Supreme Court

New South Wales

Case Name:	In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) (No 2)
Medium Neutral Citation:	[2018] NSWSC 346
Hearing Date(s):	31 January, 1, 2, 3 February 2017
Date of Orders:	19 March 2018
Decision Date:	19 March 2018
Jurisdiction:	Common Law
Before:	Brereton J
Decision:	See [400]-[410]
Catchwords:	CORPORATIONS — Winding up — Conduct of liquidation — Application for directions - Distribution of assets – Distribution of client segregated accounts – the manner in which funds should be distributed per Corporations Regulations reg 7.8.03 - whether liquidators should group or poll all (or some) of the client segregated accounts – whether to apply reg 7.08.06(6) should be applied separately to each client segregated account – held pooling not directed across product lines. CORPORATIONS — Winding up — Conduct of liquidation — Application for directions - Distribution of assets – Distribution of recoveries – Returned collateral - whether some or all of the recoveries are beneficially owned or held on trust for clients – how recoveries and retuned collateral should be distributed having regard to Corporations Regulations – held recoveries and returned collateral held on trust for clients.

	CORPORATIONS — Winding up — Conduct of liquidation — Application for directions -Distribution of assets – Calculation of entitlements – how an entitlement to client segregated accounts and recoveries should be calculated – Set off – whether Liquidators are entitled to set off positive net account balances against negative account balances – where accounts are owned by the same client - held combine balance of individual trading accounts to calculate net position of individual clients without any need to set-off within the same group. CORPORATIONS — Winding up — Conduct of liquidation — Application for directions - Distribution of assets – Low balance – whether the Liquidators are justified in treating clients with a low balance in a client segregated account or recovery as having no entitlement to participate – held no entitlement. CORPORATIONS — Winding up — Conduct of liquidation — Application for directions - Distribution of assets – Interest – whether interest earned on client segregated accounts and recoveries is beneficially owned or held on trust for clients – held interest held on trust per reg 7.08.03(6).
Legislation Cited:	(CTH) Corporations Act 2001, s 424, s 479, s 511, s 601EE(2), s 889C(2), s 892F, s 981A, s 981B, s 981C, s 981D, s 981E, s 981F, s 981G, s 981H (CTH) Corporations Regulations 2001, regs 7.8.01, 7.8.02, 7.8.03. (NSW) Trustee Act 1925, s 63 (VIC) Trustee Act 1958, s 63
Cases Cited:	All Class Insurance Brokers Pty Ltd (in liq), In the matter of; Vardy v Westpac Banking Corporation [2014] NSWSC 475 Australian Elizabethan Theatre Trust, Re (1991) 30 FCR 491 Australian Securities and Investments Commission v Atlantic 3-Financial (Aust) Pty Ltd [2004] 1 Qd R 591; [2003] QSC 386 Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd [2001] QSC 082

Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd (1999) 33 ACSR 403; [1999] QSC 387
Australian Securities and Investments Commission v Giann & Giann Pty Ltd (2005) 141 FCR 278; 23 ACLC 276; [2005] FCA 81
Australian Securities and Investments Commission v Letten (No 5) [2010] FCA 1047
Australian Securities and Investments Commission v Letten (No 7) [2010] FCA 1231; (2010) 190 FCR 59; (2010) 80 ACSR 401.
Australian Securities and Investments Commission v Nelson [2003] NSWSC 129; (2003) 44 ACSR 719
Australian Securities Commission v Buckley (1996) 7 BPR 15,024
Australian Securities Investments Commission v Tasman Investment Management Ltd (2006) 59 ACSR 113; 202 FLR 343; [2006] NSWSC 943.
Barnes v Addy (1874) LR 9 Ch App 244
BBY Limited (Receivers and Managers appointed) (in liquidation), In the matter of [2016] NSWSC 1366
Black v Freedman & Co (1910) 12 CLR 105
CPT Custodian Pty Ltd v Commissioner of State Revenue (2005) 224 CLR 98
Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd (1997) 42 NSWLR 209
Diplock's Estate, Re; Diplock v Wintle [1948] Ch 465
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89
Fire Nymph Products Ltd v The Heating Centre Pty Ltd (1992) 7 ACSR 365
Foskett v McKeown [2001] 1 AC 102
French Caledonia Travel Service Pty Ltd, Re (2003) 59 NSWLR 361; 204 ALR 353; 48 ACSR 97; [2003] NSWSC 1008
GDK Financial Solutions Pty Ltd, Re; Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd (2006) 236 ALR 699; 60 ACSR 447; [2006] FCA 1415
Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) (2012) 288 ALR 240; 87 ACSR 442; [2012] FCA 75
Georges v Seaborn International Pty Ltd (2012) 206

	FCR 408; [2012] FCAFC 140 Global Finance Group Pty Ltd, Re (2002) 26 WAR 385; [2002] WASC 63 Handberg v MIG Property Services Pty Ltd [2010] VSC 336; (2010) 79 ACSR 373 Magarey Farlam Lawyers Trust Accounts (No 3), Re [2007] SASC 9; (2007) 96 SASR 337 MF Global Australia Ltd (in liq), In the matter of (2012) 267 FLR 27; [2012] NSWSC 994 Mier v FN Management Pty Ltd [2006] 1 Qd R 339; 56 ACSR 93; [2005] QCA 408 Re TVSN Ltd [2005] NSWSC 692 Russell-Cooke Trust Co v Prentis [2002] EWHC 2227; [2003] 2 All ER 478 Travel Compensation Fund v Classic International Cruises Pty Ltd (in liq) and Ors [2014] NSWSC 167 Warner, Re GTL Tradeup Pty Ltd (in liq) (2015) 104 ACSR 633; [2015] FCA 323 Windsor Mortgage Nominees Pty Ltd v Cardwell (1979) CLC 40-540
Texts Cited:	Campbell JC, “Republic of Brazil v Durant and the equities justifying tracing” (2016) 42 Aust Bar Rev 32 Thomas SB, "Clayton's Case and the 'Common Pool' Exception” (2004) 15 JBFLP 177
Category:	Principal judgment
Parties:	Stephen Ernest Vaughan and Ian Richard Hall in their capacity as liquidators of BBY Limited (Receivers & Managers appointed) (In liquidation) ACN 007 707 777 (1P) BBY Limited (Receivers & Managers appointed) (In liquidation) ACN 007 707 777 (2P) J Mazzetti Pty Ltd ATF J Mazzetti Pty Limited Staff Superannuation Fund & Ors (1D) Peter Brian Haywood and Bronwen Menai Haywood (ATF the Haywood Superannuation Fund) (2D) Clive Riseam (3D) Securities Exchange Guarantee Corporation Ltd (4D) David Nadin (5D)
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File Number(s): 2015/237028

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INTRODUCTION

2 The first plaintiffs Mr Stephen Ernest Vaughan and Mr Ian Hall (“the Liquidators”) became the liquidators of the second plaintiff company (“BBY”), pursuant to (CTH) *Corporations Act* 2001, ss 446A and 499, on 22 June 2015, having previously been appointed, on 17 May 2015 (“the administration date”), as administrators of BBY and nine other entities in its associated financial services group (“the BBY Group”). On 18 May 2015, St George Bank, a division of Westpac Banking Corporation appointed Mr Brett Lord and Mr Stephen Parbery receivers and managers (“the Receivers”) to BBY and other companies in the BBY Group, pursuant to a fixed and floating charge granted by those companies on 2 December 2011 (“the St George Charge”).

3 The BBY Group provided a range of financial services and products - including asset management, broker dealer services, institutional sales, trading and financial advice, and online trading - to clients in Australia. BBY offered financial products broadly comprised in the following product lines:

(1) Exchange-traded (ET) financial products, being equities such as listed shares and units (“Equities”) and exchange traded options (“ETOs”), and futures contracts and futures options (“Futures”); and

(2) "Over-the-counter" (OTC) financial products, being foreign exchange contracts (“FX”); a variety of products, including FX contracts of difference, offered by Saxo Capital Markets Australia (“SCMA”) through an on-line trading platform (“Saxo”); and other miscellaneous financial products, including some offered by Interactive Brokers LLC (“IBL”), and Carbon Trading (“Other Products”). BBY had acquired the Saxo business from the Stonebridge Group during 2011, in circumstances described below (“the Stonebridge Acquisition”).

4 Client money deposited with BBY was required, by *Corporations Act* s 981B, to be held in client segregated accounts (“CSAs”). At the administration date, there were a total of 55 CSAs, holding approximately $14.6 million; an additional $3.4 million received after the appointment of the Liquidators from ASX Clear Pty Limited (ASX Clear) (“the Returned Collateral”) has been deposited by the Liquidators into a separate trust account. The Liquidators’ preliminary investigations suggested that there was likely to be a significant shortfall between client claims in relation to CSAs, and the funds held in them:

client claims were in the order of $30 million, and the prospective shortfall in the order of approximately $12 million (before any recoveries from counterparties). It also seemed that BBY had not maintained records showing the client or clients who were entitled to the balance of any particular CSA (such as a trust ledger account for each client recording the contributions and withdrawals by that client into or from particular CSAs), nor individual cash balances for each client in each account. And there also appeared to have been transactions between CSAs - both within, and across different, product lines.

The proceedings and the parties

5 By Originating Process filed in proceedings 2015/237028 on 13 August 2015, the Liquidators - with the aspiration so far as practicable of having the issues resolved in a single proceeding, thereby avoiding incurring the additional time and cost of dealing with various separate legal challenges by clients, creditors and other interested parties – sought the Court's guidance (by way of declarations, directions under *Corporations Act*, s 479 and s 511, and advice pursuant to (NSW) *Trustee Act 1925*, s 63), as to how the amounts in the CSAs, and amounts recovered after the administration date from BBL's trading counterparties ("Recoveries"), should be dealt with ("the Liquidators' Application"). The main questions raised in the Liquidators' Application were:

(1) whether or not CSAs should be grouped or pooled, and if so, how;

(2) whether foreign currency held in the CSAs should be converted into Australian Dollars to facilitate distribution;

(3) whether Recoveries are beneficially owned by BBY, or are held on trust for clients;

(4) whether a client's positive positions should be set-off against negative \ positions, including across different product lines;

(5) whether small client entitlements (less than $100) can be disregarded;

(6) whether amounts deposited by clients after 17 May 2015, when the company went into administration, should be returned to clients, or treated as a deposit to the relevant CSA;

(7) whether interest received is owned beneficially by BBY or is held on trust for clients; and

(8) whether the liquidators' remuneration, costs and expenses should be paid out of trust property.

6 Thousands of BBY clients potentially have an interest in the CSAs and Recoveries, and for that reason representative defendants were appointed. The first defendant ("Mazzetti") represents all BBY clients with an ETO Account with open positions as at 15 May 2015. The second defendants ("Haywoods") represent all BBY clients with an Equities Account, and all BBY clients with an ETO Account without an open position as at 15 May 2015. The third defendant ("Riseam") represents all BBY clients with a Futures Account, FX Account, Saxo Account or Other Products Account.

7 The fourth defendant is the Securities Exchanges Guarantee Corporation Limited ("SEGC"). It is the trustee of the National Guarantee Fund (NGF), a compensation fund for certain classes of claims arising from dealings with participants in financial markets operated by ASX Limited (ASX) and, in certain circumstances, participants in clearing facilities operated by ASX Clear.[1] SEGC has already paid compensation in respect of *Corporations Act* Part 7.5 claims arising from BBY's insolvency and is thereby subrogated, to the extent of those payments, to all of the clients' rights and remedies in relation to the losses to which their claims relate, and stands in the shoes of those clients and may exercise their rights - even without taking an assignment of the right - in the names of the clients.[2]

8 The fifth defendant ("Nadin") represents all BBY clients with an account established in connection with financial products offered by IBL. The interest of the Nadin class was essentially resolved by directions made on an uncontentious basis on 5 December 2016, and they did not participate in the final hearing.

The preliminary questions

9 On 7 March 2016, it was ordered that it be determined, as a separate question, whether certain funds – called the Returned Collateral and the Erroneous Withdrawals - should be paid out to the class of ETO clients who had open positions as at 15 May 2015, being the class represented by Mazzetti. The

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[1] Pursuant to Corporations Act, s 889C(2), the assets of the NGF are held on trust by SEGC for the purposes of Division 4 of Part 7.5 of the Corporations Act and the corresponding regulations in Division 4 of Part 7.5 of the (CTH) Corporations Regulations 2001.

[2] Corporations Act, s 892F.

separate questions, and an Interlocutory Process filed by the Liquidators on 8 March 2016 seeking additional directions were heard on 22 and 23 March 2016. In a judgment delivered on 27 September 2016 ("the first judgment"),[3] with which this judgment should be read, I concluded (*inter alia*) that:

(1) it was not possible to conclude at that stage that the Returned Collateral was held exclusively on behalf of the Mazzetti class;

(2) however, the Erroneous Withdrawals were paid in error into a particular CSA (called the 541 Account) when they ought to have been paid into a separate post-administration account, and/or having been received post-administration were not subject to the (CTH) *Corporations Regulations 2001* reg 7.8.03(6) regime, and were held on a separate trust, and ought to be returned to the beneficiaries of that trust, being the Mazzetti class;

(3) the separate question should therefore be answered in the negative in respect of the Returned Collateral, but in the affirmative in respect of the Erroneous Withdrawals;

(4) the Liquidators would apparently be justified in returning payments made by or on behalf of clients into BBY's CSAs on or after 18 May 2015, where the purpose for which the payment was made failed ("Post-appointment Erroneous Deposits").

10 On 12 October 2016, further directions were made to give effect to the first judgment, including that the Liquidators would be justified, in respect of the Erroneous Withdrawals and Post-appointment Erroneous deposits, in treating clients in respect of payments of $100 or less, as having no entitlement to receive a distribution in respect of that payment. On 9 November 2016, the Court made an order that, *inter alia*, the Liquidators would be justified in converting the balance of CSAs for the FX, Futures and Saxo product lines denominated in foreign currency into Australian dollars.

11 On 5 December 2016 the Court made orders that:

(1) the Liquidators would be justified in treating assets held by IBL (BBY's counterparty in respect of the IBL product line), and the balance of a CSA known as the "IB Buffer account", as beneficially owned by all BBY's IBL clients; and

(2) the Liquidators would be justified in distributing the cash proceeds of realisation of those assets to BBY's IBL clients, subject to those clients being afforded an opportunity to assert and prove an *in specie* claim to particular assets held by IBL.

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[3] In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) [2016] NSWSC 1366.

The remaining issues for determination

12 The issues that remain for determination in the Liquidators' Application are:

(1) (Calculation of entitlements) how (and in particular at what date) each client's "entitlement" to CSAs and Recoveries should be calculated.

(2) (Distribution of CSAs) the manner in which funds in the CSAs should be distributed having regard to *Corporations Regulations,* reg 7.8.03, and in particular whether the Liquidators should group or pool all (or some) of the CSAs and apply reg 7.8.03(6) to such groups or pools, or whether reg 7.8.03(6) should be applied separately to each CSA.

(3) (Distribution of Recoveries) whether some or all of the Recoveries are beneficially owned by BBY or held on trust for its clients, and how the Recoveries should be distributed having regard to the *Corporations Regulations* (to the extent that such Recoveries are found to be held for the benefit of BBYL's clients). This includes whether the Mazzetti class is entitled to the Returned Collateral to the exclusion of other BBY clients.

(4) (Set off) whether the Liquidators are entitled to set off positive net account balances against negative net account balances in all accounts owned by the same BBY Group client.

(5) (Low balances) whether the Liquidators are justified in treating clients with an account balance of $100 (or some other amount) in a CSA or Recovery or less as having no entitlement to participate in the relevant CSA or Recovery.

(6) (Interest) whether interest earned on CSAs and Recoveries is beneficially owned by BBY or held on trust for its clients.

13 Meanwhile, by Originating Process filed on 10 March 2016 in proceedings 2016/77316 ("the Receivers' application"), the Receivers sought (by way of directions under *Corporations Act,* s 424, and the advice, opinion and direction of the Court pursuant to *Trustee Act,* s 63, guidance as to whether they would be justified in causing BBY to pay St George Bank an amount of $710,126.10 presently on deposit in the 541 Account, on the basis that those funds were subject to its charge. However, by their supplementary submissions dated 1 December 2016, the Receivers confirmed that they no longer claimed $710,126.10, but only $161,228.64. The Receivers relied on their written submissions and were excused from attendance at the hearing.

DISTRIBUTION OF CLIENT SEGREGATED ACCOUNTS - POOLING

14 The principal matter of contention is the manner in which funds in the CSAs should be distributed, having regard to *Corporations Regulations,* reg 7.8.03,

and in particular whether the Liquidators should group or pool all (or some) of the CSAs and apply reg 7.8.03(6) to such groups or pools, or whether reg 7.8.03(6) should be applied separately to each CSA.

15 Excluding the IBL line, there are total funds and recoveries held for BBY clients of about $25.2 million, and claims on them of about $43 million, a shortfall of about $17.8 million. In the Equities/ETOs CSAs there are funds of $14.5 million and claims of $14.4 million, a surplus of about $100,000. In Futures, FX, Saxo and Other there are funds of $10.7 million and claims of $28.7 million, a deficiency of $18 million. (In Saxo alone, there are funds of $4.5 million and claims of $12.3 million, a deficiency of $7.8 million).

16 The current state of the CSAs is the result of many thousands of transactions, commencing from at least 2 December 2011 and continuing until the administration date, including transactions in which funds have moved not only between CSAs within a product line, but also across product lines. The Liquidators, having undertaken an extensive analysis of the accounts and transactions, are not able to reconstitute the accounts so as to identify where the funds contributed by individual clients were located from time to time. It is their evidence - and appears to be common ground - that it is not reasonably and economically practicable to undertake a reconstitution of the accounts from 2 December 2011 and undertake a cash tracing exercise. Mr Vaughan deposes:

> it would be an extremely time consuming and expensive exercise for the Liquidators to attempt to identify and trace funds deposited by each client into each individual CSA, and this would at the very least require the retrieval from banks of all bank statements in respect of each CSA since the establishment of those CSAs, assuming this is possible.

17 There is no dispute that the CSAs corresponding to the same product line should be pooled for the purpose of making distributions in accordance with *Corporations Regulations* reg 7.8.3(6). However, whether there should be "pooling" across product lines is the subject of controversy. If (as contended by Mr Smith SC and Mr Ng for the third defendant Riseam, who represents the Futures, FX, Saxo and Other clients) the funds held in the CSAs corresponding to the Equities/ETOs product line are pooled with the funds in the CSAs corresponding to the Futures, FX, Saxo and Other lines, the result would be

that the $17 million shortfall would be shared by all BBY clients (except the IBL clients). If not (as contended by Mr Williams QC and Mr Parncutt for the first defendant Mazzetti, who represents ETOs clients with open positions as at 15 May 2015, by Mr Brereton SC and Ms Whitakker for the second defendants (Haywoods) who represent Equities clients and ETOs clients without an open position as at 15 May 2015, and by Mr Hutton for the fourth defendant SEGC), the Equities/ETOs clients would be paid in full, and the $17.8 million shortfall would be met by FX, Futures, Saxo and Other clients exclusively.

The statutory framework: Corporations Act and Regulations

18 Although it will be necessary to discuss various of the provisions later, it is convenient first to summarise the applicable statutory regime, which is established by *Corporations Act*, Part 7.8, Division 2 (Dealing with Clients' Money), Subdivision A (Money other than loans) ("Subdivision A"); and *Corporations Regulations,* regs 7.8.01 - 7.8.05.

19 *Corporations Act*, s 981A(1), provides that Subdivision A applies (subject to a number of exceptions) to money paid to a financial services licensee, where the money is paid in connection with a financial service that has been provided (or that will or may be provided) to a client, or a financial product held by a client; and the money is paid by the client, or by a person acting on behalf of the client, or to the licensee in the licensee's capacity as a person acting on behalf of the client. The exceptions are in subsections (2), (3) and (4), and include where the money is paid to acquire, or acquire an increased interest in, a financial product from the licensee, whether by way of issue or sale by the licensee (s 981A(2)(c)), as set out below:

> **981A Money to which Subdivision applies**
>
> (1) [**Application of Subdivision**] This Subdivision applies (subject to subsections (2), (3) and (4)) to money paid to a financial services licensee (the **licensee**) in the following circumstances:
>
> (a) the money paid in connection with:
>
> (i) a financial service that has been provided, or that will or may be provided, to a person (the **client**); or
>
> (ii) a financial product held by a person (the **client**); and
>
> (b) the money is paid:
>
> (i) by the client; or

(ii) by a person acting on behalf of the client; or

(iii) to the licensee in the licensee's capacity as a person acting on behalf of the client.

