHC 190 (Ch) is that "*the particular purpose must be specified in terms which enable a court to say whether a given application of the money does or does not fall within its terms*" provided that could be determined at the time of the application of the funds. However, the generality and impreciseness of the purpose is relevant to whether on a true construction the funds were advanced on the expectation that they could be freely disposed of. Where there

are reasons to believe that multiple realistic applications of funds might require guidance from a court to determine whether or not they were permitted, this militates against a view that the funds were advanced for a specific purpose only.

49. *Secondly*, Section 7.2 of each of the Loan Agreements undermines the view that the contract is strict in limiting the use of the funds advanced. That section allows AWL to apply proceeds of the loan to:

> "*all fees, expenses and other sums due and payable by the Borrower under this clause 7 (Fees and Expenses) out of and by deduction from the Advance*" and those sums are defined in Section 7.1 as "*all expenses (including legal and out-of-pocket expenses together with VAT, if any thereon) on a full indemnity basis that are incurred by the Lender in connection with the fulfilment of all conditions of this agreement, any amendment or extension of and the granting of any waiver or consent under and the discharge of this agreement and/or in contemplation of or otherwise in connection with the enforcement of or preservation of any rights under this agreement or otherwise in respect of any money owing under or in respect of this agreement*".

This raises the question whether these permitted uses of the funds to reimburse, say, a Lender's costs of enforcing their rights under the Loan Agreements, are associated costs of "trade opportunities". If not, this is inconsistent with Section 3. Similarly, with the full knowledge of EMB, the first tranche of the advance under the EMB Lender Agreement was used to pay the premium on the Allianz FOI Policy. It is arguable that this is an application within the remit of "trade opportunities approved by the insurance company and associated costs" but not obvious.

50. *Thirdly,* as *Lewin on Trusts* puts it at 9-065, it has been said that the effect of the authorities is that a requirement to keep monies separate is normally an indicator that they are impressed with a trust and the absence of such a requirement, if there are no other indicators, normally negatives it. This was a relevant consideration in *First City Monument Bank Plc v Zumax Nigeria Ltd*

[2019] EWCA Civ 294. None of the monies advanced here were required to be held in a segregated account, and the investors' money was all mixed. This is not fatal to the finding of a trust, per *R v Clowes & anr (No2)* [1994] 2 AER 316 and *Cooper v PRG Powerhouse Ltd (In Liquidation*) [2008] EWHC 498 (Ch), but nonetheless a relevant factor in attempting to determine objectively the intention with which the funds were advanced.

51. *Fourthly*, the Distributor Agreement pursuant to which EMB agreed to make the EMB Loan, and the way the AWL Loan Notes were marketed suggests that the Loans would be invested by AWL in the general pursuit of its business, not allocated to any particular subcategory or strand.

    i) The Distributor Agreement said that EMB would "*invest 75% of all investment from investors generated by the sub-distributors detailed in Schedule 2. The 75% is to be invested in trade programs managed by the Distributor. The investment will only be allocated once the premium on the FOI policy has been paid and as per the loan agreement signed between EMB Fund Limited/EMB Group Limited and the Distributor."* The natural reading of this is that EMB would make a general investment in AWL, but only once AWL had obtained an FOI policy.

    ii) AWL operated a website (www.argentowealth.com) captured by the FCA on 13 September 2021. From at least that date the website was advertising a "*Loan Note*" investment scheme and describing the trading opportunities in which it intended to invest proceeds, pursuant to what it claimed was a "*proprietary trading strategy*" in the following terms: *"....The Argento Wealth Loan Note has been established, based on comprehensive financial market analysis and the subsequent opportunity identified, to provide Investor's access to a high yield, robust and expertly insured product, fundamentally supported by a proprietary trading strategy. We operate a global capital markets trading strategy, seeking opportunities across multi asset and commodity sectors to include FX, Bonds, ETF, ETN, futures, options equity derivatives and other market instruments. The result is a globally diversified portfolio. Our core strategy deploys numerous methods to*

protect principal investments and where feasible, hedge the delta exposure and alpha gains. The de-risking process includes diversification across multiple trade partners, diversified trading strategies, multi asset classes, and industries without over-weighting to any particular trade or investment…."

An investor reading this description of the AWL Loan Notes would have therefore had the impression the notes gave them access to AWL's expertise and investment strategy and that AWL would have responsibility for investing the proceeds in order to generate the return.