(2) [**Limitation on application of subdiv**] This Subdivision does not apply to money paid as mentioned in subsection (1) to the extent that:

(a) the money is paid by way of remuneration payable to the licensee, or the licensee is entitled to deduct such remuneration from the money; or

(b) the money is paid:

(i) to reimburse the licensee for payments made to acquire, or acquire an increased interest in, a financial product; or

(ii) to discharge a liability incurred by the licensee in respect of the acquisition of a financial product or an increased interest in a financial product, or to indemnify the licensee in respect of such a liability; or

(c) the money is paid to acquire, or acquire an increased interest in, a financial product from the licensee, whether by way of issue or sale by the licensee; or

(ca) the licensee is a licensed trustee company, and the money is paid to the licensee in connection with traditional trustee company services provided by the licensee; or

(d) Subdivision B (loan money) applies to the money.

Note: Money excluded by paragraph (c) is covered by section 1017E.

(3) [**Where payment does not constitute money to which subdiv applies**] If a person pays money to a financial services licensee in order for it to be deposited to the credit of a deposit product held by the person or another person with the licensee, that payment does not constitute money to which this Subdivision applies.

(4) [**Regulations may exempt or modify**] The regulations may:

(a) exempt money paid in specified circumstances from some or all of the provisions of this Subdivision; or

(b) declare that this Subdivision applies in relation to money paid in specified circumstances as if specified provisions of this Subdivision were omitted, modified or varied as set out in the regulations.

(5) [**Exemption may be subject to conditions**] An exemption in regulations made for the purposes of paragraph (4)(a) may be made subject to conditions specified in, or imposed in accordance with, the regulations. The regulations may provide for consequences of a contravention of a condition.

20 Section 981B(1) obliges a licensee to ensure that money to which Subdivision A applies ("Subdivision A money") is paid into a segregated account:

981B Obligation to pay money into an account

(1) [**Licensee's obligation to pay applicable money into certain account**] The licensee must ensure that money to which this Subdivision applies is paid into an account that satisfies these requirements:

(a) the account is:

(i) with an Australian ADI; or

(ii) of a kind prescribed by regulations made for the purposes of this paragraph;

and is designated as an account for the purposes of this section of this Act; and

(b) the only money paid into the account is:

(i) money to which this Subdivision applies (which may be money paid by, on behalf of, or for the benefit of, several different clients); or

(ii) interest on the amount from time to time standing to the credit of the account; or

(iii) interest, or other similar payments, on an investment made in accordance with regulations referred to in section 981C, or the proceeds of the realisation of such an investment; or

(iv) other money permitted to be paid into the account by the regulations; and

(c) if regulations made for the purposes of this paragraph impose additional requirements — the requirements so imposed by the regulations; and

(d) if the licence conditions of the licensee's licence impose additional requirements — the requirements so imposed by the licence conditions.

The money must be paid into such an account on the day it is received by the licensee, or on the next business day.

(2) [**Number of accounts**] The licensee may, for the purposes of this section, maintain a single account or 2 or more accounts.

21 Section 981C provides that the Regulations may deal with various matters relating to accounts maintained for the purposes of s 981B, including (s 981C(a)) the circumstances in which payments may be made out of an account:

981C Regulations may deal with various matters relating to accounts maintained for the purposes of section 981B

The regulations may deal with all or any of the following in relation to accounts, or a class of accounts, maintained for the purposes of section 981B:

(a) the circumstances in which payments may be made out of an account (including the circumstances in which money may be withdrawn and invested, and the kinds of investment that may be made);

(b) the minimum balance to be maintained in an account;

(c) how interest on an account is to be dealt with;

(d) how interest or other earnings on an investment of money withdrawn from an account, or the proceeds of the realisation of such an investment, are to be dealt with.

22 In that behalf, reg 7.8.01(5) amplifies the requirements of s 981B by providing that the licensee must operate and designate the segregated account as a trust account, and hold all moneys paid into it (other than moneys paid under the licensee's obligation to call margins from clients under, *inter alia*, the operating rules of a licensed market) on trust for the benefit of the person entitled to the moneys:

> (5) For paragraph 981B(1)(c) of the Act, a financial services licensee must:
>
> (a) operate an account which that paragraph applies as a trust account; and
>
> (b) designate the account to be a trust account; and
>
> (c) hold all moneys paid into the account (other than moneys paid to the financial services licensee under the financial services licensee's obligation to call margins from clients under the market integrity rules, the operating rules of a licensed market or the operating rules of a licensed CS facility) on trust for the benefit of the person who is entitled to the moneys

23 Regulation 7.8.02(1), makes provision for permissible withdrawals from accounts maintained for the purposes of s 981B:

> **(1) Withdrawals from account** For paragraph 981C(a) of the Act, payments may be made out of an account maintained for section 981B of the Act in any of the following circumstances:
>
> (a) making a payment to, or in accordance with the written direction of, a person entitled to the money;
>
> (b) defraying brokerage and other proper charges;
>
> (c) paying to the financial services licensee money to which the financial services licensee is entitled
>
> (d) making a payment of moneys due to an insurer in connection with a contract of insurance;
>
> (e) making a payment that is otherwise authorised by law;
>
> (f) paying to the financial services licensee money to which the financial services licensee is entitled pursuant to the market integrity rules or the operating rules of a licensed market.

24 Section 981D provides for another situation in which Subdivision A money can be used (even though it is in a s 981B account), namely that if the relevant

financial service is or relates to a dealing in a derivative, or the relevant financial product is a derivative, the money concerned may also be used for the purpose of meeting obligations incurred by the licensee in connection with margining, securing or settling dealings in derivatives by the licensee, *including dealings on behalf of people other than the client*:

> **981D Money related to derivatives may be used for general margining etc purposes**
>
> Despite anything in regulations made for the purposes of section 981C, if:
>
> (a) the financial service referred to in subparagraph 981A(1)(a)(i) is or relates to a dealing in a derivative;
>
> (b) the financial product referred to in subparagraph 981A(1)(a)(ii) is a derivative;
>
> the money concerned may also be used for the purpose of meeting obligations incurred by the licensee in connection with margining, guaranteeing, securing, transferring, adjusting or settling dealings in derivatives by the licensee (including dealings on behalf of people other than the client).

25 In the first judgment, I concluded that while this means that no breach of trust was involved in a licensee using moneys paid by one derivatives client to meet a call for cover relating to other derivatives clients, it does not mean that the licensee is entitled to treat client moneys as its own, so as to extinguish the rights of the clients to whom they initially belonged and who deposited them - the permission is to *use* the money for limited purposes, not to appropriate it. On the other hand, as it would be curious if, by permissibly using one client's moneys to fund an obligation owed in respect of another, the other could unwittingly become a trustee for the first, and as there is no direct relationship between the two clients, the preferable analysis is that where a licensee permissibly uses the funds of one client to meet the margin or security obligations of another, the licensee becomes a borrower from the first and a lender to the second client. In other words, the licensee (permissibly) borrows from the trust account, and lends to another client; but the first client does not have a right to trace the money into the hands of the second.[4]

26 Section 981E protects Subdivision A money from attachment, except at the suit of the person entitled to it:

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[4] In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) [2016] NSWSC 1366 at [91]-[93].

981E Protection of money from attachment etc

(1) [**Application of section**] This section applies to:

(a) money to which this Subdivision applies that has been paid to the licensee, both while it is in an account maintained for the purposes of section 981B and before and after it is paid into such an account; and

(b) other money in such an account as permitted by paragraph 981B(1)(b); and

(c) investments made in accordance with regulations made for the purposes of section 981C.

(2) [**Limitations on dealing with applicable money and investments**] Money and investments to which this section applies are not capable:

(a) of being attached or otherwise taken in execution; or

(b) of being made subject to a set-off, security interest or charging order, or to any process of a similar nature;

except at the suit of a person who is otherwise entitled to the money or investment.

27 Section 981F provides that the Regulations may include provisions as to how funds held are to be dealt with "if the licensee becomes insolvent, within the meaning of the regulations":

981F Regulations may deal with how money to be dealt with if licensee ceases to be licensed etc

The regulations may include provisions dealing with how money in an account maintained for the purposes of section 981B, or an investment of such money, is to be dealt with if:

(a) the licensee ceases to be a financial services licensee; or

(b) the licensee becomes insolvent, within the meaning of the regulations; or

(c) the licensee merges with another financial services licensee; or

(d) the licensee ceases to carry on some or all of the activities authorised by their licence.

28 For that purpose, reg 7.8.03 relevantly applies, *inter alia,* if the licensee "is the subject of … the appointment of an administrator". It then provides that a trust attaches to the money in the account, and then prescribes the order of application of funds in a s 981B account:

(4) For each person who is entitled to be paid money from an account of the financial services licensee maintained for section 981B of the Act, the account is taken to be subject to a trust in favour of the person.

(5) If money in an account of the financial services licensee maintained for section 981B of the Act has been invested, for each person who is entitled to

be paid money from the account, the investment is taken to be subject to a trust in favour of the person.

(6) Money in the account of the financial services licensee maintained for section 981B of the Act is to be paid as follows:

(a) the first payment is of money that has been paid into the account in error;

(b) if money has been received on behalf of insureds in accordance with a contract of insurance, the second payment is payment to each insured person who is entitled to be paid money from the account, in the following order:

(i) the amounts that the insured persons are entitled to receive from the moneys in the account in respect of claims that have been made;

(ii) the amounts that the insured persons are entitled to receive from the moneys in the account in respect of other matters;

(c) if:

(i) paragraph (b) has been complied with; or

(ii) paragraph (b) does not apply;

the next payment is payment to each person who is entitled to be paid money from the account;

(d) if the money in the account is not sufficient to be paid in accordance with paragraph (a), (b) or (c), the money in the account must be paid in proportion to the amount of each person's entitlement;

(e) if there is money remaining in the account after payments made in accordance with paragraphs (a), (b) and (c), the remaining money is taken to be money payable to the financial services licensee.

29 Section 981G provides:

981G Account provider not liable merely because of licensee's contravention

Nothing in this Subdivision, or in regulations made for the purposes of this Subdivision, makes the body (not being the licensee) that the account is with under paragraph 981B(1)(a) subject to any liability merely because of a failure by the licensee to comply with any of the provisions of this Subdivision or those regulations.

30 Section 981H provides that Subdivision A money that is paid to the licensee by the client, or by a person acting on behalf of the client, or in the licensee's capacity as a person acting on behalf of the client, is taken to be held in trust by the licensee for the benefit of the client:

981H Money to which Subdivision applies taken to be held in trust

(1) [**Money taken to be held in trust**] Subject to subsection (3), money to which this Subdivision applies that is paid to the licensee:

(a) by the client; or

(b) by a person acting on behalf of the client; or

(c) in the licensee's capacity as a person acting on behalf of the client;

is taken to be held in trust by the licensee for the benefit of the client.

(2) [**Repealed**]

(3) [**Regulations may exempt or make provisions relating to money to be held in trust**] The regulations may:

(a) provide that subsection (1) does not apply in relation to money in specified circumstances; and

(b) provide for matters relating to the taking of money to be held in trust (including, for example, terms on which the money is taken to be held in trust and circumstances in which it is no longer taken to be held in trust).

31 No regulations of the kind authorised by 981H(3)(a) exempting money from the s 981H trust in specified circumstances have been made.

32 It is important to observe that while s 981B requires that Subdivision A money be paid into a segregated account, which reg 7.8.01(5) requires be designated and operated as a trust account, s 981H has the effect that all Subdivision A money is taken to be held in trust by the licensee for the benefit of the client – and that does not depend on its being paid into, or remaining in, a s 981B segregated account.

33 Of the provisions of Subdivision A, in *Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq)*, Gordon J observed:[5]

> The effect of these provisions is to create one or more mixed trust funds with special characteristics: they are intended to be used specifically for the provision of financial services and for the holding of and dealing in financial products; they can be used to meet margin calls and to act as security for dealings in derivatives, including dealings on behalf of clients other than the depositing client; however, they cannot be used to satisfy the creditors of the licensee. Such money "is taken to be held on trust by the licensee for the benefit of the client".

[5] (2012) 288 ALR 240; 87 ACSR 442; [2012] FCA 75 at [77]; see also MF Global Australia Ltd (in liq), In the matter of (2012) 267 FLR 27; [2012] NSWSC 994 at [40]. Other cases which have considered Subdivision A include Georges v Seaborn International Pty Ltd (2012) 206 FCR 408; [2012] FCAFC 140 (e.g. at [62]-[72], [196]-[200]); and In the matter of All Class Insurance Brokers Pty Ltd (in liq); Vardy v Westpac Banking Corporation [2014] NSWSC 475 ("All Class Insurance Brokers") (e.g., at [15]-[27], [39]-[52]) (White J); Warner, Re GTL Tradeup Pty Ltd (in liq) (2015) 104 ACSR 633; [2015] FCA 323.

How the question of pooling arises

34 As BBYL is insolvent, regulation 7.8.03 applies. In the context of the reference in reg 7.8.03(4) to "an account of the financial services licensee maintained for section 981B", the singular word "account" in reg 7.8.03(6) is not to be read as referring to the plural.[6] By reg 7.8.03(4), each s 981B account is taken to be subject to a trust in favour of each person who is entitled to be paid money from *that* account. The order of distribution, provided by reg 7.8.03(6), requires that (after payment out of money paid in in error, and of insurance proceeds to the insured), "the next payment is payment to each person who is entitled to be paid money from" *that* account, and if the money is insufficient to pay in full, then *pari passu*.

35 Thus to have a right to payment under reg 7.8.03(6)(c) and (d) out of a particular CSA, a claimant on the fund must demonstrate an "entitlement" to money in *that* account. Neither the Act nor the Regulations define what is meant by "who is entitled to be paid money" or its equivalents.[7] However, general principles of trust law relevant to determining entitlement will apply, insofar as they are not displaced or modified by the statutory regime.[8]

36 Because regulation 7.8.03(6) applies individually to each s 981B account maintained by an insolvent licensee, and does not provide for all the licensee's 981B accounts to be pooled and dealt with collectively, it does not authorise the pooling of accounts for the purposes of distribution. However, pooling has been permitted where there has been a mixing of funds,[9] particularly if the accounts in question "can no longer practically or economically be the subject of a cash tracing exercise".[10]

37 It is in that context that the Liquidators seek directions and/or declarations as to the manner in which funds in each CSA should be distributed, and in particular

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[6] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [45] - [47].

[7] See In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [100] - [101].

[8] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [102]; Vardy v Westpac Banking Corporation [2014] NSWSC 475 ("All Class Insurance Brokers") at [47] and [48].

[9] Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) (2012) 288 ALR 240 at 262-263 [82-86]; 87 ACSR 442; [2012] FCA 75; In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27 at 45-48 [49]-[55]; [2012] NSWSC 994.

[10] Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) (2012) 288 ALR 240 at 264 [92]; 87 ACSR 442; [2012] FCA 75.

whether they should group (or "pool") all or some of the CSAs and apply reg 7.8.03(6) to the pooled accounts, or whether reg 7.8.03(6) must be applied separately to each CSA.

The basis on which "pooling" is permitted

38 As has been foreshadowed, although the reference to an "account" in reg 7.8.06 is to a singular s 981B account not to pooled "accounts", pooling has been held to be permissible in a number of cases. As Black J observed in *MF Global,*[11] the term "pooling" in this context may not be entirely apt, but includes at least the application of reg 7.8.03(6) to multiple CSAs, where the funds in those CSAs have already been mixed. As will appear, although informed by equitable principles pertaining to deficient mixed funds, pooling is directed on pragmatic grounds.

39 The effect of "pooling" two or more accounts is to treat each client's entitlement to one account as identical to its entitlement to the other account(s), and so to treat each client as having a rateably equal interest in each fund. Thus in principle it will be warranted when the funds have become so intertwined that each client's entitlement to one account may reasonably be regarded as identical to its entitlement to the other(s), and this will be so when it is reasonable to regard each as having a rateably equal interest in the mixed fund.

A pragmatic remedy

40 Although not concerned with the pooling of multiple accounts, *Re French Caledonia Travel Service Pty Ltd*[12] is an important starting point, because it demonstrates that in a liquidator's application for directions, courts often have to do "rough justice" by reason of the limitations of the available evidence, in the light of what is reasonably practical and economical, and judgments may be made on evidence much inferior to that which would be required to sustain a beneficiary's claim in adversarial proceedings. Campbell J (as he then was) explained that while a liquidator must distribute the company's funds – or funds under its control as a trustee - in accordance with the legal entitlements of

[11] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [44].
[12] (2003) 59 NSWLR 361 at 420-1; 204 ALR 353; 48 ACSR 97; [2003] NSWSC 1008 at [186].

people to those funds, findings as to what those legal entitlements are depend upon the evidence and inferences properly drawn from it, and where a liquidator seeking to administer a fund knows no more than that the fund is held on trust and that there are a number of potential claimants whose merits he cannot on any rational basis distinguish between, a liquidator may be justified in distributing the fund amongst the claimants proportionately to their claims, and it may be appropriate to direct the liquidator accordingly:

> [186] As *Crace-Calvert's Case* and *Sinclair v Brougham* show, it is possible for there to be tracing which does not depend upon identifying the transmogrifi-cations which the assets of a particular beneficiary have gone through. Sometimes, a liquidator seeking to administer a fund will know nothing more than that the fund is held on trust, and that there are a number of potential claimants to the fund, whose merits he cannot on any rational basis distinguish between. In such a situation, it may be appropriate for the court to direct a liquidator that he is justified in distributing the fund amongst the claimants proportionately to their claims. It is relevant to this that in *Sinclair v Brougham* the fact of monies being mixed was enough for the House to decide that there should be a pro rata distribution, and the paucity of evidence meant that there was no reason to depart from a pro rata distribution.
>
> [187] Sometimes, however, there might be facts which show that claimants fall into particular classes, such that the amount of the charge which one class has on the assets which remain is likely to be a smaller proportion of the amount of their money which went in than is the case with another class. If, for instance, there was a time when a trust account was completely depleted, beneficiaries whose money went into that trust account before the day of depletion could not have any equitable right at all to the sum which stands in the account at the date of trial. If the account in which the mixing occurred at any time reached a particularly low level, it may be that those people whose money was paid into the account before that low level was reached ought be accorded a smaller dividend on the amount of their claim than people whose money was paid in after that low level was reached. In carrying out such calculations, estimation and inference can be appropriate if precise evidence is not available.
>
> [188] Sometimes, likewise, there might be facts which showed that claimants fall into particular classes such that one class has a higher priority for the charge it can establish than does the other class.
>
> [189] While a liquidator must distribute funds of the company, or under his control through the company being trustee of trusts, in accordance with legal entitlements of people to those funds, the court's findings about what legal entitlements exist depend upon the evidence which is placed before the court, and inferences properly drawn from that evidence. When distribution of a fund is made by reference to classes of claimants, the available evidence is frequently evidence about the nature of a fund and the types of contribution which have gone into it. It is because the evidence is at this level of generality that the court reaches conclusions about the beneficial ownership of the fund by saying that it is divided amongst claimants in some particular way. If ever the court is able to give a remedy founded on tracing some individual claimants, it is because evidence is available which enables the property of those individual claimants to be more specifically traced. It should not be a

> cause for surprise that evidence of these different types can lead to different types of conclusion.
>
> [190] It is possible to recognise that, on the basis of evidence of a liquidator's investigations taken to a certain stage, distribution among claimants proportion-ately to their claims is proper, while at the same time recognising the theoretical possibility that further investigation might turn up facts which showed, in some way, inequality amongst the various claims. If ever a liquidator is in significant doubt about whether he ought conduct further investigations to see whether any such facts emerge, he can always ask the Court for directions on that topic.

41 Thus the liquidator – and the Court – has to do the best it can with the available evidence. One reason for that is that the fund has to be distributed, one way or another.

42 In *Sonray*,[13] in an application under *Corporations Act,* s 511, and (VIC) *Trustee Act 1958*, s 63, by the liquidators of Sonray Capital Markets Pty Ltd (who, like the present Liquidators, had become liquidators following an initial appointment as voluntary administrators) Gordon J directed, apparently under s 511, that the liquidators pool various assets, including the client segregated accounts, into a single client fund for the purpose of distribution. Having observed that "[w]here a licensee ceases to be licensed, or becomes insolvent, reg 7.8.03(6) of the regulations determines how money in "the account" of the licensee maintained for the purposes of s 981B is to be paid",[14] her Honour proceeded to hold that in circumstances where it was not possible to work out precisely who is entitled to what moneys in particular segregated accounts, all the Court could do was to permit the moneys in the segregated accounts to be pooled with a view to their proportionate distribution:[15]

> [82] In the present case, applying these provisions of the *Corporations Act* and the regulations is not straight forward. First, the words "entitled" and "entitlement" are not defined in the *Corporations Act* or the regulations. Given the statutory trust imposed by s 981H(1) of the *Corporations Act*, the liquidators submitted (and I accept) that these words import the principles applicable to trusts and, in particular, to deficient mixed trust accounts: compare *Re Lehman Brothers* at [67]–[72] and [181] .
>
> [83] Those principles provide that all contributors to a deficient mixed fund hold an equitable charge over the entire fund and its traceable proceeds to the

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[13] Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) (2012) 288 ALR 240; 87 ACSR 442; [2012] FCA 75

[14] Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) (2012) 288 ALR 240; 87 ACSR 442 at 464 [78]; [2012] FCA 75.

[15] Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) (2012) 288 ALR 240; 87 ACSR 442 at 464-5; [2012] FCA 75

> value of their contributions, subject to any dealings and costs (*Sutherland Re; French Caledonia Travel Services Pty Ltd (in liq)* (2003) 59 NSWLR 361; 204 ALR 353; 48 ACSR 97; [2003] NSWSC 1008 (*French Caledonia*) and *Australian Securities and Investments Commission v Letten (No 7)* (2010) 190 FCR 59; 80 ACSR 401; [2010] FCA 1231 (*Letten* (No 7))) or are equitable tenants in common of the mixed fund as a whole, including its traceable proceeds, and subject to such deductions: R M Goode, *Goode on Legal Problems of Credit and Security*, 4th ed, Sweet & Maxwell/Thomson Reuters, London, 2008, at [6-11 - 6-14].
>
> [84] Next, the *Corporations Act* and the regulations do not deal with the situation where it is not possible to work out precisely who is entitled to what moneys in particular segregated accounts. It was common ground that all the court can do in such circumstances is to permit the moneys in the segregated accounts to be pooled with a view to their proportionate distribution. The basis for the rateable distribution is the mixing of the funds: *French Caledonia* at [127] and [187] .
>
> [85] Such a course of action is consistent with the purpose of the statutory regime, namely the achievement of a fair outcome between clients by a pragmatic and even-handed distribution among them: see, by way of example, s 983E of the *Corporations Act* which provides that where the money received is insufficient to pay all proved claims, the court may "despite any rule of law or equity to the contrary, apportion the money among the claimants in proportion to their proved claims and show in the scheme how the money is so apportioned" and the second reading speeches in relation to the *Financial Services Reform Bill 2001* (Cth) which indicate that the legislation was designed to produce a harmonised regulatory regime for market integrity and consumer protection across the financial services industry.
>
> [86] Of course, rateable distribution is subject to an important qualification — it does not apply if the claimants do not have equal claims: *French Caledonia* at [176] and [185]. Put another way, it is necessary to determine whether there should be differential treatment of claimants. That question is determined on available evidence. Thus, if a claimant can establish a remedy founded on tracing, the court will grant relief founded on that evidence because it permits it to reach a different conclusion in respect of that claimant: *French Caledonia* at [178], [187] and [189].

43 Those opposing pooling submitted that at this point, Gordon J was speaking of the application of reg 7.8.03(6) to a particular segregated account, in the context that entitlements to the moneys in *that* account could not be worked out precisely, and that those observations were not addressed to the pooling of multiple accounts to be treated as one for the purposes of distribution under that regulation. However, I do not accept this. Her Honour refers (in [84]) to permitting "the moneys in the segregated accounts to be pooled with a view to their proportionate distribution"; and the reference to accounts in the plural is consistent with how her Honour then proceeded:[16]

[16] Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) (2012) 288 ALR 240; 87 ACSR 442 at 466-7; [2012] FCA 75.

a Balances in the segregated accounts

[91] As discussed at [48] above, there were at least 1049 defalcations which directly or indirectly affected the funds held in the ANZ AUD segregated account. Due to the nature, number and frequency of the defalcations and the number and frequency of legitimate deposits, withdrawals, transfers, dealings and trading by Sonray clients, officers and providers, that account cannot practically or economically be the subject of a cash tracing exercise.

[92] When Sonray client money from the ANZ AUD segregated account was transferred into other segregated accounts, or was used for trading by Sonray clients who had deposited money into another segregated account for that purpose (the tainted transactions), those segregated accounts became "tainted" with both the deficiency in the ANZ AUD segregated account and the equitable joint charge over, or the equitable tenancy in common in, the money transferred or the money deposited but not used in the trading: see [83] above. Those accounts share with the ANZ AUD segregated account the character of being irreversibly deficient and mixed and too can no longer practically or economically be the subject of a cash tracing exercise.

[93] Indeed, the liquidators' investigations revealed that:

(1) transfers of funds to and from providers occurred predominantly through the ANZ segregated accounts listed at [8] above, notwithstanding that deposits from Sonray clients in respect of margin calls and anticipated trades were made into other segregated accounts, for example, one of the HSBC AUD segregated accounts;

(2) money from the ANZ AUD segregated account was transferred into other accounts, including the ANZ USD segregated account, which in turn was subject to transfers into the ANZ Euro segregated account and the Macquarie cash management account;

(3) according to Sonray's cash management manual, the ANZ AUD segregated account was to be used for deposits of USD, GBP, EUR, NZD and JPY, notwithstanding that separate bank accounts denominated in those currencies were maintained;

(4) money was transferred between foreign currency segregated accounts as and when requested by a Sonray client and not necessarily in connection with trading;

(5) Sonray clients were permitted to make withdrawals of USD from the ANZ USD segregated account notwithstanding that they had not deposited USD into that account; and

(6) all margin calls by Saxo in relation to all trading through that provider were met from the ANZ AUD segregated account and, on at least one occasion, the ANZ USD segregated account, irrespective of individual Sonray clients and their trading and the currency in which trading was denominated.

[94] For those reasons, the tainted segregated accounts (see [12] above) must be pooled before Sonray client entitlements can be meaningfully calculated and entitlements distributed. The pooled tainted segregated accounts (the pool), after deductions for any set-offs, net offs and liquidators' remuneration and expenses (as defined in Annex B), must be distributed rateably to those Sonray clients who contributed to the tainted segregated accounts, either by operation of r 7.8.03(6)(d) or by application of the relevant equitable principles: see [83] above.

44 Moreover, the order ultimately made by her Honour was in respect of the segregated accounts collectively:[17]

> (1) The liquidators are directed to pool the following assets into the client fund:
>
> (1.1) the segregated accounts (but excluding the funds held in the HSBC USD Singapore segregated account, being account number 260-696760-178 held at the Singapore branch of HSBC);
>
> 87 ACSR 442 at 505
>
> (1.2) the Saxo shares (but excluding shares referred to in order 6) to the extent they come within the liquidators' control;
>
> (1.3) the Interactive Broker balances (but excluding shares referred to in order 6);
>
> (1.4) the recovered money.

45 *Sonray* proceeds on the principle that "all contributors to a deficient mixed fund hold an equitable charge over the entire fund and its traceable proceeds to the value of their contributions, subject to any dealings and costs … or are equitable tenants in common of the mixed fund as a whole, including its traceable proceeds, and subject to such deductions".[18] Thus a person who deposits money in a trust account, whose money by reason of subsequent transactions becomes mixed in a deficient second trust account, thereby acquires an equitable charge over all of the moneys in the second account, and so can be said to be "entitled" to money in the second account. In *Sonray,* the transfers of client money from one segregated account to others "tainted" the others with both the deficiency in the first account and the equitable joint charge over, or the equitable tenancy in common in, the money transferred; and because they could no longer practically or economically be the subject of a cash tracing exercise, they could be regarded as irreversibly deficient and mixed, and treated as one fund and pooled.

46 That is not to say that once mixing is established, pooling must follow. In *MF Global*, Black J, having observed that reg 7.8.03(6) "does not seem to

[17] Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) (2012) 288 ALR 240; 87 ACSR 442 at 504-5 [307]; [2012] FCA 75.

[18] Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) (2012) 288 ALR 240 at 262 [83]; 87 ACSR 442 at 504-4 [307]; [2012] FCA 75, citing Re French Caledonia Travel Service Pty Ltd (2003) 59 NSWLR 361; 204 ALR 353; 48 ACSR 97; [2003] NSWSC 1008 and Australian Securities and Investments Commission v Letten (No 7) (2010) 190 FCR 59; 80 ACSR 401; [2010] FCA 1231.

contemplate pooling of accounts in the ordinary course",[19] and that there was "no reason to read reg 7.8.03(6) in a manner which would require pooling where more than one account had been maintained as permitted by s 981B(2), but those accounts had in fact been maintained separately so that there was no mixing of funds between them",[20] continued:

> [49] This conclusion does not, however, prevent the court directing the Liquidators that pooling is appropriate in a particular case, at least where there has been mixing of funds across the relevant accounts. In *Sonray*, Gordon J permitted the pooling of accounts maintained for the purpose of s 981B. Her Honour noted (at [78]) that "[w]here a licensee ceases to be licensed, or becomes insolvent, reg 7.8.03(6) of the regulations determines how money in "the account" of the licensee maintained for the purposes of s 981B is to be paid". Her Honour also noted (at [84]–[85]) that:
>
>> Next, the Corporations Act and the regulations do not deal with the situation where it is not possible to work out precisely who is entitled to what moneys in particular segregated accounts. It was common ground that all the court can do in such circumstances is to permit the moneys in the segregated accounts to be pooled with a view to their proportionate distribution. …
>>
>> Such a course of action is consistent with the purpose of the statutory regime, namely the achievement of a fair outcome between clients by a pragmatic and even-handed distribution amongst them: …

47 His Honour observed that "the case law has recognised that, where there are relatively clear property interests in particular property, this cannot "be altered by reference to some notion of common misfortune",[21] and that "accounts should only be pooled … if mixing or another proper basis for pooling is established".[22] His Honour directed pooling in the context of findings that "it would not be possible, or at least would not be practicable in a cost-effective way, to calculate the portion of the balance of each CSA attributable to any individual client",[23] and that "distribution by account would be impractical or inappropriate, since the balance of all of the CSA accounts as at the

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[19] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [47]
[20] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [48].
[21] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [78]; citing Russell-Cooke Trust Co v Prentis [2002] EWHC 2227; [2003] 2 All ER 478 at [44]; Australian Securities Commission v Buckley (1996) 7 BPR 15,024; Re Magarey Farlam Lawyers Trust Accounts (No 3) [2007] SASC 9; (2007) 96 SASR 337 at [123], [145]; S B Thomas, "Clayton's Case and the 'Common Pool' Exception (2004) 15 JBFLP 177 at 183.
[22] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [78]-[79].
[23] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [50].

Appointment Date has been affected by one or more of these transactions, … [which] resulted in a mixing of the CSAs”.[24]

48 While his Honour refers to “another proper basis”, all the cases appear to involve mixing. As his Honour explained,[25] in this context a “mixed fund” is one that contains funds from more than one source;[26] and while the typical case involves mixing “across accounts”,[27] there is also “mixing” where funds of one trust are applied to meet obligations of another:[28]

> In *Re Global Finance Group Pty Ltd (in liq)* [2002] WASC 63; (2002) 26 WAR 385 at [97], McLure J observed that a "mixed fund" is "one which contains funds from more than one source". The cases in which pooling has been sanctioned typically involve the mixing of funds across accounts: *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* [2001] QSC 082; *Australian Securities and Investments Commission v Letten (No 7)* [2010] FCA 1231; (2010) 190 FCR 59; (2010) 80 ACSR 401. However, mixing may also be established where funds in one trust have been applied to meet obligations of another trust. In *Australian Securities and Investments Commission v Nelson* [2003] NSWSC 129; (2003) 44 ACSR 719 at [21], Austin J referred to mixing in that sense, although also noting that there had also been a physical mixing in bank accounts in that case. That approach was also adopted by Gordon J in *Sonray* at [92], when her Honour observed that one segregated account in the case was "tainted" when it was, inter alia, used for trading by clients who had deposited money into another segregated account. The corresponding situation here is where the Australian-based CSAs are used for payment of commission and fees referable to trading by MFGS (and ultimately its clients) who had deposited monies to the Singapore-based accounts, as I will note below.

49 In respect of a particular sub-set of the accounts in question (the “Singapore-based accounts”), his Honour explained:[29]

> These transactions do not involve the deposit of funds from the Australian based CSAs to the Singapore-based accounts. However, if too much was withdrawn from the Singapore-based accounts by way of margin, then monies subject to the statutory trust over the Singapore-based accounts were applied to meet obligations which should properly have been met from the Australian-based CSAs; and, if too little was withdrawn, monies subject to the statutory trust over the Australian-based CSAs were applied to meet obligations which should properly have been met from the Singapore-based accounts. The

[24] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [52].
[25] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [79].
[26] Re Global Finance Group Pty Ltd (in liq) (2002) 26 WAR 385 at [97] (McLure J).
[27] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [79].
[28] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC at [79], citing Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd [2001] QSC 082; Australian Securities and Investments Commission v Letten (No 7) [2010] FCA 1231; (2010) 190 FCR 59; (2010) 80 ACSR 401; Australian Securities and Investments Commission v Nelson [2003] NSWSC 129; (2003) 44 ACSR 719 at [21].
[29] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [84]

deposit of receipts from hedging to the Australian-based CSAs in turn gives rise to a potential diminution of the Singapore-based accounts.

50 His Honour continued (emphasis added):[30]

> On balance, I have concluded that the case for pooling the Singapore-based accounts has been established. *I would not have considered that the small number and size of money transfers from the Australian-based CSAs into the Singapore-based accounts were sufficient, without more, to warrant a direction for pooling*. However, it seems to me that direction is justified by the fact that commission and fees for MFGS (and its clients) who had deposited monies to the Singapore-based accounts was paid, by excess funds transfers, from the Australian-based CSAs. I do not think it is [an] answer to that fact that, as MFGS contends, the position of the trust over the Australian-based CSAs could at least partly (where MFGS is in liquidation) be restored by a claim by MFGA against MFGS for liabilities of the Singapore-based accounts which were in fact met out of the Australian based CFD CSAs.
>
> *I am reinforced in that view by the fact that payment of margins and recoveries appear to have proceeded on the basis that the Australian based CFD CSAs and the Singapore-based accounts were treated as integrated accounts, consistent with the fact that margins were paid on a nett basis across the CFD Product Lines rather than separately by reference to trading by MFGS and other CFD clients of MFGA*. The amount of any overpayment or underpayment of margins from the trust over the Singapore-based accounts is unknown and probably unknowable (because margins were paid on a nett basis rather than a client basis) and the amount of any overpayment of recoveries to the Australian-based CSAs is also unknown. *In the absence of pooling, it is very likely, and possibly inevitable, that the trust over one of those accounts will benefit at the expense of the other, although it is not known from the evidence which will be the winner and which the loser.* This also seems to me to be a strong reason to order pooling of the Singapore-based accounts with the Australian-based CFD CSAs.

51 The second emphasised passage was relied upon for the proposition that the fact that the trustee in fact deals with the segregated accounts on an "integrated" basis may weight in favour of pooling. I do not think that is what his Honour was saying; rather, it was an observation that this treatment of the accounts had contributed to making the calculation of any amount to be restored to the donor accounts practically impossible. There is no good reason why a trustee's disregard of its legal obligation to keep the funds separate should favour pooling them, if they would not otherwise be pooled.

52 The importance of the first and emphasised passages is that they show that questions of degree are involved (so that a small number of small transfers may not have warranted pooling), and that one of the objects is to avoid a

[30] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 at [86]-[87].

situation in which one trust benefits at the expense of another. This is consistent with the observation of Lord Millett in *Foskett v McKeown:*[31]

> As against the wrongdoer and his successors, the beneficiary is entitled to locate his contribution in any part of the mixture and to subordinate their claims to share in the mixture until his own contribution has been satisfied …
>
> Innocent contributors, however, must be treated equally inter se. Where the beneficiary's claim is in competition with the claims of other innocent contributors, there is no basis upon which any of the claims can be subordinated to any of the others.

53 Pooling does not necessarily produce such a result, particularly where there are two funds, one with a large deficiency, and one with no deficiency, and the mixing has been of a small amount (relative to the total funds). Assume there are two funds, each with 100 beneficiaries each of whom contributed $1. At the distribution date, fund A balances, but fund B is deficient by $50, one of several reasons for which is a transfer of $10 in breach of trust to fund A. The beneficiaries of fund B would have an equitable charge over fund A, for $10. However, pooling the two funds would treat fund B as entitled to 50% of fund A (and fund A to 50% of fund B). That illustrates why the yardstick must be whether the funds have become so intertwined that each client's entitlement to one account may reasonably be regarded as identical to its entitlement to the other(s), and that it is reasonable to regard each as having a rateably equal interest in the mixed fund.

54 In *MF Global,* Black J observed that, at least in the case of a court-ordered winding-up, the pooling of CSAs could be effected by a direction under *Corporations Act*, s 479, permitting the liquidators to make a distribution in a manner which did not comply strictly with reg 7.8.03(6), on the basis that to do so would be 'a wise and commercial breach of trust':[32]

> **[55]** I note that the same result could be reached, as Underdog points out, by the court making a direction under s 479 of the Corporations Act permitting the Liquidators to make a distribution in a manner which did not strictly comply with reg 7.8.03(6), so far as accounts were pooled on an appropriate basis and that course amounted to "a wise and commercial breach of trust": *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209 at 213. It is not necessary for present purposes to express a view as to whether such a direction could be made under s 511 of the Corporations Act. While Young J held to the contrary in *Dean-Willcocks v Soluble Solution Hydroponics*

[31] [2001] 1 AC 102 at 132.

[32] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27 at 48 [55]; [2012] NSWSC 994

above, that view was not followed by Warren CJ in *Handberg (in his capacity as liquidator of S&D International Pty Ltd (in liq)) v MIG Property Services Pty Ltd* above at [9]–[15].

55 This illustrates the pragmatic basis for the pooling remedy, which also appears from the judgment of Gordon J in *Australian Securities and Investments Commission (ASIC) v Letten (No 7),*[33] albeit in the context of an unregistered managed investment scheme. While acknowledging that *generally*, the Court's power (under Corporations Act, s 601EE(2)) "to make any orders it considers appropriate for the winding up of the scheme" does not authorise a distribution of surplus assets of an unregistered managed investment scheme other than to those entitled to the assets in proportion to their entitlements, namely, the members,[34] this general principle yields in cases where it is not pragmatic to ascertain their proprietary rights:[35]

> [332] The facts of the present case disclose circumstances which may be classified as exceptional. Circumstances in which the general principle (that there should be no distribution of surplus assets other than to those entitled to the assets in proportion to their relevant entitlements) must yield to pragmatism. Why? Because in the present case, in addition to the matters raised in [250] and [259] above, it is to no one's advantage that a very long time and very large costs be spent in working out the entitlements and liabilities on a scheme by scheme basis (see [249]–[260] above and *Re TVSN Ltd* [2005] NSWSC 692 at [17] and following) where:
>
> (1) As a result of the way in which Mr Letten and companies associated with him (including the corporate defendants) conducted the schemes, it is not possible to say now what are the net assets of any scheme and there appear to have been so many inter-scheme transactions that it is not possible to say what assets were acquired by what scheme using whose money.
>
> (2) The receivers have been unable to trace investor contributions because receipts and payments in relation to each scheme were made through four primary LGHA bank accounts and funds frequently were moved between

[33] Australian Securities and Investments Commission (ASIC) v Letten (No 7) (2010) 190 FCR 59; (2010) 80 ACSR 401; [2010] FCA 1231 at [259], [268], [332] (Gordon J), citing Re TVSN Ltd [2005] NSWSC 692; Australian Securities and Investments Commission v Nelson (2003) 44 ACSR 719; [2003] NSWSC 129; Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd (1999) 33 ACSR 403; [1999] QSC 387; Australian Securities Investments Commission v Tasman Investment Management Ltd (2006) 59 ACSR 113; 202 FLR 343; [2006] NSWSC 943.

[34] Australian Securities and Investments Commission (ASIC) v Letten (No 7) (2010) 190 FCR 59; (2010) 80 ACSR 401; [2010] FCA 1231 at [268], citing Australian Securities and Investments Commission v Letten (No 5) [2010] FCA 1047; and Mier v FN Management Pty Ltd [2006] 1 Qd R 339; 56 ACSR 93; [2005] QCA 408.

[35] Australian Securities and Investments Commission (ASIC) v Letten (No 7) (2010) 190 FCR 59; (2010) 80 ACSR 401; [2010] FCA 1231 at [259], [332], citing Re TVSN Ltd [2005] NSWSC 692; Australian Securities and Investments Commission v Nelson (2003) 44 ACSR 719; [2003] NSWSC 129; Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd (1999) 33 ACSR 403; [1999] QSC 387; Australian Securities Investments Commission v Tasman Investment Management Ltd (2006) 59 ACSR 113; 202 FLR 343; [2006] NSWSC 943; and French Caledonia.