52. *Fifthly*, the insurance of the notes did not in fact place, and was not marketed to investors as placing, a constraint on the investments AWL could make. Both AWL and EMB produced marketing materials which described the FOI policies, seemingly incorrectly, as providing indemnity to the lenders against any failures to pay by AWL as borrower.

i) An insurance insert in EMB's summary materials references "*High Yielding Trade Programs*", meaning the EMB Loan to AWL with a 25% interest rate, saying "*The Trade Partners* [i.e. AWL] *have co-ordinated the placement of a bespoke Financial Offering Insurance Policy (FOI) programme which provides an insurance backed indemnity for the investment*" and "*The lead insurer providing primary capacity to the total FOI programme, is an FCA regulated, investment grade, top ten global insurer*". It goes on to say "*Trade partner is the FOI policy holder that provides indemnity to EMB Fund Limited in the event of the trade partner not fulfilling its responsibilities under the structured loan agreement, namely principal capital and interest*."

ii) Information from the "Argento Loan Note Fact Sheet" prepared by AWL, which describes the AWL Lender Agreements as "Insured Loan Notes" says:

"*In order to stay at the forefront of lender security and protection, Argento Wealth Limited has secured a bespoke, investment grade Financial Offering Insurance policy (FOI). The FOI policy attaches*

directly to the Argento Wealth Loan Note debt obligations, providing lenders with market leading indemnity and security, with policy cover underwriting principal loan capital and interest payments, to a 100% sum insured ratio. Argento Wealth Limited work in partnership with a regulated Lloyds of London placing broker, accompanying principal capacity is provided by leading, investment grade global insurers. The primary £5,000,000 tranche of loan note issuance is underwritten by Allianz Global Corporate & Speciality SE. The secondary £5,000,000 tranche of loan note issuance is underwritten by Everest RE."

iii) The terms of the FOI Policies themselves do not, unsurprisingly, set out any approval by the insurance companies of AWL's investment process or any process for approving trading opportunities in the future. The way the FOI Policies are described in marketing materials implies it provides a backstop for repayment of capital and interest, but not that it limits the investments AWL will make with the proceeds of the loans.

53. *Sixthly*, several of the lenders under the Loan Agreements have provided information, subsequent to the execution of the Loan Agreements, seeking to explain what they intended at the time. The relevant standard is of course not what the parties subjectively meant, but what the meaning of their agreement objectively is, and extrinsic evidence obtained at a later date of subjective intention is of limited relevance even where the relevant language is ambiguous. In *Twinsectra v Yardley* at [71] Lord Millett said "*If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them*." Nonetheless, it must be sufficiently clear that the funds may be used solely for the specified purpose and for no other.

i) In the transcript of the interview given by Mr Henrys (of EMB) to the FCA on 25 April 2023, he claimed he believed the insurer had done due diligence on AWL's proprietary trading strategy as part of its underwriting process and made a determination that the loan notes could be insured. There is no suggestion that this actually happened, nor is it really consistent with the headline language on the first page of the FOI

policies which makes clear "*This is not a Performance Bond or Financial Guarantee product*".

ii) However, the view that this was what was meant by trading opportunities "*approved by the insurance company*" is supported by the contents of standard form letters delivered by certain AWL Lenders to the FCA on various dates in 2024 which say not only that they (the investors) did not intend to create a trust, which is not relevant, but also that they intended the funds to be used by AWL "*as they saw fit*" and "*in their sole discretion*" to generate enough profit to meet the 25% interest rate. This is not consistent with their executed agreement requiring AWL to invest their loan into investments approved by the insurance company, unless they mean that they understood AWL's trading programmes had been approved by the insurance company.

54. The waters are muddied because, I accept, the lenders under the AWL Loan Agreements and possibly EMB were given the impression that their investments were backstopped by insurance, and the language, though imprecise, that their proceeds would be invested in trading opportunities approved by the insurance company can be understood as making reference to that "safety" expectation, which was not met.

55. But the narrow question for today is whether on a true construction the lenders advanced their loans on the understanding that the borrower would apply them generally within its business. Taking all of these circumstances together in the round, my conclusion is that objectively the intention of the lenders was to make an immediate loan to AWL to be freely disposed of in the course of its business to support repayment with a high interest rate. The lenders appear to have understood that their return was guaranteed through insurance, and that was not correct, and without a doubt AWL breached its contractual obligations, but the lenders did not advance their money on trust.