> these accounts, the LGHA bank accounts were often in overdraft and payments were commingled.
>
> (3) A number of the schemes were oversubscribed in that the amount of investor contributions in relation to a particular scheme exceeded the funding requirements for that scheme. These oversubscriptions were not refunded or returned to investors: see, by way of example, schemes numbered 14 (Twinview, see [135] above), 8 (Low Head — see [148] above) and 5 (Cimitiere House, see [205] above).
>
> (4) A significant proportion (up to $38 million) of investor contributions to schemes appears to have been used to pay distributions to investors in other schemes in circumstances where there were not sufficient profits or funds in the other schemes to fund payment of distributions: see, by way of example, scheme numbered 18: Aurora Park, see [72] above.
>
> (5) The tracing of funds is further complicated and, I consider, rendered impossible by the lack of reliable financial and accounting data and the estimated cost ($18 million). Such a cost and burden would reduce what is already a limited expected return with no guarantee of any certainty of outcome.

56 Section 601EE is analogous to s 479(3),[36] and her Honour's approach is applicable under s 479(3) and s 511 in the present context.

57 This is important because it means that while there are references to the "impossibility" of tracing, the notion is not one of absolute impossibility, but whether tracing is not reasonably and economically practical, so that they should be regarded as irretrievably commingled; thus her Honour's references to "property of the Schemes [being] *irretrievably commingled* owing to the central treasury role played by LGHA and the manner in which the Schemes were operated",[37] and to "the tracing of funds is further complicated and, *in some cases*, rendered impossible by the lack of reliable financial and accounting data".[38] On the other hand, pooling may be inappropriate where the trust ledger records provide a reliable factual foundation on which to mould relief,[39] and mere difficulty in ascertaining entitlements to permit distribution by

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[36] See Re GDK Financial Solutions Pty Ltd; Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd (2006) 236 ALR 699; 60 ACSR 447; [2006] FCA 1415 at [42] and the cases there cited; Australian Securities and Investments Commission v Atlantic 3-Financial (Aust) Pty Ltd [2004] 1 Qd R 591; [2003] QSC 386 at [28] and the cases there cited, and Mier v FN Management Pty Ltd [2006] 1 Qd R 339; 56 ACSR 93; [2005] QCA 408 at [16].

[37] Australian Securities and Investments Commission (ASIC) v Letten (No 7) (2010) 190 FCR 59; (2010) 80 ACSR 401; [2010] FCA 1231 at [238].

[38] Australian Securities and Investments Commission (ASIC) v Letten (No 7) (2010) 190 FCR 59; (2010) 80 ACSR 401; [2010] FCA 1231 at [250]. See also Windsor Mortgage Nominees Pty Ltd v Cardwell (1979) CLC 40-540, and the discussion by McLure J in Re Global Finance Group Pty Ltd (2002) 26 WAR 385; [2002] WASC 63 at [238]-[243].

[39] Re Global Finance Group Pty Ltd(2002) 26 WAR 385; [2002] WASC 63 at [243].

single account may not suffice to justify "pooling", though that would be influenced by the size of the estate, the number of claimants, and the degree of difficulty.

58 In *MF Global*, Black J founded the Court's jurisdiction on s 479(3), which was available in a voluntary liquidation by reason of s 506(1)(b) and s 511.[40] In *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd*,[41] Young J (as he then was) suggested that whereas under s 479(3) the Court could authorise its officer to perform what would otherwise be a breach of trust, that was not available under s 511:[42]

> Under s 511, the court does not give directions to the liquidator as to what he should do. It cannot advise the liquidator to do something which would be, for instance, a wise and commercial breach of trust. Although it is said that the section must be construed liberally (see per Gibbs J in *Re Evers Motor Co Ltd* (at 13) and *Re Union Bank of Kingston-Upon-Hull* (1880) 13 Ch D 808), the court's role is to decide disputes according to law. Thus the court decides a question of fact or law in a summary way, but the decision is the same as would have been reached by a court sitting with a jury or after full-blown pleadings. The jurisdiction is not to decide matters according to the opinion of the presiding judge as to what would be commercially appropriate.

59 I would depart from any *dicta* of Young J with great reservation. However, in *Handberg v MIG Property Services Pty Ltd,*[43] Warren CJ explained, to my mind compellingly, that s 511 is not limited in that way, but was intended to give the Court the same powers in respect of a voluntary liquidator as it has in respect of a Court-appointed liquidator (footnotes omitted):[44]

> [9] It has not been uncommon when discussing ss 479(3) and 511 to draw a distinction between liquidators in compulsory and voluntary windings up for the purposes of these sections because the former are officers or agents of the court while the latter are agents of the company. The principle modern authority for this position is the following statement of Young J, as he then was, in *Dean-Willocks*:
>
> > There is a real difference between a court appointed liquidator and a liquidator appointed in a voluntary winding up. In the former case the liquidator is an officer of the court and the court is at liberty to give him directions accordingly or may utilise the statutory power under s 479. With a voluntary winding up, the liquidator is not an officer of the court

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[40] Re Global Finance Group Pty Ltd (2002) 26 WAR 385; [2002] WASC 63 at [7], citing Warne v GDK Financial Solutions Pty Ltd [2006] NSWSC 464; (2006) 57 ACSR 525 at [63]–[64], [82].

[41] (1997) 42 NSWLR 209.

[42] (1997) 42 NSWLR 209 at 213.

[43] [2010] VSC 336; (2010) 79 ACSR 373.

[44] Handberg v MIG Property Services Pty Ltd [2010] VSC 336; (2010) 79 ACSR 373 at 377-378.

> but is the agent of the company. Thus, in *Re Reid Murray Holdings Ltd* [1969] VR 315 at 318, Adam J pointed out that the court has an inherent or implied jurisdiction on an application by its own officer to assist him. This does not apply to a voluntary liquidator.
>
> However, I need not stay on this point as it is clear that although a voluntary liquidator does not have access to the court through s 479, he has access through s 511 and the authorities tend to suggest that the court has the same jurisdiction under both sections, see *Re County Marine Insurance Co; Rance's case* (1870) LR 6 Ch App 104 at 114–5 .

I note that *Rance's* case tends to say that the jurisdiction under s 479 and s 511 is much the same, but this cannot be completely true. Although the court may under s 479 direct its officer to commit a breach of trust or to do something which it is arguable he has not power to do, under s 511 the court is only given power to avoid expensive procedures but must act according to law and not authorise the liquidator to do anything which is ultra vires the company.

[10] For my part, although it is really an academic point, a review of the wording of the section and its legislative history suggest a different approach for a number of reasons.

[11] First, the wording of the section provides the liquidator or any contributory or creditor the opportunity to apply to the court:

> … to exercise all or any of the powers that the court might exercise if the company were being wound up by the Court.

[12] The qualification on those powers is one of purpose, it must be "just and beneficial", not one of scope. As such, it cannot be characterised as more or less limited than the powers the court is able to exercise with respect to a liquidator in a compulsory winding up.

[13] Second, the legislative history of the section indicates that no essential distinction was intended to be made between compulsory and voluntary windings up when the court was directing liquidators as to what actions they should take. Section 511 of the Act may be traced back through various pieces of Australian and United Kingdom legislation to s 14 of *The Joint Stock Companies Amendment Act 1858* which amended and extended the *Joint Stock Companies Act 1857*. The intention of this act was to further develop the court supervised, voluntary winding up procedure that had recently been established, while ensuring that adequate safeguards were in place to protect creditors, liquidators and contributories. It allowed the court to take advantage of voluntary windings up, while ensuring that they were conducted equitably:

> In the Act of 1857 it was provided that where a company is in the process of winding-up voluntarily and proceedings are taken for a winding-up by the court, the court may direct that the voluntary winding-up shall continue under its supervision.

This voluntary winding-up under supervision of the court was thus an alternative to an order for compulsory winding-up, if the company could begin a voluntary winding-up before an application was made to the court. And since the court was empowered to specify conditions governing the winding-up and was open to applications by creditors and contributories, the mechanism was both convenient in operation and equitable in results. It was this procedure that

> the *Joint Stock Companies Amendment Act, 1858*, endeavoured to develop still further.
>
> [14] Although the wording of this section, which has changed remarkably little in 150 years, is somewhat oblique, I consider its intention to be quite clear. It was part of a legislative scheme put in place to ensure that applications were not made to the court to transform voluntary windings up into compulsory windings up simply so as to be able to have access to the advantages and protection thus conferred. The policy behind such an intention being the sensible one of reducing the work of the court in voluntary windings up to the minimum supervision necessary to ensure that such windings up were conducted properly and fairly, or in the words of the section "justly and beneficially"; as if they had been conducted by the court. The observations of James LJ and Mellish LJ in *Re County Marine Insurance Co; Rance's case* on the slightly later incarnation of the section as s 138 of the *Companies Act 1862* make this quite explicit. As James LJ stated:
>
>> … the object of the Act was that a company and its creditors should be left, if possible, to settle their affairs without coming to the court at all, either for a compulsory winding up or for a winding up under supervision, but to provide them, under the 138th section, with the means of access to this court whenever any question arose, in the course of the voluntary winding up, just in the same way as when any question arose in the case of a compulsory winding-up or under supervision.
>
> [15] The same purpose is attributed to s 511 (in one of its earlier incarnations) by the commentary in Young and Wallace's *Australian Company Law and Practice*:
>
>> The effect of this section (which the court has interpreted to give it wide powers — see *Re Union Bank of Kingston-upon-Hull* (1880) 13 Ch D 808) — is to lessen the distinctions between a voluntary and compulsory winding up: see *Black & Co's Case* (1872) LR 8 Ch App 254 at 263; *Re Bank of Gibraltar & Malta* (1865) LR 1 Ch App 69; *Re Beaujolais Wine Co* (1867) LR 3 Ch App 15 at 25.
>
> [16] All windings up and liquidators are supervised by the court to the necessary extent.

60 Accordingly, while I acknowledge that there remain important differences between the status of a voluntary liquidator and a Court-appointed liquidator, the scope of the Court's jurisdiction to give directions and advice does not differ between them.

61 The nature of the proceeding as a liquidator's application for directions and advice is fundamental, not least because it involves questions of pragmatism, informed but not ruled by principle. Quite different considerations may apply, for example, on a suit by a beneficiary seeking a tracing remedy against a recipient fund. In such a case, the tracing beneficiary would have to prove that its moneys could be followed into the recipient fund, whereas in the context of

a liquidator's application for directions, as *French Caledonia* indicates, a liquidator (and the Court) has to do the best one can with evidence that is often imperfect, or worse.

The relevance of equitable tracing rules

62 It is at this point that some equitable principles in respect of "mixing" and tracing require consideration.

Continuing proprietary interest?

63 The opponents of pooling contended that, in order to establish relevant "mixing", it must be shown that the trust funds (from Trust A) that were mixed with trust funds (from Trust B) remain so mixed at the time of the order and have not been otherwise dissipated. They invoked the proposition in *Re Diplock's Estate; Diplock v Wintle*:[45]

> The equitable remedies pre-suppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. If on the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself.

64 The argument proceeds that it is necessary (though not sufficient), in order to obtain a pooling order, for the clients in "donor" CSAs to have an "entitlement" in the mixed CSAs, and thus to demonstrate that they have some equitable interest in the mixed CSAs and that it is a continuing interest, which can be done only by reliance on tracing, with the consequence that tracing rules, including the lowest intermediate balance rule, apply. The burden of this submission is that it is not enough to justify a pooling order that there has been mixing of trust funds, in circumstances where tracing is no longer possible, but that it is also necessary to be able to trace the funds from the first account into the account sought to be pooled, and to show that they remain there. So stated, I reject it, for the following reasons.

65 First, that would deny the utility of the pooling remedy, which proceeds on the basis of a tracing exercise being not reasonable or economically practicable. If a tracing exercise were possible, then there would be no need or basis for pooling. It is because such an exercise is not possible that the Court may be

[45] [1948] Ch 465 at 521 (CA).

justified in directing a liquidator, as in *French Caledonia,* that he is justified in distributing a fund amongst claimants proportionately to their claims where there is insufficient information to make any better judgment.[46]

66 Secondly, it confuses a liquidator's distribution of a mixed fund, with a beneficiary's claim for an equitable property right. *Re Diplock's Estate* was a tracing case, involving claims *in rem* in respect of funds that had been paid out of a deceased estate pursuant to an invalid charitable bequest. The passage cited above begins with a reference to "equitable remedies", and the remedies in question were "an order to restore an unmixed sum of money (or property acquired by means of such a sum) or a declaration of charge upon a mixed fund (or upon property acquired by means of which a fund)."[47] The Court then proceeded to restate a necessary pre-condition to the grant of those remedies (emphasis added):[48]

> It is, therefore, a necessary matter for consideration *in each case where it is sought to trace money in equity*, whether has such a continued existence, actual or notional, as will enable equity to grant specific relief" (emphasis added).

67 This is not such a case. As Mr Smith SC submits, tracing is a process of attributing the value inherent in an item of property to its various substitutes, with a view to claiming the asset, and involves the assertion of an entitlement to proprietary relief, and it is a prerequisite to obtaining a proprietary remedy that a claimant must show a continued proprietary interest in the property against which the remedy is sought. But this proceeding concerns how a liquidator is to discharge the obligation to distribute a mixed fund, on which there are multiple classes of claimants (corresponding to the clients who dealt in BBY's different product lines), where it is not reasonably or economically practical to distinguish between their claims. As *French Caledonia* illustrates, in the distribution of funds, liquidators and Courts supervising them have to act on such evidence as is available, and the reasonably available inferences, without insisting on the proofs that would be required in a beneficiary's claim.[49]

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[46] See at [40] above.
[47] Re Diplock's Estate; Diplock v Wintle [1948] Ch 465 at 521.
[48] Re Diplock's Estate; Diplock v Wintle [1948] Ch 465 at 521.
[49] See at [40] above.

68 The pragmatic nature of the remedy is inconsistent with requiring claimants on a fund to prove, as they would have to in an equitable proprietary claim, that their funds remain in the mixed account. However, that is not the end of the matter. Just because strict proof of an entitlement may not be required does not mean that the principle is without relevance to the remedy. Pooling is intended to be an approximate reflection of equitable rights which cannot be precisely ascertained, and to decide whether it is appropriate involves some judgment, which may be of an evaluative, inferential and impressionistic nature, of what those equitable rights are likely to be. In forming that judgment, the equitable tracing rules are relevant. If it were to appear, for example, that the beneficiaries of the contributing fund could no longer have any equitable interest in the mixed fund, then pooling would be inappropriate, because it would bear no resemblance to the legal position; it would amount to no more than the alteration of legal rights by reference to common misfortune.

Lowest intermediate balance

69 It is in this way that the so-called “lowest intermediate balance” rule has potential relevance.

70 The rule was explained by McLure J (as her Honour then was) in *Global Finance,*[50] as follows:

> [102] Secondly, subsequent deposits by a trustee of its own funds into a mixed fund are not presumed to be impressed with the trusts in favour of the beneficiaries: *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62 at 69; *Bishopsgate Investment Management Ltd (in liq) v Homan* [1994] 3 WLR 1270. If the subsequent deposits are not impressed with the relevant trusts, the beneficiaries are only entitled to the lowest balance in the mixed fund between the date when the beneficiaries' money was deposited in the account and the date of the claim. This is known as "the lowest intermediate balance rule". The rule has also been applied in Australia: *Re Laughton* [1962] Tas SR 300; *Re Joscelyne* (1963) Tas SR 4; *Whitehand v Jenkins*, unreported; SCt of Vic (Ormiston J); 6 February 1987.

71 In *French Caledonia,* Campbell J acknowledged that the potential operation of the “lowest intermediate balance” rule such that, if the account in which the mixing occurred reached at any time a particularly low level, it may be that those people whose money was paid into the account before that low level was reached ought be accorded a smaller dividend on the amount of their claim

[50] Re Global Finance Group Pty Ltd (2002) 26 WAR 385; [2002] WASC 63.

than people whose money was paid in after - and that in carrying out such calculations, estimation and inference can be appropriate if precise evidence is not available.[51] Although noting that such an approach had been rejected in Canada, his Honour did not accept that it had no part to play in deciding how a mixed fund of several beneficiaries should be distributed - but in that case, there were no facts before the Court which led to a conclusion that the various claimants ought to be divided into various classes which were given different dividends:[52]

> [191] In *Law Society of Upper Canada v Toronto-Dominion Bank* (1998) 169 DLR (4th) 353 the Ontario Court of Appeal held that beneficiaries whose money had been mixed in an account, and wrongly depleted, should share whatever balance remained in the account pro rata to their contributions, without regard to the "lowest intermediate balance rule". One reason for this conclusion was pragmatic — that performing the calculations required to identify the proportions in which the fund was held following each deposit or withdrawal would be extremely complicated in principle, and often not achievable in fact. The second was that the fund was a blended fund, and when it was wrongly depleted it was the fund as a whole which was wrongly depleted, not any particular beneficiary's contributions.
>
> [192] I do not accept that either of these reasons leads to a conclusion that, always and regardless of the facts of the individual case, the lowest intermediate balance rule has no part to play in deciding how a mixed fund of several beneficiaries should be distributed in specie. As to the first reason, whether performing the calculations to carry out a full tracing exercise is complicated, or achievable, will depend upon the particular case being considered. Further, it is not as though the only available alternatives are full analysis of every transaction in the account, and dividing between all claimants equally. As to the second reason, while it is true that, when a depletion occurs from a fund, it is the fund as a whole, as it exists at that time, which is depleted, accretions to the fund after that time are, self-evidently, not affected by that depletion.
>
> [193] In the present case, the liquidator puts no facts before the court which lead to a conclusion that the various claimants ought be divided into various classes which are given different dividends. There is no reason to believe that there are any assets purchased from the accounts, into which some beneficiaries can trace but not others. The funds available are comparatively small, and likely to be completely, or substantially, depleted by the liquidator's own costs if the liquidator tried to carry out a more extensive analysis of the accounts. In these circumstances, the liquidator is justified in distributing among all the claimants, proportionately to their claims as assessed by him.

[51] Re French Caledonia Travel Service Pty Ltd (2003) 59 NSWLR 361; 204 ALR 353; 48 ACSR 97 at 187; [2003] NSWSC 1008.

[52] Re French Caledonia Travel Service Pty Ltd (2003) 59 NSWLR 361; 204 ALR 353; 48 ACSR 97 at [187] at 152; [2003] NSWSC 1008; see also Travel Compensation Fund v Classic International Cruises Pty Ltd (in liq) and Ors [2014] NSWSC 167 at [27].

72 In *ASIC v Letten (No 7),* Gordon J said of the "lowest intermediate balance rule":[53]

> [278] Another approach is the "lowest intermediate balance rule" which provides that tracing through a mixed fund cannot occur for any sum that exceeds the lowest intermediate balance in the fund during the interval between the original contribution and the time when a claim with respect to that contribution is being made against the fund: *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62 . In *Law Society of Upper Canada v Toronto Dominion Bank*; (1998) 169 DLR (4th) 353 (*Toronto Dominion Bank*), Blair J explained the rule as follows (at [19]):
>
> [19] This … concept is grounded, ultimately, on the premise that tracing rights are predicated upon the model of property rights. [The lowest intermediate balance rule] seeks to recognize that at some point in time, because of earlier misappropriations, an earlier beneficiary's money has unquestionably left the fund and therefore cannot physically still be in the fund. Accordingly, it cannot be "traced" to any subsequent versions of the fund that have been swollen by the contributions of others, beyond the lowest intermediate balance in the fund.
>
> [279] In *Toronto Dominion Bank*, Blair J rejected the application of the lowest intermediate balance rule on the basis that the performance of the necessary calculations following each deposit or withdrawal would be extremely complex and may not be achievable. His Honour stated that there were very limited circumstances in which the lowest intermediate balance rule would apply. The rule has been applied in some circumstances in Australia: *Re Laughton* [1962] Tas SR 300 and *Re Joscelyne; Allen's Plaster Products Pty Ltd v Prudential Assurance Co Ltd* [1963] Tas SR 4. However, as identified by Debelle J in *Re Magarey Farlam Lawyers Trust Accounts (No 3)* (2007) 96 SASR 337; [2007] SASC 9, the rule is inapplicable in cases involving multiple and competing beneficiaries whose moneys have been deposited in a mixed fund.

73 Like Campbell J, I do not accept that the "lowest intermediate balance" rule has no part to play in deciding how a mixed fund of several beneficiaries should be distributed. On the other hand, the authorities to which reference has been made, make clear that there is no rule that it must be applied. Nonetheless it is at least an aid in assessing the extent to which the beneficiaries of fund B can be said to have a continuing entitlement in Fund A. It depends on the facts, and it will be necessary to return to whether and if so how it should be applied in this case.

Tracing through an intermediary fund

74 Broadly speaking, there are two categories of transactions relied on as "mixing" in this case: "direct" transfers of funds from a Saxo/FX/Futures CSA to an

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[53] Australian Securities and Investments Commission (ASIC) v Letten (No 7) (2010) 190 FCR 59; (2010) 80 ACSR 401; [2010] FCA 1231 (Gordon J).

Equities/ETOs CSA, and “indirect” transfers, where there was a transfer of funds from a Saxo/FX/Futures CSA to an intermediary account, followed by a transfer from the intermediary account to an Equities/ETOs CSA.

75 The mere fact that money is transferred from one bank account to another does not amount to “mixing” in the relevant sense, which involves a mixing of beneficial entitlements, so that money beneficially owned by B is mixed in a fund beneficially owned by A. That will be so if there is a direct transfer, in breach of trust,[54] from fund B to fund A, and as has been seen it may also be established if fund B is used, in breach of trust, to discharge an obligation of fund A. The present issue concerns the situation in which money from fund B is transferred, in breach of trust, to fund C, and money is then transferred from fund C to fund A. In those circumstances fund C is a mixed fund, but what of fund A. The answer is, it depends on the state of fund C. If fund C is deficient, then the transfer of money from it to fund A taints fund A with the mixture and the deficiency. But if fund C is not deficient, then the trustee is presumed to use its own money first, and while fund C remains a mixed fund into which the beneficiaries of fund B can follow their money, their money is not mixed into fund A.

76 Upon this principle, Mr Brereton SC, and Mr Hutton, submitted that where the alleged “mixing” involved funds from one (donor) CSA passing through an intermediary account before reaching another (recipient) CSA, there could only have been relevant mixing if the intermediary account were deficient at the time when funds were transferred into the recipient CSA, and that it could not be proved, in respect of any transfer from an intermediary account into an Equities/ETOs CSA, that the intermediary account was deficient at the time of the transfer.

77 Again, I reject the proposition that it is necessary that the proponents of pooling prove that matter, as a beneficiary might have to in an equitable proprietary claim. Insistence on such proof would overlook the pragmatic nature of the jurisdiction to give directions and advice to a liquidator. But again, that is not to

[54] While the transfer of funds from an account held for one group of clients, to one held for a different group of clients, will usually involve mixing, that is not invariably the case – for example, if the transfer was permitted under s 981D.

say that the principle is irrelevant; to the contrary, it informs an evaluation of the extent to which fund B money has contributed to fund A - and thus the extent of the equitable charge in favour of fund B over fund A,[55] which in turn informs whether pooling would approximate that result.

Cleansing

78 As will appear, there are numerous instances where money transferred into Equities/ETOs CSAs have been, within a day or so, returned, though not invariably to the account from which they came, and not necessarily to any source CSA in other lines in which they may have originated. There is a question as to whether, where fund A has become mixed as a result of the receipt of fund B money through an intermediary account fund C, fund A is "cleansed" by return of the money to fund C. Mr Williams QC submitted that in such a case fund A's obligation would be to return it the money whence it came, to fund C, and fund A would thereby be "cleansed".

79 In principle, if the charge over a mixed fund arising from the principles under discussion is satisfied by payment to the chargees, that must discharge the charge, and thus "cleanse" the mixed fund. But the chargees are the beneficiaries of fund B, not their defaulting trustee. Return of the money to fund C would not relieve the trustee of fund A (as a constructive trustee by knowing or voluntary receipt of funds transferred in breach of trust) of the personal liability to account to the beneficiaries of fund B. But if the fund B money remained distinctly identifiable, it would remove it from fund A.

80 That could not be so if the mixed fund A was itself deficient, in which case the payment would involve a further mixture. A deficient mixed fund is not "cleansed" by the transfer out of it of a sum equivalent to (let alone less than) the amount initially mixed. Upon mixture, the innocent beneficiaries obtain an equitable charge over the entire mixed fund, which they continue to hold (in common with other beneficiaries). When money is transferred out of that fund it is itself mixed money, and the charge extends to the mixed money transferred out, which can be traced wherever it goes, "tainted" with the deficiency and the

[55] In this context, when speaking of "the extent of the equitable charge", I acknowledge that the charge extends over the whole of fund A, but it does so only to the value of the contributions made by fund B; I am referring to the extent of those contributions.

mixture. The beneficiaries can enforce against the fund or funds of their choice; if one fund is dissipated, they can enforce against the others, and that right amounts to an “entitlement” for relevant purposes.

81 But “mixture” can be a matter of degree, and is not necessarily irreversible; it can sometimes be seen that the fund B money sits for a short time in fund A, as oil on water, and is then removed elsewhere. In such a case, where fund A is in effect merely a conduit or temporary repository before the money reaches its ultimate destination (and particularly if fund A has disgorged the money it received, back to fund C) it is difficult to see why fund B should be regarded any longer as having contributed to fund A, and the beneficial interest of the fund A beneficiaries diminished on that account - although that may be subject to qualification depending on how long the money was retained and the use made and benefit derived by fund A from the money while it retained it.

82 Thus, in the context of the impressionistic and imprecise exercise involved in deciding whether the pragmatic remedy of pooling is appropriate, the return or removal from a mixed fund of money which has been transferred to it in breach of trust may inform the extent to which the beneficiaries of the donor fund have in net terms contributed to the mixed fund, and thus the extent of their charge (in the sense I have used that term above) over it.

Summary of the principles

83 The relevant principles applicable in the context of a liquidator’s application for directions and advice may therefore be summarised as follows:

(1) While a liquidator must distribute funds under his or her control through the company being trustee of trusts in accordance with the legal entitlements to those funds, findings about what legal entitlements exist depend upon the evidence, and where a liquidator knows no more than that the fund is held on trust and that there are a number of potential claimants, it may be appropriate for the Court to direct distribution of the fund amongst the claimants proportionately to their claims. That is because it is the best that can reasonably be done on the available evidence.

(2) Regulation 7.8.03(6) applies individually to each s 981B account maintained by an insolvent licensee, and does not authorise the pooling of accounts for the purposes of distribution. To have a right to payment under reg 7.8.03(6)(c) out of a particular CSA, a claimant must demonstrate an “entitlement” to money in that account. In this respect,

general principles of trust law relevant to determining entitlement apply, insofar as they are not displaced or modified by the statutory regime.

(3) While the Court's powers to give directions under s 479(3) and s 511 do not generally permit orders that depart from proprietary rights, this principle yields in cases where it is not pragmatic to ascertain the proprietary rights with precision;

(4) The theoretical basis for pooling is the principle that all contributors to a deficient mixed fund hold an equitable charge over the entire fund and its traceable proceeds to the value of their contributions, subject to any dealings and costs or are equitable tenants in common of the mixed fund as a whole, including its traceable proceeds, and subject to such deductions, so that each contributor has an "entitlement" in each fund. In this context, a "mixed fund" is one that contains funds from more than one source; and while the typical case involves mixing "across accounts", there is also "mixing" where funds of one trust are applied to meet obligations of another.

(5) The pragmatic nature of the jurisdiction means that neither strict proof of mixing such as would entitle a beneficiary to an equitable proprietary remedy, nor absolute impossibility of tracing, is required; pooling may be directed where the identification and tracing of the interests of individual clients is not in the circumstances of the particular case reasonably and economically practical, on the basis that it is reasonable in the circumstances that the funds be regarded as irreversibly deficient and mixed.

(6) However, relatively clear property interests are not to be altered by reference to some notion of common misfortune, nor should one fund unduly benefit at the expense of another. Because the effect of pooling two or more accounts is to treat each client's entitlement to one as identical to its entitlement to the other(s), and so to treat each client as having a rateably equal interest in each fund, it will be warranted when the funds have become so intertwined that each client's entitlement to one account may reasonably be regarded as identical to its entitlement to the other(s), and this will be so when it is reasonable to regard each as having a rateably equal interest in the mixed fund.

(7) The combination of mixing and impracticability of tracing does not of itself mean that it will necessarily be reasonable to treat each client's entitlement to one account as identical to its entitlement to the other(s), and to regard each as having a rateably equal interest in the mixed fund. Whether that will be so is influenced by the scale of the mixing, and the relative sizes of the funds and the deficiencies, and above all the extent of the interest of the contributing fund (which I have called fund B) in the mixed fund (which I have called fund A). That requires the Court to form a view, if it can – albeit an imprecise and impressionistic one – as to what is likely to be the extent of the interest of the beneficiaries of each fund in the other(s). In doing so, the Court is informed, but not controlled, by equitable tracing principles.

The transactions of interest

84 The proponents of pooling originally pointed to the following 19 "transactions of interest":

(1) the transfer on 2 December 2011 of $12 million from the Saxo eBridge Buffer account 0256 to Equities Trust account 8694;

(2) the payment on 13 June 2014 of a $10 million CBPL margin call by BBY to ASX, using $1.8 million withdrawn from a Saxo account and $6.8 million from a Futures account);

(3) the transfer on 17 June 2014, when ASX returned the margin, of $8.8 million to BBY No 4 Trust account;

(4) the transfer on 25 June 2014 from the No 4 Trust account of $7.5 million (including $1.8 million of Saxo client money and $6.8m of Futures client money) into three term deposits;

(5) the payment between 1 April and 12 December 2014 by BBY to SCMA of $21.6 million (including $7.1 million from the term deposits containing the money originally taken from Saxo and Futures accounts referred to above, and $1 million from an FX account);

(6) the return between 10 February and 15 May 2015 by SCMA to BBY of $44.7 million, of which $0.5 million was returned to a Futures account and $1.1 million to an FX account;

(7) the transfer on 8 December 2014 of $0.85 million from a Saxo account to an FX account;

(8) the transfer on 12 January 2015 of $0.5 million from a Saxo account to an FX account;

(9) the transfer on 21 January 2015 of $0.5 million from a Saxo account to an FX account;

(10) the transfer on 24 December 2014 of $0.6 million from an FX account to a Saxo account;

(11) the transfer on 24 December 2014 of $0.2 million from a Futures account to an FX account;

(12) the transfer on 26 February 2015 of $0.5 million from a Saxo account to a Futures account;

(13) payments on 16 December 2014 contributing to deposit of $4.092 million to Equities/ETOs accounts, including $14,400 from Saxo accounts, $26,000 from FX accounts, and $757,000 from Futures accounts;

(14) the transfer on 18 December 2014 of $0.6 million from an Other account to an FX account;

(15) the transfer on 18 December 2014 of $0.3 million from an FX account to Equities/ETOs accounts;

(16) the transfer on 13 March 2015 of $0.75 million from a Saxo account to Equities/ETOs accounts;

(17) the transfer on 16 March 2015 of $0.139 million from a Saxo account to Equities/ETOs accounts;

(18) the flow of funds between 29 June 2012 and 14 June 2013 through BBY NAB No 4 Trust account 5357; and

(19) the net movement during the period 2 December 2011 to 17 May 2015 to Equities/ETOs accounts of $2 million in "Equities/ETOs funding transactions", as illustrated by the "Adjusted BBY Funding Ledger".

85 Ultimately, Mr Smith SC did not rely on transactions 18 and 19 as relevant "mixings", but they are not irrelevant to the argument. Of the remaining 17 transactions:

(1) Only two are "direct" transfers, in which there was apparently no return of funds to the transferring account. They are (1) the 2 December 2011 $12 million transfer from the (Saxo) buffer account to Equities/ETOs, and (15) the 18 December 2014 transfer of $300,000 from an FX account to Equities/ETOs accounts.

(2) Three – (13), (16) and (17) involve transfers to Equities/ETOs accounts where there appears to have been a return of funds to an intermediary account.

(3) The remainder involve transfers between Saxo, Futures and FX accounts, which do not involve Equities/ETOs accounts: namely (2), (3), (4), (5) and (6) (all of which, as will appear, relate to the so-called Aquila transaction); and (7), (8), (9), (10), (11), (12) and (14).

The $12 million transfer - 2 December 2011

86 On 2 December 2011, $12 million was transferred from the eBridge Buffer Account 0256 (an account in the Saxo product line) directly to the Equities Trust Account 8694 (an Equities/ETOs CSA), from which $9.5 million was immediately disbursed for margin in respect of ETO positions. This is said to amount to a mixing of Saxo client money with Equities/ETOs client money in the Equities/ETOs CSAs. The case for pooling relies primarily, though it does not depend exclusively, on this transaction, which is the only instance of an Equities/ETOs CSA directly receiving funds referable to the Saxo product line, and the only unreversed direct transfer to Equities/ETOs CSAs.[56] This gives rise to issues concerning the characterisation of the $12 million immediately

[56] As will be seen, transaction (15) the 18 December 2014 transfer of $300,000 from an FX account to Equities/ETOs accounts was, effectively, more or less, reversed.

before the transfer (and in particular whether it was trust money for the benefit of Saxo line clients, or money to which BBY was beneficially entitled, or entitled to use), its application upon receipt into the 8694 account, and whether it was "returned". But it is first necessary to describe how Equities/ETOs are traded on the ASX, and how BBY's Equities/ETOs business operated, before saying more about the circumstances of the transfer itself.

Trading on the ASX

87 The following summary is taken in large part from the very helpful submissions of Mr Healey, who appeared for the Liquidators. Trading on the ASX involves the placement by market participants (such as BBY became on 5 December 2011, as described below) on behalf of their clients of orders to buy or sell certain instruments such as shares or ETOs; and the matching of those orders by the ASX. To facilitate settlement of those trades, the contracts formed as a result of those orders are matched and novated so that ASX Clear becomes the central counterparty in each such transaction – that is, it becomes "the buyer to every seller and the seller to every buyer". The result is that a market participant such as BBY is responsible, as principal, to ASX Clear for the settlement of trades that it initiates on behalf of its clients and for the management of risks associated with any failure to settle.

88 In relation to ETOs, the writer – that is, the seller – of an option is required to provide security in the form of cash or other collateral, in respect of its open position. Rule 14.6.1 of the ASX Clear Operating Rules requires each Participant to deposit or to provide to, and maintain with, ASX Clear cash or collateral for the purpose of discharging its margin obligations, as determined by ASX Clear with respect to, amongst other forms of transaction, "Derivatives CCP Contracts". These are the novated contracts formed as part of ASX Clear fulfilling its role in clearing derivative transactions, including options. Rule 14.6.4 provides for attributing security provided by a Participant to one or more of its clients' accounts. Rule 14.7.1 provides that a Participant must call cash or collateral from its client sufficient to ensure that the Participant is able to satisfy its obligations to ASX Clear in respect of contracts related to that client:

> Where a Derivatives CCP Contract relates to a Client, a Participant must call Cash or Collateral from that Client which the Participant considers sufficient to

> ensure that the Participant is able to satisfy its obligations to ASX Clear for those Derivatives CCP Contracts.
>
> The Participant is also entitled, at any time, to call from its Client any additional Cash or Collateral which the Participant considers appropriate in connection with the clearing of Derivatives CCP Contracts for its Client.

89 Rule 14.7.5 provides that the client must pay or provide security for any amount so called:

> The Client must, by the time specified in their Client Agreement:
>
> (a) pay to the Participant any amounts which the Participant asks the Client to pay under Rule 14.7.1 … or
>
> (b) provide security for those amounts which is acceptable to the Participant.

90 Thus, even though BBY was liable as principal to meet margin calls issued by the ASX, the rules of ASX Clear have the effect that the funds to meet such calls in respect of Derivatives CCP Contracts were ultimately provided by clients.

91 The position is different with Cash CCP Transactions, where the two matching transactions arise between ASX Clear and a Participant upon the registration and novation to ASX Clear of a Cash Market Transaction. The expression "Cash Market Transaction" is defined in the ASX Clear Operating Rules to mean a transaction entered into on or reported to the market of an Approved Market Operator under which (a) one party has an obligation to deliver a particular number and class of transferable Financial Products; and (b) the other party has an obligation to pay an amount of money for the delivery. In respect of such transactions, Rule 14.8.1 provides that the Participant must not call the client for margin for the purpose of meeting the participant's margin obligations to ASX Clear:

> A Participant must not:
>
> (a) call a Client for margin; or
>
> (b) use Cash or Collateral that belongs to a Client,
>
> for the purpose of meeting the Participant's margin obligations to ASX Clear in connection with Cash CCP Transactions whether those Cash CCP Transactions were entered into on behalf of the Client or otherwise.

92 For transactions which involve the purchase and sale of financial products, as distinct from the writing of derivative contracts, the Participant's obligation was as principal to meet a call for margin by ASX Clear and to be borne by the

Participant alone. Cash market margin was not introduced until June 2013. Thus BBY's obligation to meet any margin calls as at 2 December 2011 was in relation to Derivative CCP Contracts, attracting clause 14.7.1, which required BBY to call clients to provide sufficient cash or collateral to meet a call by ASX Clear.

The daily business cycle for Equities/ETOs

93 In the first judgment,[57] I summarised the daily business cycle for Equities and ETOs product lines, based on the evidence as it then was.[58] Based on the additional evidence at the present hearing (which differed in some respects from that on which I relied for the summary to be found in the first judgment), those procedures appear to have been, until March 2015, as follows:

(1) Each day at about 1030 the Equities/ETOs business made a payment to, or received a payment from, ASX, to reflect net movements in the "margin" required to be held by ASX. The adjustment was on a net basis, and reflected the aggregation of individual client account movements, some of which might be positive and some negative.

(2) The payment was made from (or into, where BBY was a net payee) BBY's Facilitation account, a St George account with an $8 million overdraft facility established for the purpose of funding and receiving such payments.

(3) Before March 2015, when a payment was made to ASX from the Facilitation account, the Facilitation account was reimbursed from the 541 account (an Equities/ETOs trust account that was the main "working" account for that product line), via the general account (a house account).

(4) BBY applied the individual client account movements (the net effect of which was reflected in the payment to or from ASX) to the client's Equities account ledger. If, after this process, a client's Equities Ledger had a debit balance, the amount of the debt would be collected from the client, by means of withdrawals from their linked cash management accounts (CMAs) or direct entry accounts (DEAs). To implement this, files were generated and communicated to banks with instructions to withdraw funds from client accounts. "CMA Files" were generated for and communicated to each CMA bank, and cleared funds would be received later that day by "real time gross settlement"; while for clients who had accounts with other banks, "DE Files" were generated, which were loaded to the St George online banking portal, in order to initiate

[57] In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) [2016] NSWSC 1366 at [14] - [19].

[58] Mr Vaughan's affidavit of 23 December 2015; see In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) [2016] NSWSC 1366 at [212] - [239].

direct debits, as a result of which funds were generally received the following business day. If the client did not pay, BBY could liquidate the client's position which, aside from extreme market movements, included a sufficient buffer to protect BBY.

(5) At the end of each day, the money which ought to be held for clients was reconciled, in the detailed trust position report, against the funds in the 541 account. To the extent there was any shortfall, that was then made up by a transfer from "House" (or "BBY Corp"). To the extent there was a surplus, it was "swept" out to House.

94 The pre-March 2015 procedures were the subject of comment by the ASX that "Client Money was not held in trust between approximately 9.30am to 12.30pm on each Business Day" from 7 June 2013 to 30 December 2014 - presumably because funds had been paid from the 541 Account to reimburse the Facilitation Account and not yet recouped from clients – and that given the use of externally sourced funds to form a buffer so that the closing balance in the 541 Account would correspond with the total amount that BBY was required to hold on trust for its Equities/ETO clients, BBY was not able to conduct a reconciliation of the amount held in the 541 Account for each client at the close of business on the last Business Day of each week", in breach of ASX Clear Operating Rule 43.6(b). As a result, from March 2015, instead of reimbursing the Facilitation Account from the 541 account before it was replenished from clients' CMAs or DEAs, other accounts were used for that purpose. Once the moneys were received from clients' CMAs or DEAs into the 541 account, producing a surplus there at end-of-day, they were "swept" to House (which had to that point born the payment to ASX).

The events surrounding the 2 December transaction

95 Prior to December 2011, BBY engaged Berndale Securities Limited as its third-party clearer in respect of equities and ETOs dealings on the ASX. Pursuant to that arrangement, when BBY placed trades on behalf of its clients on the ASX, they were cleared by Berndale. Prior to the Stonebridge Acquisition, Stonebridge also engaged Berndale as its third-party ASX clearer.

96 In 2010, Berndale announced that it would cease clearing on behalf of small and mid-sized brokers, including BBY. In response, BBY announced that it would seek admission as an ASX clearing participant. BBY became a clearing

participant of ASX Clear and a settlement participant of ASX Settlement on 5 December 2011.

97 A transition between clearing participants, such as occurred between Berndale and BBY, involves the transfer of positions, collateral and HINs, as recorded in the systems of ASX, from Berndale to BBY; the provision by BBY as incoming clearing participant of collateral in respect of margin obligations for the transferred positions; and the subsequent return to Berndale as outgoing clearing participant of the collateral which had been provided by it in respect of margin obligations for the transferred positions.