DISTRIBUTION OF FUNDS

56. I have determined that the funds advanced in this case were not advanced on trust for a particular purpose, but as regular debt investments. Most of the funds

so advanced are lost, but the FCA has been able to recover the TW Residue and the Starling Residue which it now seeks to distribute out to "qualifying persons" with the approval of the court, where per s382(8) FSMA:

> (8) "*Qualifying person" means a person appearing to the court to be someone—*
> *(a) to whom the profits mentions in subsection (1)(a) are attributable; or*
> *(b) who has suffered the loss or adverse effect mentioned in subsection (1)(b)."*

Qualifying Persons

57. The FCA's investigation identified 3 categories of potentially "*qualifying persons*":

(1) The AWL Lenders, including 40Tree and Lead7 to the extent of their full (i.e., fiat and cryptocurrency) investments. On the FCA's case, these investors suffered loss as a result of AWL's contraventions of FSMA, i.e., its unlawful promotion of investments in the AWL Loan Scheme and unauthorised deposit-taking by operating it. Had those contraventions not occurred, the AWL Lenders would not have invested and would not have suffered the loss.

(2) Persons who invested in EMB because of the promotional efforts of AWL and its network of sub-distributors ("**AWL-EMB Investors**"). These investors have suffered loss as a result of AWL's unlawful promotion of, and arrangement of transactions to acquire, participating shares in EMB. AWL's contraventions in this regard caused the AWL-EMB Investors to invest in EMB and so suffer loss, now that their investments are effectively frozen and EMB's assets have been largely dissipated or misappropriated.

(3) Persons who invested in EMB otherwise than because of the promotional efforts of AWL and its network of sub-distributors ("**Non-AWL Investors**"). They may have suffered loss as a result of AWL's contraventions with respect to the EMB Scheme, because AWL's receipt of and dissipation of the TW Receipts under the EMB Lender Agreement may be seen as a significant cause of EMB's losses.

58. In my judgment, the Non-AWL Investors in the EMB Schemes are not "*qualifying persons*" in respect of the Defendants' behaviour as their loss is too remote from the relevant contraventions by the Defendants.

59. In respect of the EMB Scheme, the Defendants' alleged contraventions under FSMA were in relation to the promotion / arrangement of investments in EMB, which by definition only influenced the investment of the AWL-EMB Investors into EMB. In turn, it was 75% of the amount of the contributions of the AWL-EMB Investors only that was on-lent to AWL; EMB did something else with an amount of money equal to the total investments by the Non-AWL Investors. It is not possible to say what the impact would have been on the Non-AWL Investors if the Defendants had not made these contraventions. The FCA believes that without the loss of the funds invested under the EMB Lender Agreement, EMB's position may have been better, but the direct effect of the Defendants' contraventions was that the investments by the AWL-EMB Investors were made at all, and it is too speculative an exercise to determine what the impact on the Non-AWL Investors would have been if the AWL-EMB Investors had not joined them in this doomed investment. I therefore think that the persons who suffered loss as a result of the Defendants' contraventions in respect of the EMB Scheme, i.e. those "qualifying persons", should be limited to those who invested in EMB as a result of those contraventions, the AWL-EMB Investors.

Distributions Among Qualifying Persons

60. The FCA suggested that the Court then has two options for distribution among all of the "*qualifying persons*". The first would be to distribute the Starling Residue plus the TW Residue among all of them, *pro rata* to their investment amounts. This would be on the basis that the Starling Residue and TW Residue have been received pursuant to the terms of the Repayment Deed, which did not attribute those sums to either scheme. The second would be to direct distribution by reference to the scheme in which the relevant "*qualifying person*" invested, with the AWL Lenders participating *pro rata* in the distribution of the Starling Residue and the AWL-EMB Investors participating *pro rata* in the distribution of the TW Residue.

61. The alleged contraventions by the Defendants in this case are, in respect of the EMB Scheme, contravention of ss.19 and/or 21 of FSMA by carrying on the regulated activity of arranging deals in investments[1] (i.e., shares in EMB) and by engaging in financial promotions, in each case without authorisation or exemption. In respect of the AWL Loan Scheme, the contraventions were carrying on the regulated activity of accepting deposits,[2] and/or that the AWL Loan Scheme amounted to an unauthorised collective investment scheme.