98 On 2 December 2011, the opening balance of the Equities Trust Account 8694, which had only just been established, for the specific purpose of paying margin payments to ASX Clear, was nil. At 9.43 am, in connection with the migration of ETO positions from Berndale to BBY, Mr Eddie Farah of the ASX sent an email to Ms Fiona Bilton of BBY, stating that "the amount required to be settled intraday is 9,516,478". The ASX has informed the Liquidators that this related to migrated ETO positions for which BBY was assuming clearing obligations.

99 $12 million was then transferred into the 8694 account, from the eBridge Buffer account 0256, described as "transfer in from BBY Corp". At 10.10am, Mr Arun Maharaja, the Chief Financial Officer of BBY, emailed Mr Andrew White at ASX:

> Andrew – as discussed this is to confirm that $9,516,478 margin requirement has been processed to the following and is available. BSB 083004 Account# 124 078 694 BBY Trust.

100 That was the 8694 account, which had received the transfer of $12 million from the eBridge Buffer account 0256.

101 Mr White replied at 10.18am:

> On this basis, we will action the margin call on BBY. We will require settlement of this margin call by 12 noon.

102 Later that day, $9,516,478 was paid to ASX Clear from the 8694 account, described as "payment out to ASX – margin requirement". Thus funds from the eBridge Buffer account 0256 were transferred to the BBY Equities Trust account 8694 and used to meet the margin call. The balance of the $12 million transferred from the 0256 account remained in the 8694 account.

The source of the $12 million

103 Characterisation of that $12 million immediately prior to its transfer – and in particular whether it was trust money in the Saxo line - requires examination of a number of earlier transactions, dating from March 2011, before the Stonebridge Acquisition.

104 Between 1 and 16 March 2011, a total of $25 million was received from Saxo Bank A/S[59] (which, as will be seen, was the counterparty in transactions in the Saxo line), in three tranches, into Stonebridge FX account 0184. On the same day as each tranche was received into the FX account (or in one case the following day), it was transferred to the Stonebridge eBridge Buffer account 0256. In the period between 16 March 2011 and 21 April 2011, the balance of the 0256 did not fall below $34,796,471.83, nor did it exceed $37 million.

105 On 21 April 2011, $30 million was transferred from the 0256 account to Stonebridge's NAB High Interest account 2428, as the opening deposit in that account. Thus as at 21 April 2011, the bulk (but not the whole) of the funds held in the High Interest account 2428 comprised the $25 million which Stonebridge had received from Saxo Bank.

106 On 7 June 2011, BBY contracted to acquire Stonebridge's business. From 5 August 2011, some funds flowed back from the High Interest account 2428 to the eBridge Buffer account 0256. On 26 August, BBY completed the acquisition of the Stonebridge group ("the Stonebridge Acquisition").

107 On 30 November, the ASX approved BBY's application to become a self-clearing participant, and on 2 December 2011, the migration process to self-clearing required BBY to contribute margin to ASX Clear. BBY Equities Trust account 8694 was opened for that purpose.

108 Between 25 May 2011 and 2 December 2011, the balance in the NAB High Interest account 2428 did not exceed $36,000,000, nor fall below $25,000,000. On 2 December 2011, its opening balance was $27,101,605.23, while the opening balance in the eBridge Buffer Account 0256 was $1,867,518.23. During the course of that day, $12 million was transferred from account 2428 to

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[59] The Australian subsidiary of the Danish Saxo Bank, which later became SCMA.

account 0256. The same amount was then transferred to the Equities Trust Account 8694, from which, on the same day, $9.5 million was paid to ASX.

109 Thus the $12 million transferred from account 0256 to the Equities Trust Account 8694, and the $9.5 million paid to the ASX, despite its temporary location in the High Interest account 2428, originated from the eBridge Buffer Account 0256, and is substantially but not exclusively comprised of the $25 million received by Stonebridge in March 2011 from Saxo Bank. Characterisation of the $12 million transferred therefore involves consideration of the $25 million received from Saxo Bank ("the Saxo Bank receipts"), and the other funds in the 0256 account ("the other Buffer account funds").

The Saxo Bank receipts

110 To a very large extent, the $12 million was comprised of the $25 million received by Stonebridge from Saxo Bank in March 2011.

111 Saxo Bank had developed an internet-based on-line trading system called SaxoTrader, to which Stonebridge (formerly Tricom) had since 2004 offered its clients access, under the style "eBridge Trader" or "eBridge Online Trader. This platform facilitated online trading by clients in equity contracts (a synthetic equity product), FX, contracts for difference (CFDs), stocks, futures and other derivatives. The relationship between Stonebridge and Saxo Bank was governed by a "White Label Trading System Agreement" dated 21 June 2004 ("the Stonebridge White Label Agreement") between Saxo Bank and Tricom.

The Account Terms

112 Stonebridge clients who traded on the eBridge platform had a contractual relationship with Stonebridge, contained in a Stonebridge-branded document entitled "eBridge Online Trading Account Terms".

113 Clause 1.4 of the Account Terms provided that "[b]y this agreement, the Client has a [sic] eBridge Online Trading Account with SmarTrader". The expression "eBridge Online Trading Account" was defined to mean "the account covering all the dealing and Trading Accounts under the Facility". "Trading Account" was defined to mean "an account opened by SmarTrader and conducted in accordance with this agreement". Pursuant to clause 1.5, the client could have one or more Trading Accounts within the eBridge Online Trading Account.

114 Clause 4 of the Account Terms then relevantly provided:

> 4.1 For all Transactions and services under this agreement, SmarTrader will open one or more Trading Accounts for the Client. All Trading Accounts are part of the same eBridge Online Trading Account made under this agreement.
>
> 4.2 Subject to clause 4.3, all money and the cleared proceeds of cheques or other payments that are paid by the Client or on behalf of the Client or for the account of the Client to SmarTrader from time to time including initial and later deposits for *Margin* or which the Client directs SmarTrader to credit will be:
>
> (a) first credited to the eBridge Online Trading Account and not any specific Trading Account;
>
> (b) then will only be credited to a Trading Account on the written instructions of the Client (whether for specific payments or as standing instructions) or as a result of SmarTrader exercising its rights following a Default Event.
>
> …
>
> 4.3 The Client acknowledges that all funds received by SmarTrader as described in clause 4.2 (whether or not credited to the Trading Account) will, subject to clause 4.3 [sic, apparently 4.4], *be initially held by SmarTrader entirely for its own account, except only to the extent required by law or Operating Rules* (such as when the money must first be deposited into a trust account) or when SmarTrader receives payment as agent, in which case the Margin may be held in an omnibus account which will include Margin deposited with SmarTrader by other clients of SmarTrader.
>
> 4.4 To the extent funds received by SmarTrader as described in clause 4.2 (whether or not credited to the Trading Account) are, or are required to be, deposited into any trust account of SmarTrader or other kind of account required by law, the Client acknowledges, authorises and directs that, *to the extent permitted by law*:
>
> (a) the funds are not held in trust by SmarTrader for the benefit of the client; and
>
> (b) SmarTrader is entitled to keep, and will keep, any interest earned on the account (even if the funds are held on trust for the Client);
>
> (c) the funds are funds to which SmarTrader is entitled to be paid (other than funds paid as Margin to be paid to Market Participants on behalf of the Client) or, to the extent that is not applicable for whatever reason, are funds which SmarTrader may immediately withdraw and pay to a Market Participant or to SmarTrader (as the case may be) the funds to pay Margin or any other costs, fees or payments in respect of Transaction [sic] to which Market Participants or SmarTrader, as the case may be, is entitled under this agreement or at law.

115 Clause 5.4 relevantly provided as follows:

> 5.4 The Client:
>
> (a) acknowledges and represents that the Client has been provided with and has read and understood the product disclosure statement or other disclosure document for any Transaction made by it under this agreement:
>
> > (i) which explains the nature of the kind of Transactions;

> (ii) which explains the nature of the obligations assumed by the Client when the Client deals with StoneBridge or instructs StoneBridge to enter into Transactions on behalf of the Client; and
>
> (b) accepts the risks referred to in the disclosure documents for the Transactions as well as all other risks associated with Transactions.

The Protection Trust

116 By about March 2010, Stonebridge adopted a policy of transferring eBridge client funds from the eBridge Trust Account into which they were deposited by clients, either to Saxo Bank as hedge counterparty, or to a protection trust bank account, at least ostensibly for the better protection of client moneys. This is reflected in the eBridge Futures Contracts PDS of March 2010, and it is probable that other PDS were amended to the same effect at about the same time.

117 To constitute this "protection trust", on 31 May 2010, Stonebridge Securities executed a "Declaration of Limited Trust" ("the Stonebridge Trust Declaration"), declaring that it held all Trust Property, comprising "(i) all agreements between Trustee and the provider of the Trust Account in relation to the Trust Account including all of Trustee's rights to and interests in the property in, and interest on income of, the Trust Account and (ii) Hedge Counterparty Claims" on trust on the terms set out in that document. The expression "Trust Account" was defined to include any bank account nominated as such from time to time. Clause 1.4 provided:

> **1.4 Rights of Clients to and Interest in Trust Property**
>
> (a) Trustee holds all interests (legal and beneficial) in, rights to and entitlements in the Trust Property on the terms of the Trust established by this deed without any Client having any right to, beneficial interest in or other entitlement to the Trust Property except, subject to clause 1.4(b), only to the extent of having the right by this deed to require Trustee to comply with the terms of this deed and otherwise to perform the duties of a trustee of the Trust documented by this deed.
>
> (b) If a Trigger Event occurs, then automatically by that event Trustee holds all the Trust Property beneficially for all Clients on the terms of this deed.
>
> …

118 Clause 2.1 provided that before the occurrence of a "Trigger Event", certain payments may be made from the protection trust account. Relevantly, clause 2.1(d) provided:

> **2.1 Payments from Trust Account before any Trigger Event**

….

(d) Trustee may withdraw funds from the Trust Account only for any of the following purposes:

(i) to pay to a bank account which is a trust account for the purposes of Part 7.8 of the Corporations Act 2001 (Commonwealth), for the benefit of a Client or for some or all Clients generally;

(ii) to pay Clients (or as a Client directs) in full or partial satisfaction of Trustee's obligations under a Client Transaction;

(iii) to pay itself or otherwise to appropriate for its own uses only those amounts to which it is entitled to be paid under a Client Transaction;

(iv) to pay itself or otherwise to appropriate for its own uses amounts to which it is entitled to be paid under this deed for example in respect of interest earned on the Trust Account;

(v) to meet some or all of Trustee's contractual obligations owed to its Hedge Counterparty corresponding with part or all of one or more of Client Transactions; and

(vi) for any purpose it determines provided the withdrawal occurs after termination of the Trust by Trustee giving at least 20 Business Days' notice of that termination to Clients.

119 Clause 2.2 provided for the trust to become a fixed trust for the clients upon a trigger event occurring:

2.2 Payments from Trust Account after a Trigger Event

If a Trigger Event occurs, automatically from that time:

(a) Trustee will hold the Trust Account beneficially for Clients. Trustee may pay amounts from the Trust Account to Clients (or as Clients direct) towards satisfaction of Trustee's obligations under Client Transaction in fair and reasonable manner determined by Trustee.

(b) All interest earned on or in respect of the Trust Property is earned for the benefit of Clients from the day the Trigger Event occurs. The rate of interest (if any) earned on the amount of the Trust Property will be the rate actually applied to the Trust Account.

(c) Trustee will not charge or allocate any fees or charges arising from the Trust Account to the Trust Property nor impose any fees or charges itself in respect of the Trust.

(d) If all Client Transactions terminate (and Trustee is unaware of any actual or threatened claim by a Client with respect to a terminated Client Transaction that is not frivolous, vexatious or without any apparent merit) and Trustee does not owe any other payment to Clients under Client Transactions, by that event all Clients automatically relinquish any interest in the remaining Trust Property so Trustee may as it sees fit then withdraw or re-allocate the balance of the funds from the Trust Account, and it may manage Hedge Counterparty Claims, to or for the benefit of Trustee.

120 The limited nature of a client’s interest in the trust before a trigger event was confirmed by clause 2.3:

> 2.3 Before a Trigger Event occurs, Trustees may use Trust Property and act in relation to that as it determines, in the ordinary course of its business, without having to act in the best interests of the contingent beneficiary, including Managing Hedge Counterparty Claims as Trustee sees fit.

121 A "Trigger Event" was defined, in clause 5.8, to mean each of (i) an Insolvency Event occurring with respect to Trustee or Hedge Counterparty; and (ii) a breach by Trustee of this deed that materially adversely affects the interests of Clients as a class of beneficiaries. Client, Client Transaction and Platform were respectively defined as follows:

> *Client* means a person who has an account agreement with Trustee, from time to time, for Client Transactions.
>
> *Client Transaction* means a transaction between Trustee and Client which is made by or on the Platform.
>
> *Platform* means the service provided by or in relation to the Market Agreement for dealings in Client Transactions and for Trustee's transactions with Hedge Counterparty, as nominated by Trustee when establishing the Trust, as later amended or substituted.

122 On 18 August 2010, Stonebridge Securities executed a document entitled "Nomination of Trust" ("the Stonebridge Nomination"), which nominated the eBridge Buffer Account 0256 as a trust account for the purposes of the Stonebridge Trust Declaration.

Product Disclosure Statement

123 Stonebridge also issued product disclosure statements in respect of the financial products offered for trading on the eBridge platform.

124 The product disclosure statements issued by Stonebridge in 2009, before the introduction of the protection trust, contained statements to the following effect:[60]

> Once an order for a CFD is received, StoneBridge will, at or about the same time, make a similar transaction (in its own name, on its own account) with other market participants to hedge the transaction entered into with you, so that StoneBridge has little or no direct market exposure to later changes in the value of the Underlying Security.
>
> In order to make those transactions, StoneBridge is usually required to pay for its hedge or to deposit moneys with the hedging counterparty to maintain StoneBridge's open hedge position. StoneBridge funds this with the payments made to it from withdrawing all of your funds from the trust account. The moneys withdrawn from the trust account are payment to StoneBridge (even if more than the required Margin). The withdrawn moneys are not held

[60] The example from which this is taken is the Stonebridge 2009 Contracts for Difference (CFD) PDS.

beneficially for you (see under “Client Moneys Trust Account” earlier in this Section). (Please note that StoneBridge does not use your trust moneys to pay for its own principal positions. The moneys withdrawn from the trust account become owned by StoneBridge and so may be used by StoneBridge as it decides, but its policy is to use those funds to acquire and manage hedge transactions which correspond with the CFD issued to you.)

125 Unsurprisingly, as they were prepared and issued before the introduction of the notion of the protection trust, the 2009 PDS did not contain any reference to a protection trust. As has been mentioned, there is evidence that they were amended after the introduction of the protection trust. The form of PDS issued by Stonebridge in 2011 (which was later copied by SmarTrader when, as described below, it took over the business in June 2011) differed from that issued in 2009; in particular, it stated that funds deposited by clients in the eBridge Trust Account would either be transferred to the protection trust bank account, or paid to Saxo Bank as hedge counterparty.

126 Each of the PDS related to a different category of financial product offered for trading on the eBridge platform, but was (relevantly for present purposes) to the same effect. Relevantly, they stated:[61]

3.1 Your Account

You need to establish your Account by completing StoneBridge’s Account application form, which will be made available for you by contacting StoneBridge directly. …

By opening an eBridge Online Trader Account, you agree to the Account Terms.

127 The operation of the eBridge platform was described as that, once an order for the relevant contract was received, Stonebridge would, at or about the same time, make a similar transaction (in its own name, on its own account) with another market participant (a hedge counterparty) to hedge fully the contract entered into with the client, so that Stonebridge had little or no direct market exposure to later changes in the value of the underlying security; and that in order to enter into those transactions, Stonebridge was usually required, to pay for its hedge, to deposit moneys with the hedge counterparty to maintain Stonebridge’s open hedge position, and funded this payment obligation to the

[61] Using as the example the Stonebridge 2011 eBridge Futures Contracts PDS.

hedge counterparty from the proceeds of the client's margin payments to Stonebridge. The hedge counterparty was Saxo Bank.

128 In respect of a client's margin payments, the PDS explains that:

(1) each client is required to pay a minimum amount of margin before the issue of the relevant contract, which amount is determined by Stonebridge on the basis of factors including "the market price of the Underlying Security, the Margin required to hedge the Underlying Security, the Margin w hich Stonebridge is required to pay its Hedge Counterparty and Stonebridge's risk assessment of the client";

(2) all moneys paid by a client to Stonebridge for a derivative contract issued on the eBridge Platform ("eBridge Contracts") were initially deposited into a client moneys trust account maintained by Stonebridge ("the eBridge Trust Account"); and

(3) Stonebridge's general policy was that "it [would] immediately withdraw all of your money which was deposited, on your direction in accordance with [the eBridge Account Terms], from the eBridge Trust Account to pay as Margin to Stonebridge". This was done by paying the money in question into what is referred to as "the Protection Trust Bank Account" or to the Hedge Counterparty.

129 Thus the PDS assumes that clause 4 of the Account Terms is effective to permit Stonebridge, forthwith upon payment by a client of margin into an s 981B trust account, immediately to withdraw it and place it in another account to meet initial margin call. For example, in respect of establishing an eBridge Futures Contract Position (there are similar statements elsewhere in the PDS):

> **3.6 Payments and Client Moneys**
>
> **Step 1** You (as our client) pay moneys into StoneBridge's eBridge Trust Account
>
> **Step 2** StoneBridge's general policy is that it will immediately withdraw from the eBridge Trust Account all of your money which you had deposited there, on your direction and in accordance with the Account Terms, from the eBridge Trust Account to pay as Margin to StoneBridge for your eBridge Future Contracts (including for any other fees or charges or other payments which you owe, according to your Account Terms or for other amounts for your Trading Account). This will allow for your Trading Account to be credited in order for you to trade in the eBridge Futures Contract.
>
> ***Step 2** shows that the money is withdrawn to pay StoneBridge, which is the legal step. This is done by withdrawing from the eBridge Trust Account and **paying directly into only** either the Protection Trust Bank Account (Step 2A), or to the Hedge Counterparty (Step 2B).
>
> **Step 3 and 4** are virtually simultaneous:
>
> **Step 3** eBridge Futures Contract is issued to you.

> **Step 4** StoneBridge fully hedges all clients' eBridge Futures Contracts with Hedge Counterparty.

130 Under the heading "Consequences of withdrawals from the eBridge Trust Account", it is prominently explained (in bold print, in a box) that from the time when a client's funds were withdrawn from the eBridge Trust Account, the client lost "the protections given to a client moneys trust account of that kind", was "an unsecured creditor of Stonebridge for its obligations on the eBridge Contracts", and was not "beneficially entitled to any moneys paid by Stonebridge to manage those hedge contracts" nor to the hedge contracts themselves:

> Moneys are withdrawn from eBridge Trust Account either to pay StoneBridge or to pay you. **Moneys withdrawn to pay StoneBridge are StoneBridge's own moneys (and are not held for you).**
>
> The law allows StoneBridge (as for any other licensee with a client moneys trust account) to use any Client's moneys in the eBridge Trust Account for meeting margin and settlement obligations of any other Client's derivatives.
>
> From the time of withdrawal from the eBridge Trust Account:
>
> • You lose the protections given to a client moneys trust account of that kind;
>
> • You are an unsecured creditor of StoneBridge for its obligations on the eBridge Contract's. This includes exposure as an unsecured creditor for payment to you or the net account balance (if any) after closing all of your eBridge Contract positions; and
>
> • You are not beneficially entitled to any moneys paid by StoneBridge to manage those hedge contracts nor do you have any beneficial interest in those hedge contracts unless there is a trigger event (see "Protection Trust")

131 The PDS also explained that Stonebridge reduced the risks to clients resulting from the withdrawal of funds from the eBridge Trust Account by using a trust account, called the "Protection Trust Bank Account", dedicated only for clients using an eBridge Online Trader Account (and not mixing its own moneys in it); using client payments "only for hedging or managing the hedging of its hedge contracts for those Clients' eBridge Contracts or for paying fees and charges on the eBridge Contracts"; fully hedging all clients' eBridge Contracts; and keeping all eBridge Contract-related surplus funds not used for paying hedge counterparties in the protection trust bank account. The "Protection Trust" was defined to mean "the trust created under the document 'Declaration of Limited Trust' for eBridge Contract Clients as beneficiaries", and its operation was explained in the following terms:

StoneBridge has chosen to give eBridge Contract Clients additional protection by creating the Protection Trust. This binds StoneBridge to keep to the terms of the Protection Trust. In simple terms, StoneBridge commits to using funds from your payments for margin only for fully hedging your eBridge Contracts or managing the hedge contracts, for paying fees and charges to which it is entitled and for payments back to you. This reduces your credit risk on StoneBridge because StoneBridge fully hedges and does not speculate or use the funds for non-eBridge Contract purposes (such as general working capital).

The Protection Trust holds:

• all of the benefit of the claims against the Hedge Counterparty, for the hedge contracts (Claims); and

• all of the surplus funds from your payments to StoneBridge which are not paid to the Hedge Counterparty or paid as your fees and charges (Surplus).

All of the Surplus moneys are held in the Protection Trust Bank account.

The Protection Trust has two sets of rules – one set applies before a trigger event, the other set applies automatically on a trigger event.

The Protection Trust operates as follows:

• until a trigger event occurs, the Claims and the Surplus may only be used for hedging and managing hedges for your eBridge Contract's, paying money to eBridge Futures Contract Clients, paying money to which StoneBridge is entitled (fees, charges, interests) (or payments on winding up the trust). In practical terms, the Protection Trust gives you protection by limiting use of Surplus to eBridge Contract-related activity, maximising the available funds that could be available if needed to be paid to an eBridge Contract Client and stopping the use of the Surplus for purposes outside the rules of the Protection Trust. During this time before any trigger event, each eBridge Contract Client is a beneficiary of the rights under the trust and may enforce the terms of the trust (but at this time they do not have a beneficial interest in the trust property such as hedge contracts or cash); and

• automatically upon a trigger event, holds the Claims and Surplus beneficially for the eBridge Contract Clients and, in simple terms, StoneBridge as trustee must manage the Claims and the Surplus to pay out all eBridge Contract Clients. This gives eBridge Contract Clients more protection by holding the Claims and Surplus for eBridge Contract Clients beneficially and intends to prevent their use for other purposes or being available to creditors other than eBridge Contract Clients. StoneBridge (as trustee) is allowed to manage the Claims, because it could get quite complex and require skill, time and judgement to get the best practical result but all of the benefit flows first to eBridge Contract Clients, not StoneBridge or other creditors.

Trigger events are: (i) insolvency by the Hedge Counterparty or StoneBridge; and (ii) a breach by StoneBridge of the terms of the Protection Trust that adversely affects the interests of eBridge Contract Clients as a whole.

So, if StoneBridge or its Hedge Counterparty were to become insolvent, all of the Claims and Surplus are protected under the trust for the benefit of CFD Clients first, and the Claims and Surplus can only be used first to payout Clients.

Please see the section below under "Payments to you in StoneBridge Insolvency" for a summary of what would happen when that trigger event occurs.

Clients benefit from the Protection Trust by StoneBridge holding the benefit of the Claims and Surplus only for eBridge Contract dealings, before and during any insolvency until eBridge Contract Clients are paid out. (a full copy of the terms of the Protection Trust are available free of charge on request.)

The Stonebridge Acquisition

132 On 7 June 2011, BBY entered into an agreement entitled "Rock Share and Business Sale and Purchase Agreement" ("the Stonebridge Purchase Agreement") with Stonebridge Two Pty Ltd, Stonebridge Securities and Stonebridge Futures Pty Ltd, for the acquisition by BBY of the private client advisor network, staff and product platforms of Stonebridge, including all of the assets forming part of, or used in connection with, Stonebridge's Equities, ETOs, Futures and corporate finance businesses. The acquisition was completed on 26 August 2011.

133 The Stonebridge Purchase Agreement provided for the assignment by Stonebridge Securities and Stonebridge Futures, shortly before completion of the acquisition, of the business carried on through the eBridge Platform (which included Stonebridge's Saxo, IB and FX businesses) to an entity then known as Australian Financial Market Services Limited ("AFMS"), which was then a subsidiary of Stonebridge Two (clause 7.1); to be followed by the purchase by BBY from Stonebridge Two of all the issued shares in AFMS (clause 2.1).

134 In June 2011, Stonebridge Securities by deed novated its agreements with Saxo Bank to AFMS. AFMS was renamed as SmarTrader Limited, and new documentation (Account Terms and PDS) were issued in the name of SmarTrader, but otherwise identical to those which had been in use by Stonebridge. On or about 23 June 2011, the eBridge Buffer account 0256 was assigned by Stonebridge Securities to SmarTrader. On 15 July 2011, Stonebridge notified its clients that with effect from 22 August 2011, Stonebridge would (inter alia) assign all of its rights and obligations under the eBridge Online Trading Account Terms, and migrate the client's personal eBridge Online Trading Account(s), to SmarTrader, and that shortly afterwards, SmarTrader would be acquired by BBY (in fact, it was ultimately acquired by BBY Holdings Pty Ltd, presumably as BBY's nominee).

135 Upon completion of the acquisition on 26 August 2011, SmarTrader became a wholly-owned subsidiary of BBY; the BBY Group acquired Stonebridge's Equities, ETOs, Futures, FX, Saxo, IB and corporate finance businesses; and client money previously controlled by Stonebridge, including Saxo client money, came to be controlled by the BBY Group. Thereafter, and as at 2 December 2011, BBY clients using the eBridge platform had a contractual relationship with SmarTrader, which by then was BBY's wholly-owned subsidiary. This relationship was governed by the SmarTrader Account Terms and Product Disclosure Statements which, save for the change of names, were identical to those which had been issued by Stonebridge before the acquisition.

The nature of the Saxo Bank receipts

136 On 3 March 2011 – the date on which the first of the three deposits, totalling $25 million, was received - the opening balance of the eBridge Buffer account 0256 was $9,306,213.24. The third tranche was received on 16 March 2011. These deposits were of funds transferred to Stonebridge by Saxo Bank, and were initially deposited to the Stonebridge Securities FX account, but almost immediately transferred to the Buffer account. The deposits are annotated in the 0256 account bank statements as "Saxo recall" or "Saxo fund recall". The Liquidators report that "$25 million of the funds held in eBridge Buffer account as at 16 March 2011 related to Saxo client funds drawn down from the Saxo Platform prior to the sale of Stonebridge to BBYL".

137 There were suggestions that the Liquidators' conclusion that the $25 million represented funds paid by Saxo Bank as a result of closing out clients' positions or return of surplus margin should not be accepted. Initially, it was suggested (on behalf of Haywoods) that the funds in the eBridge Buffer Account 0256 did not originate from eBridge Contract clients, or that their source had not sufficiently been proved, and (on behalf of SEGC) that the nature and purpose of the payment by Saxo Bank to Stonebridge in March 2011 was unclear.

138 The Stonebridge 2009 Contracts for Difference (CFD) PDS, referred to above, stated that once an order for a CFD was received, Stonebridge would, at or about the same time, make a similar transaction (in its own name, on its own

account) with other market participants to hedge the transaction, so that Stonebridge had little or no direct market exposure to later changes in the value of the underlying security; and that in order to make those transactions, Stonebridge was usually required, to pay for its hedge or to deposit moneys with the hedging counterparty to maintain Stonebridge's open hedge position, which it did with the payments made to it through withdrawing the client's funds from the trust account. The Stonebridge 2011 eBridge Futures Contracts PDS, also referred to above, stated that funds deposited by eBridge Contract clients in the eBridge Trust Account would either be transferred to the protection trust bank account, or paid to the hedge counterparty, namely Saxo Bank. The 2011 PDS described two scenarios by which funds might be returned from the hedge counterparty (namely, Saxo Bank). The first was "Margin Cover Surplus Requirements" (emphasis added):

> **Steps:**
>
> Assume that you (as our Client) have excess margin, i.e., the Margin Cover amount is positive and you request payment of an amount not exceeding Withdrawable Funds.
>
> **Step 1** StoneBridge sources funds for payment to you (which will be step #2) either from:
>
> - its Protection Trust Bank Account (1A) or
> - *from the Hedge Counterparty i(1B).*
>
> Note that the source could be either or both of those places. *Any funds sourced from the Hedge Counterparty* could go directly to you *or they could go into the Protection Trust Bank Account* before being paid out to you, whichever is more efficient on the day. Note that these funds do not go into any other StoneBridge bank account.
>
> **Step 2** StoneBridge pays funds into your nominated bank account.

139 The second was "eBridge Futures Contract Close Out and return of surplus funds" (emphasis added):

> **Steps:**
>
> You (as our Client) Close Out the eBridge Futures Contract, realising a gain. Your Account has a net credit balance above any remaining minimum required Margin (if any remains).
>
> You request payment of the Withdrawable Funds.
>
> **Step 1** StoneBridge sources funds for payment to you (which will be step #2) either from:
>
> - its Protection Trust Bank Account (1A) or

- *from the Hedge Counterparty (1B).*

Note that the source could be either or both of those places. *Any funds sourced from the Hedge Counterparty* could go directly to you *or they could go into the Protection Trust Bank Account* before being paid out to you, whichever is more efficient on the day. Note that these funds do not go into any other StoneBridge bank account.

Step 2 StoneBridge pays funds into your nominated bank account.

140 In that PDS, “Withdrawable Funds” was defined to mean:

> The amount of cash which would be paid to you from the eBridge Trader Online Account if requested. There are Withdrawable Funds only if your Margin Cover is a positive amount. The amount of the Withdrawable Funds is the lesser of the cash balance of your Account and the Margin Cover. If your Margin Cover is not positive, there will be no Withdrawable Funds.

141 In the light of the known dealings and arrangements between Stonebridge and Saxo Bank, and in the absence of any alternative explanation having been suggested, therefore, the probable explanation of the receipt of $25 million in April 2011 is that they were hedging receipts. The $25 million could well have represented cash in excess of the margin requirement imposed by Saxo Bank on Stonebridge. It is improbable that, at any particular point in time, all money deposited by Stonebridge’s Saxo clients was being fully utilised as margin. For example, according to a *Corporations Act* s 912C Response provided by SmarTrader to ASIC in March 2012, as at 24 November 2011 its Saxo client account balances totalled $27,075,262.49, while its Saxo clients' margin obligations totalled only $8,257,420.48, thus the "free equity" of its Saxo clients totalled $18,817,842.01, of which only $1,975,157.22 was actually held by Saxo Bank (much less than the total margin obligation of Saxo's SmarTrader clients, $8,257,420.48). Moreover, as at March 2011 there was an incentive for Stonebridge to maximise its income, in order to elicit the most favourable bid from BBY for its businesses; it is notable that it was upon return of the $25 million that it opened the NAB High Interest account and transferred the $25 million – and more – from Buffer Account 0256 into it.

142 Although the initial deposit of the Saxo receipts into the Stonebridge Securities FX account might suggest that the money was referable to the FX product line rather than the Saxo product line, this - as the Liquidators submit - seems unlikely: first, because on 24 March 2011 Stonebridge advised BBY that its FX Client Funds totalled only $6,375,141; and secondly, because the money

received into the Securities FX account was promptly transferred into the eBridge Buffer account, in tranches which corresponded in timing and amount with the receipts from Saxo. While the reason why the moneys were originally deposited to the Securities FX account is unknown, their prompt transfer to the Saxo eBridge Buffer Account – which as will be seen was an account to which the protection trust applied - supports the view that it was referable to the Saxo product line. Moreover, even if the money was referable to the FX product line rather than the Saxo product line, it is not apparent why that of itself would lead to the conclusion that it was not Subdivision A money, albeit FX rather than Saxo client money; the FX Terms provided:[62]

> Any monies received by BBY in respect of your Account will be deposited and held by us on trust in a segregated trust account …

143 Accordingly, the probable explanation of the receipt of $25 million in April 2011 is that they were hedging receipts, representing the return of funds that had previously been deposited by Stonebridge with Saxo Bank for the purpose of maintaining open hedge positions, which funds had been moneys paid to Stonebridge by eBridge Contract clients, and were repaid to Stonebridge upon closing out presumably favourable hedge contracts maintained by Saxo Bank. At least Mr Brereton SC for Haywoods – as well as Mr Healey for the Liquidators and Mr Smith SC for Riseam – ultimately accepted that this was the probable explanation.

Were the Saxo Bank receipts Subdivision A money (s 981A(1)(b)(iii))?

144 Pursuant to *Corporations Act* s 981A, Subdivision A applies to money paid to a licensee in connection with a financial product held by a client, if the money is paid by the client, or by a person acting on behalf of the client, or to the licensee in the licensee's capacity as a person acting on behalf of the client. The question is whether the Saxo Bank receipts were caught by s 981A(1)(b)(iii), as money paid to the licensee “in the licensee’s capacity as a person acting on behalf of the client”. The argument that they were not client money is that Saxo Bank and Stonebridge traded with each other as principals,

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[62] While this is taken from clause 3.8.2 of the BBYL FX Terms, headed 'Client Money', a clause to the same effect appears in the Desk FX terms dated August 2012, and it is to be inferred that an identical term was contained in the predecessor SmarTrader and Stoneridge documentation.

and that notwithstanding that Stonebridge was representing to its clients that transactions would be fully hedged with a counterparty, that liability to the client was limited to the amount recovered from the counterparty, and that amounts received would be placed in the protection trust, the money was nonetheless paid to Stonebridge as principal and not on behalf of its clients – even if upon receipt Stonebridge became, as against its client, bound to deal with it for the client. The contrary argument is that Stonebridge, in establishing and closing hedge positions, was acting for the benefit of its clients, received the proceeds for their benefit, and (at least from 2010) had undertaken (in the PDS) to hold moneys so received from its hedge counterparty on the trusts of the protection trust, ultimately if not immediately for the benefit of the clients.

145 In *MF Global,* Black J held, in relation to OTC recoveries, that while payments *to* the counterparty in respect of margin for hedge contracts were permitted by s 981D and the authority conferred in client agreements,[63] and the statutory regime did not provide for an extension of the s 981H trust to choses in action acquired by the licensee as a consequence of payments made to counterparties,[64] and there was a fundamental obstacle to the attachment of a non-statutory express purpose trust to OTC Recoveries at the time of their receipt because the relevant purpose had by then been achieved,[65] nonetheless OTC Recoveries were received "on behalf of" the OTC clients in light of the ordinary meaning of those words, including because the hedge transactions were "also undertaken for the benefit of OTC clients, so far as they supported MFGA's capacity to discharge its obligations to OTC clients under the relevant client agreements".[66] His Honour said:[67]

> [239] A further question is whether OTC Recoveries, once received by MFGA, are monies to which Pt 7.8 Div 2 Subdiv A applies by reason of s 981A of the Corporations Act. That money is neither money paid by the client nor by a person acting on behalf of the client. However, a question arises as to whether such OTC Recoveries are received by MFGA as a person acting "on behalf of" the relevant OTC clients within the meaning of s 981A(b)(iii).

[63] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [216].
[64] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [220].
[65] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [237].
[66] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [242].
[67] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [239].

146 His Honour held that they were (emphasis added):[68]

> [241] As I noted in paragraphs 195-196 above, s 9 of the Corporations Act defines "on behalf of" in an inclusive manner, to include "on the instructions of". The relevant provisions (and particularly s 981D in its application to derivative transactions) indicate that the concept of "on behalf of" extends beyond transactions undertaken on an agency basis; and the term "on behalf of" in s 981B and s 981H has a wider meaning as a matter of its ordinary usage, extending to "the standing of one person as auxiliary to or representative of another person or thing" and to a transaction undertaken by one person "for the benefit of and in the interest" of another.
>
> [242] MFGA relied on the authority conferred under the relevant client agreements to pay margins to OTC counterparties in respect of hedge transactions and those agreements also provided the mechanism for closing out positions, including providing for MFGA to credit the amount payable to the relevant CFD ledger accounts (CFD client agreements, Ex I1, Tab 9, cl 8-9). *Those transactions were also undertaken for the benefit of OTC clients, so far as they supported MFGA's capacity to discharge its obligations to OTC clients under the relevant client agreements*. For these reasons, it seems to me that it can properly be said that MFGA undertook hedging transactions with OTC counterparties and received the proceeds of closing those transactions "on the instructions of" OTC clients, or at least that it acted as auxiliary to and for the benefit of OTC clients in undertaking those transactions and receiving those proceeds. In my view, funds returned by OTC counterparties to MFGA in respect of hedging were therefore received by MFGA in its capacity as a person "acting on behalf of the [OTC] client[s]" for the purposes of s 981A(1)(b)(iii) and were therefore monies which were required to be paid into the relevant CSAs maintained under s 981B. This position is not changed by the fact that the liquidators have paid those monies into separate accounts pending the outcome of these proceedings.

147 His Honour's approach directs attention to the character of the funds upon their receipt in the hands of the licensee, rather than the intention of the payer. That is consistent with the purpose of protecting client moneys. Just because market participants deal *inter se* on a principal-to-principal basis affords no reason for permitting a licensee upon receipt of funds, vis-à-vis its own clients, to ignore associated obligations. In s 981A(b)(iii), "paid to" is equivalent to "received by", and the focus is on the position of the licensee, not the payer.

148 As has been mentioned, the Stonebridge PDS explained that, once a client's order for the relevant contract was received, Stonebridge would, at or about the same time, make a similar transaction (in its own name, on its own account) with a hedge counterparty, to hedge fully the contract entered into with the

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[68] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [241]-[242].

client. Thus, the hedge contract is entered into as a result of the client's instruction. According to the PDS, the protection trust holds (emphasis added):

> - *all of the benefit of the claims against the Hedge Counterparty*, for the hedge contracts (**Claims**); and
> - all of the surplus funds from your payments to StoneBridge which are not paid to the Hedge Counterparty or paid as your fees and charges (**Surplus**).

149 Thus Stonebridge regarded itself as holding the benefit of claims against the hedge counterparty upon the terms of the protection trust. It is true that, until a trigger event occurred, no client had a beneficial interest in the trust property; however, the protection trust had the effect of limiting the trustee's ability to disburse the funds. Moreover, reference has been made, above, to provisions of the PDS which provided for the return of "Withdrawable Funds" to clients, and in particular that "any funds sourced from the hedge counterparty could go directly to you or they could go into the Protection Trust Bank Account before being paid out to you", but in any event "these funds do not go into any other Stonebridge bank account".

150 The PDS also explained that Stonebridge's liability was limited by the extent to which it actually recovers from the hedge counterparty and allocates the proceeds to the client's eBridge Futures Contract (emphasis added):

> Since StoneBridge is in the business of providing eBridge Futures Contracts in respect of the Underlying Futures Contracts and is not assuring the performance and credit risk of StoneBridge's counterparties, StoneBridge limits its liability to you under the terms of the eBridge Futures Contracts by the extent to which StoneBridge actually recovers against its Hedge Counterparties *and allocates that to your eBridge Futures Contract*. Put another way, any liability owed by StoneBridge to you will be satisfied only by the extent to which StoneBridge is able to recover from its Hedge Counterparties.

151 This manifests a nexus between recovery by Stonebridge from the hedge counterparty, and discharge of Stonebridge's liability to the client, and illustrates that the hedging transactions were undertaken for the benefit of Stonebridge's clients, in that they supported its capacity to discharge its obligations to them.

152 The Saxo Bank receipts were paid to Stonebridge because (1) consequent on the instructions of its clients, it had entered into hedge contracts with Saxo Bank as counterparty, the benefit of which was held in the protection trust, and

(2) it became entitled as a result of those contracts to recall the $25 million. Stonebridge had represented in the PDS that upon return of such funds it would either pay them to the client, or pay them into the protection trust before paying them to the client.

153 Consistently with the decision of Black J in *MF Global*, it can properly be said that Stonebridge undertook hedging transactions with Saxo Bank and received the proceeds of closing those transactions "on the instructions of" its Saxo clients, or at least that it acted as auxiliary to and for the benefit of its Saxo clients in undertaking those transactions and receiving those proceeds. Thus the funds returned by Saxo Bank to Stonebridge in respect of hedging were received by Stonebridge in its capacity as a person "acting on behalf of the [Saxo] client[s]" for the purposes of s 981A(1)(b)(iii), and so were Subdivision A money, to which the s 981H trust applied.

154 But even if this be incorrect, and the s 981H trust did not apply to the Saxo Bank receipts – and I acknowledge that the documentation has the effect that the money returned, if paid into the protection trust, is (absent a trigger event) not held for the benefit of any individual client, and that Stonebridge as trustee was entitled to use it and act in relation to it as it determined in the ordinary course of its business without having to act in the best interests of the contingent beneficiary, so that it might be argued that to that extent Stonebridge received the Saxo Bank receipts on its own behalf – the Saxo Bank receipts were nonetheless paid into a protection trust bank account (in conformity with the representations in the PDS), as the Buffer 0256 account had been nominated as such, and became subject to the terms of that trust. The consequences of this are considered, below.

The other Buffer account funds

155 From the foregoing it may also be concluded that, to the extent that the funds in the eBridge Buffer 0256 – a designated protection trust bank account – and those that were transferred from it to and back from the NAB High Interest 2428 – were not sourced in the Saxo Bank receipts, then they were moneys transferred in, in the manner described in the PDS, in respect of Saxo client

deposits. That this was Saxo client money tends to be confirmed, *inter alia*, by the following:

(1) The Saxo product line was described in client agreements and PDS issued by SmarTrader in around June 2011 as "eBridge Online Trading".