62. Although I do not consider any person has a proprietary interest in the proceeds of their investments, nonetheless through the efforts of the FCA it is possible to identify what amounts of the funds held by the FCA now are attributable to receipts to the Defendants from each of the Schemes. In *Paradigm* at [44], the Deputy Judge observed that "*where a sum is recovered and is attributable to certain contraventions in respect of separate schemes, the starting point is to respect the separate existence of each scheme unless fairness requires otherwise*". Here, the Schemes, on the FCA's case, involved distinct wrongs done to distinct groups of investors and I think it is fair to use what remains of the TW Receipts to compensate AWL-EMB Investors and what remains of the Starling Receipts to compensate AWL Lenders.

EMB Scheme –Distribution

63. The FCA has identified all of the AWL-EMB Investors who I have determined are "*qualifying persons*" in respect of the TW Residue. The TW Residue is insufficient to make those investors whole for their loss, so, doing the best I can in the circumstances and taking a simple and broad brush approach as the principles summarised so helpfully in *Exall* indicate I should, I consider that the TW Residue should be distributed among the AWL-EMB Investors *pro rata* to their investment amounts, subject to the approval of the Crown Court in releasing the funds from the CROs in order to effect such distribution. I understand that the EMB Investors have not obtained any return on their investment to date but, as with the AWL Lenders as discussed below, if that is not correct then an adjustment to their investment amount should be made for

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1 A regulated activity under article 25 of the Financial Services and Markets Act 2000 (Regulated Activities Order 2001 ('**the RAO**').

2 A regulated activity under article 5 of the RAO.

those investors who received payments on their EMB shares in connection with their investments.

AWL Loan Scheme – Distribution

64. The FCA has identified all of the AWL Lenders. In my judgment all of the AWL Lenders are "*qualifying persons*" in respect of the Starling Residue, having suffered loss of the same nature arising from the same contraventions. This includes those AWL Lenders whose investments were made in cryptocurrency. There are insufficient funds available in this pool to make good the losses suffered by these investors even to the extent of the capital invested. Taking into account the principles summarised in *Exall,* I consider the fairest thing to do is to distribute the Starling Residue available funds among each of the AWL Lenders on a *pro rata* basis, pro rata to their investment amount (after deducting any "interest" or "compensation" payments any investor received from the AWL Loan Scheme).

Adjustments to Pro Rata Distribution?

65. It is my understanding that the investment amounts of the investors in EMB Shares were almost all quantified in USD, and the investments in AWL loans and payments of "interest" or "compensation" in relation thereto thereon were quantified in GBP, and that therefore there is no need to convert currency to determine the proportion of the total investment made by each of the investors. However, seven investors in EMB Shares acquired shares denominated in either EUR or GBP, and for them I accept the FCA's proposal to convert the relevant subscription sums into USD as set out in Appendix 3 to Mr Edwards' witness statement.

66. Mr Andrew Brown, an AWL Lender, has argued that distribution should be based on investment amount only, ignoring any 'interest' or other payments received back, in the interests of simplicity and fairness. However, I agree with the FCA that it would be fairer for those investors who received a (partial) return on their investments to have that return reflected in the distribution amount.

67. I note of course the objection that dividing the available amount pro rata based on unrecovered investment amount only does not take account of the different times at which the investors made their investments (and received any return)

or the different forms (fiat or cryptocurrency) in which the investments were made and in that sense does not strictly reflect the relative losses of the investors, some having been out of their funds for longer and some having missed out on the increase (or decrease) in value of their invested assets. However, bearing in mind that all of the investments were made within a relatively short period of time, a few months rather than years, in respect of both Schemes, and the argument that would inevitably ensue if I were to attempt to fix some notional return on investment the investors missed out on over time, I consider it fairer to take the simpler approach of dividing the pot based on unreturned investment amount only. In the case of the cryptocurrency investors, the investment amount is the fiat-currency equivalent specified in their AWL Lender Agreements.

CONCLUSION

68. For the reasons set out above, I am satisfied that the Court has jurisdiction under section 382(3) of FSMA to give directions for the distribution of the monies paid to the FCA pursuant to the Repayment Deed. I direct that: (i) the sum of £841,763 standing to the credit of the FCA and derived from the Starling Residue be distributed by the FCA among the AWL Lenders on a pro rata basis by reference to each lender's net investment, after deduction of any payments previously received by way of interest or compensation; and (ii) the sum of £1,046,488 standing to the credit of the FCA and derived from the TW Residue be distributed by the FCA among the EMB-AWL Investors on a pro rata basis by reference to their respective investment amounts, subject in each case to any necessary approval of the Crown Court for the release of those funds from the criminal restraint orders.