(2) The eBridge Buffer account 0256 was declared by the Stonebridge Nomination to be a protection trust bank account for the "eBridge Trader, provided by SAXO Bank A/S" platform (the Saxo Online Platform); and subsequently, in 2012, both the eBridge Buffer account 0256 and the NAB High Interest account 2428 were declared by the SmarTrader nomination, to be protection trust bank accounts for the Saxo Online Platform.

(3) Not only were the receipts of $25 million from Saxo Bank, but large payments from the 0256 account between 5 August 2011 and 11 May 2012, totalling $24 million, were made to Saxo Bank, indicative of its use for hedging transactions with Saxo Bank.

(4) The Liquidators sampled 40 transactions on the eBridge Buffer account between March 2011 and December 2011, selected because they contained transaction descriptions which referred to other product lines. They found supporting correspondence for seven of those transactions, none of which suggested that the eBridge Buffer account held client money referable to any other product line than Saxo.

(5) The Liquidators have found nothing which would suggest that funds from any other source were in the account.

156 Those opposing pooling contended that these receipts from clients were not held in trust for Saxo clients, because they were excepted from Subdivision A by s 981A(2)(c), and/or because of the operation of the Account Terms and *Corporations Regulations*, reg 7.8.02(1)(a) and (c).

Money paid to acquire a financial product from the licensee (s 981A(2)(c))?

157 By s 981A(2)(c), Subdivision A does not apply to money paid to acquire, or acquire an increased interest in, a financial product from the licensee, whether by way of issue or sale by the licensee. It was submitted (by the opponents of pooling) that moneys paid for the purchase of derivatives from Stonebridge (and subsequently also SmarTrader and BBY) represented the purchase price paid by clients for the issue of a financial product, namely the derivative which traded on the eBridge platform, and fell within s 981A(2)(c), so that margin funds were excluded from Subdivision A. Whether s 981A(2)(c) is engaged to exclude the s 981H statutory trust depends on the characterisation of the

moneys paid by a client to Stonebridge as money paid to acquire, or acquire an increased interest in, a financial product from Stonebridge.

158 In *MF Global,* Black J held that the reference to money "paid to acquire" a financial product in that subsection was to money paid by the client to the licensee on a final basis, in the nature of the purchase price for that product, and that payments made by clients to the licensee in respect of margin could not be treated as the purchase price for the relevant products, since they were paid "as collateral to secure Client's obligations":[69]

> *Whether the monies were within the scope of Pt 7.8 Div 2*
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> 201 Deutsche Bank contends that s 981A(2)(c) of the Corporations Act applies to monies used by MFGA to acquire equity swaps for hedging purposes and pay margins called upon them so that those monies were either never, or ceased to be, money to which Pt 7.8 Div 2 Subdiv A applied and cannot thereafter be client money, trust money or its traceable proceeds (Deutsche Bank SIC [87]).
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> 202 One element of the exception in s 981A(2)(c) is satisfied, in that OTC clients acquired the relevant financial products from MFGA by the "issue" of those products to those clients, since a derivative is treated as issued to a client when it enters into the legal relationship that constitutes that product under s 761E of the Corporations Act. However, it seems to me that the reference to money "paid to acquire" a financial product in that subsection is to money paid by the client to the licensee on a final basis, in the nature of the purchase price for that product. The payments made by clients to MFGA in respect of margin cannot be treated as the purchase price for the relevant products since they were paid "as collateral to secure Client's obligations" under clauses 5(j) of the CFD client agreement and Margin FX client agreement and clause 5(g) of the Online FX client agreement. The construction of s 981A(2)(c) for which Deutsche Bank contends would also have the unlikely consequences that, first, Pt 7.8 Div 2 Subdiv A would have no application to derivatives trading and clients engaged in such trading would not have the benefit of client money segregation or the statutory trust and, second, s 981D of the Corporations Act would be otiose since the licensee which received monies in respect of the acquisition of derivatives, even by way of margin, would be entitled to apply those monies for any purpose. I therefore do not accept Deutsche Bank's submissions in this regard.

159 The proponents of pooling submitted that even if the position under the Stonebridge/SmarTrader documentation is distinguishable, in that some of the money paid could be characterised as a purchase price for a product, not all money paid by clients as “margin” can be so characterised. First, the client must open an account, which requires the deposit of “Margin”, which can remain in the account until trading commences; then, once an order is made,

[69] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR; [2012] NSWSC 994 at [202].

the client must pay a minimum amount of margin (called “Initial Margin”) before the issue of the relevant contract; and as that Initial Margin will typically if not invariably exceed what Stonebridge has to pay the counterparty, the difference (called “Surplus”) is paid into the protection trust.

160 As Black J pointed out in *MF Global*,[70] if all moneys paid in connection with acquiring an over-the-counter derivative fell within s 981A(2)(c), then trading in derivatives would never be subject to Subdivision A, which would be anomalous, because it would both deprive clients of any protection under Subdivision A, and leave s 981D no work to do.

161 In my view, the “Margin” paid by Saxo clients was not a purchase price for a product, but the establishment of a running account which was required to be maintained at a sufficient level to cover the risk assumed by Stonebridge. What clients deposit, and from time to time adjust, is an amount of money stipulated by Stonebridge for the purpose of protecting itself against the credit risk of an adverse movement in the value of the underlying security. It is not a purchase price. Section 981A(2)(c) is not engaged to except their margin payments from Subdivision A.

Entitlement under the Account Terms (reg 7.08.02(1(a) or (c))?

162 By the Account Terms, and as reflected in the PDS, Stonebridge (and after the Stonebridge Acquisition, SmarTrader) sought to achieve the result that it was entitled to withdraw funds paid to it as if free of any trust, notwithstanding that such funds, if not paid to Saxo Bank (as hedge counterparty), would be paid into the protection trust bank account. The question arises whether the Account Terms were effective to avoid clients’ funds paid to SmarTrader remaining subject to the s 981H statutory trust.

163 Section 981C provides for the making of regulations relating to accounts maintained for the purposes of s 981B, including (by paragraph (a)) dealing with “the circumstances in which payment may be made out of an account …”. In that behalf, (CTH) *Corporations Regulations,* reg 7.8.02(1), makes provision for permissible withdrawals from an accounts maintained for the purposes of s 981B, relevantly as follows:

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[70] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [201]-[202].

> **(1) Withdrawals from account** For paragraph 981C(a) of the Act, payments may be made out of an account maintained for section 981B of the Act in any of the following circumstances:
>
> (a) making a payment to, or in accordance with the written direction of, a person entitled to the money;
>
> …
>
> (c) paying to the financial services licensee money to which the financial services licensee is entitled;
>
> …

164 Clause 4 of the Account Terms, which has been set out above (and which is common to Stonebridge and SmarTrader, and later BBY), applies to "all money and the cleared proceeds of cheques or other payments that are paid by the Client or on behalf of the Client or for the account of the Client to Stonebridge from time to time including initial and later deposits for Margin".

165 Clause 4.3, in providing that all funds paid to Stonebridge/SmarTrader would be held by Stonebridge/SmarTrader "entirely for its own benefit", is subject to the express qualification "except only to the extent required by law". If moneys paid to Stonebridge/SmarTrader were caught by s 981A(1), then s 981B required that they be paid into a s 981B account, and s 981H provided that they were taken to be held on trust for the benefit of the client.[71] As that result was "required by law", the qualification in clause 4.3 was enlivened, and clause 4.3 was not effective to confer on Stonebridge/SmarTrader beneficial ownership of the money.

166 By clause 4.4, the Client acknowledges, authorises and directs that, to the extent funds received by Stonebridge are, or are required to be, deposited into any trust account or other kind of account, *to the extent permitted by law* the funds are (a) *not* held in trust by Stonebridge for the benefit of the client; and (c) the funds are funds which Stonebridge is entitled to be paid. Thus clause 4.4 also is subject to the qualification "to the extent permitted by law".

167 Regulation 7.8.02 authorises payment (a) to or in accordance with the written direction of the person entitled, and (c) to a licensee of money to which the

[71] The exception, under Reg 7.8.01(5)(c), in respect of money paid into CSAs in connection with margin calls which the licensee is obliged to make under market rules is not applicable, as margin in respect of the Saxo products, being over-the-counter and not exchange-traded products, was not subject to the rules of any market.

licensee is entitled. The statutory context is a scheme for imposing a trust, for the benefit of clients, on money to which it applies, and requiring that such be paid into segregated accounts, from which they may be disbursed only for permitted purposes. The regulation authorises payments out of the s 981B trust account which, once made, will be free from the s 981H trust. The "entitlement" to which the regulation refers is an "entitlement" in the context of such a trust. The word "entitled" – rather than "owed" – usually conveys a beneficial entitlement, rather than a debt. Generally speaking, the "person entitled" will be the client for whose benefit the moneys are held. This is the sense in which the term "person entitled" is used in (a), which authorises, in effect, payment to or as directed by the beneficial owner. However, the context and slightly different terminology of (a) and (c) suggest that the word may not be used in the same sense in both paragraphs; if it were used in the same sense in (c), it would add nothing to (a). Thus the context suggests that in (c) the concept is wider, and extends to money which the licensee is owed.

168 It may be, as the opponents of pooling suggested, that clause 4.4 was intended to authorise payment to the protection trust. Clause 5.4 includes an acknowledgment of the PDS, which explains that this will happen, and that – absent a trigger event – the client has no beneficial interest in the protection trust property. However "the law" – that is to say, Subdivision A – requires that moneys to which it applies be held on trust *for the benefit of the client*. Clause 4.4(a) purports to negative that. Clause 4.4(c) purports to create an immediate entitlement on the part of Stonebridge/SmarTrader to the funds paid by a client, as soon as those funds are "deposited into any trust account of SmarTrader or other kind of account required by law", without any further basis for creating an "entitlement". If effective, these provisions would mean that upon payment of the money into a CSA as required by s 981B, to which the statutory trust under s 981H applied, Stonebridge/SmarTrader would become beneficially entitled to them. This would be inconsistent with, and negate, the requirements of Subdivision A that such moneys be held on trust for the benefit of the client in a segregated account, and defeat its purpose which is to ensure, by means of the statutory trust, that funds paid to a licensee by a client in connection with a financial service or financial product do not form part of the general assets of

the licensee to be used as it pleases and to be available for its creditors in the event of insolvency, but are segregated and held on trust for the benefit of the client. Thus clause 4.4 is not effective to vest “entitlement” to the money in Stonebridge/SmarTrader, because that is not “permitted by law”.

169 Such a result was not uncontemplated by the drafter of the Account Terms, because clause 4.4(c) then proceeds to provide for the contingency that the provision that the funds are funds to which Stonebridge/SmarTrader is entitled to be paid “is not applicable”, as follows (emphasis added):

> or, *to the extent that is not applicable for whatever reason*, are funds which StoneBridge may immediately withdraw and pay to a Market Participant or to StoneBridge (as the case may be) the funds to pay Margin or any other costs, fees or payments in respect of Transaction [sic] to which Market Participants or StoneBridge, as the case may be, is entitled under this agreement or at law.

170 That provision may well engage reg 7.8.02(c). But it is confined to payments to a market participant or Stonebridge/SmarTrader of “Margin or any other costs, fees or payments in respect of Transaction[s] to which Market Participants or Stonebridge/SmarTrader, as the case may be, is entitled under this agreement or at law”. And under the Account Terms, liability to pay “Margin” (defined to mean “an initial deposit or a Margin payment, by whatever terms they are described, and any like payments”) accrues at the time the transaction is entered into or the obligation to pay the relevant market participant comes into existence, regardless of whether or when a call is made. Thus this “fall-back” authority gave Stonebridge/SmarTrader no entitlement to funds in excess of the amounts that a client was required to pay by way of margin, and no entitlement to margin in advance of entry into a relevant transaction.

171 In *MF Global*,[72] Black J found that regulation 7.8.02(1)(a) was satisfied by a contractual direction that a licensee may apply money held in the CSA for a particular purpose, provided that the direction is sufficiently clear and subject to the licensee’s statutory and general law obligations. The directions under consideration in *MF Global* referred to a particular purpose, namely “discharging obligations which MFGA incurs to a counterparty”:[73]

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[72] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [212] to [216].

[73] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [207]; see also at [206].

> The Client authorises MFGA to deduct from the Client Segregated Account client money to which the Client is entitled, for the purposes of discharging obligations which MFGA incurs to a counterparty with whom MFGA enters into derivatives to hedge its exposure to the Client in connection with CFDs or to hedge its exposure to other clients who have entered into contracts for difference with MFGA under agreements similar to this Agreement.

172 Such a direction is far removed from the generality of clauses 4.3 and 4.4, and the absolute negation of the application of Subdivision A which they seek to achieve. They do not refer to any "particular purpose", and they subvert the statutory scheme. They do not engage regulation 7.8.02(1)(a).

173 It follows that clause 4 of the Account Terms did not have the legal consequence that Stonebridge/SmarTrader became "entitled" for the purpose of reg 7.08.02(1)(a) or (c) to moneys paid to them which were otherwise caught by s 981A(1), and were not effective to remove, or authorise the removal of, such moneys from the s 981H statutory trust. It makes no difference to this that it may be inferred that the clients accepted the risks associated with the arrangements explained in the PDS, which clearly informed prospective clients that their funds would be withdrawn from the eBridge Trust Account – upon which they would become an unsecured creditor - and placed in a protection trust account, and have no beneficial interest in the trust property, including the cash in the protection trust, unless and until a trigger event occurred. The PDS described what Stonebridge sought to achieve through the Account Terms, but in doing so ignored that (1) the Account Terms expressly gave way to what was required by law, and (2) the requirements of the law, and in particular ss 981B and 981H, were quite to the contrary.

Conclusion – all the money in the Buffer Account 0256 was Subdivision A money

174 It follows that all the money in the Buffer Account 0256 – whether sourced in the Saxo Bank receipts or in client deposits, was Subdivision A money, and even if it was not held in a s 981B account, was nonetheless impressed with the s 981H trust for the benefit of Saxo clients. It makes no difference whether or not the "protection trust" Buffer account 0256, and the High Interest Account 2428, were styled, or operated as, CSAs. As has been pointed out, s 981H applies to all Subdivision A money – not only such Subdivision A money as is paid into and held in a s 981B account.

175 There is nothing about the transfer on 21 April 2011 of $30 million of that money to the High Interest account 2428, or still less about its return to the Buffer account on 2 December 2011, that would alter its character as Subdivision A money. Stonebridge plainly intended no change in the status of the money to arise from the transfer into the High Interest Account 2428, and regarded the entirety of the balance in that account as at 25 May 2011 as trust money comprised of Saxo client funds. In preparation for the Stonebridge Acquisition, Stonebridge sent to BBY by way of disclosure an email dated 25 May 2011, with an attachment which was described as showing "client funds on the Saxo platform on which AFSL cap ad requirements should be calculated". The attached spreadsheet, entitled "Analysis of Funds relating to Saxo Clients" referred to the following accounts, which were described as "cash held in multi-currency trust accounts with Stonebridge":

(1) "AUD Buffer Existing – NAB" with a stated balance of $1,709,331. The start of day balance of the eBridge Buffer account on 25 May 2011 was $1,647,585 and the end of day balance was $1,880,996;

(2) "AUD Buffer New – NAB" with a stated balance of $34,000,000. There is no room for doubt that this was a reference to the NAB High Interest account 2428, the balance of which was exactly $34,000,000 on 25 May 2011; and

(3) other items "USD Buffer – NAB", "EUR Buffer – NAB" and "GBP Buffer – NAB" with balances that correspond with the balances of bank accounts styled "BBY Saxo Buffer (USD)", "BBY Saxo Buffer (EUR)" and "BBY Saxo Buffer (GBP)".

176 Further, other than interest earned on the balance and a deposit of $36,153.69 (which appears to relate to a transfer of client funds from a Futures product line account to a Saxo product line account held by the same client, and was withdrawn four days later), all deposits into the NAB High Interest account appeared to have been from the eBridge Buffer account.

177 Thus the opening balance in the NAB High Interest account as at 2 December 2011 consisted of Saxo client funds, impressed with the s 981H trust for the benefit of clients. It was from those funds that $12 million was that day transferred to the Buffer Account 0256, and thence to Equities Trust account 8694. That this was the money transferred to the 8694 account and thence, as to $9.5 million, paid to ASX is confirmed by the narrative relating to the $12

million transfer in the bank statements for the Equities Trust Account 8694: "Saxo Buffer new REF 2371-1140 800146 a/c 53222m". BBY's master platform account with Saxo Bank was designated "53222M".

178 Accordingly, immediately before its transfer to Equities Trust account 8694, the $12 million was trust money impressed with the s 981H statutory trust for the benefit of Saxo clients of SmarTrader (as Stonebridge's successor).

Was there "mixing" on 2 December 2011?

179 A critical question is whether there was relevant "mixing" by reason of the 2 December 2011 transfer of $12 million to Equities Trust account 8694, and/or the subsequent payment of $9.5 million to ASX Clear. This involves questions as to the nature of the payment (and how the proceeds were applied), whether it was permitted by s 981D (so as not to be a breach of the 981H trust), and alternatively whether it was in breach of the protection trust, and if so the consequences.

The application of the $12 million

180 As has been mentioned, from the $12 million transferred from the eBridge Buffer account 0256 to the BBY Equities Trust account 8694, $9,516,478 was paid to ASX Clear from the 8694 account, and ASX has informed the Liquidators that this related to migrated ETO positions for which BBY assumed clearing obligations. The balance of the $12 million transferred from the 0256 account remained in the BBY Equities Trust 8694 account.

181 The $9.5 million was required to be paid, not in the ordinary course of margin calls, but as an aspect of the transitional arrangements associated with BBY moving to self-clearing and taking over positions from Berndale. To implement this, BBY was required to provide margin before Berndale could be released from its margining obligations. BBY would presumably be reimbursed when collateral provided by Berndale was returned to it: the cash collateral that had been deposited by Berndale with ASX ought to have been returned by ASX Clear to Berndale on or following 5 December 2011, and then paid by Berndale to BBY as the new clearing participant for the relevant clients. The Liquidators have identified payments from Berndale to the BBY Equities Trust account totalling approximately $6.2 million in the period 2 December 2011 to 29

December 2011, of which about $6.1 million was received in respect of the migration of ETO positions from Berndale to BBY. It was in effect to fund the gap that BBY used the $9.5 million.

182 The opponents of pooling submitted that, at least to the extent of $9.5 million, the Equities Trust Account 8694 was merely a conduit, for the purpose of meeting a house obligation, and did not benefit Equities/ETOs clients. Although Mr Smith SC submitted that BBY was obliged, under ASX Clear Operating Rules, r 14.7.1, to call clients to match its margin obligation, and that use of the Saxo trust money enabled it to avoid doing so and thus relieved the Equities/ETOs clients of their obligation to meet such a call, this assumes that r 14.7 was applicable. As Mr Williams QC submitted, r 14.7 deals with the ordinary incidents of trading by a participant in derivatives, and is not directed to the transfer of an account from one participant to another, which is governed by Part 13 of the rules. Part 13 makes no specific provision about how collateral is to be transferred, but leaves it to be dealt with as a condition of the agreement between the outgoing and incoming participant contemplated by r 13.1.1. The terms of the agreement between Berndale and BBY in this respect are not in evidence, but it seems inconceivable that a client, having met a margin call by Berndale, would have to meet it a second time in order to enable BBY to replace Berndale as the clearing participant and take over Berndale's extant positions. Thus I accept that the $9.5 million was, at least primarily, a "house" obligation of BBY, and its satisfaction did not, without more, operate to the benefit of Equities/ETOs clients. However, there is more.

183 First, there appears to be a significant shortfall between the $9.5 million paid by BBY from the Saxo client money, and the $6.1 million recovered from Berndale. While this is not addressed by evidence, such a shortfall could be explained by adverse market movements having the effect that the $9.5 million required from BBY exceeded whatever had previously been provided by Berndale. Or it could also be explained by ASX Clear taking a view that BBY had a higher risk profile than Berndale and requiring a higher level of cover. The implication of this shortfall is that even if BBY was not required to call on its clients in respect of the amount that Berndale had provided, it was required to do so in respect of the amount it provided in excess, and use of the Saxo

trust money relieved it from doing so, and the Equities/ETOs clients from having to meet that call.

184 Secondly, through BBY using $9.5 million of Saxo trust money, rather than its own, to procure the release of Berndale's cover, the cover for the Equities/ETOs clients was funded, during the "gap" until Berndale reimbursed BBY, by Saxo trust money.

185 Thirdly, the use of the Saxo trust money to pay ASX Clear enabled the receipts from Berndale, of at least $6.1 million, to be left in the Equites/ETOs CSAs, and thus relieve those clients from further margin calls, or permit refunds to them. While it is true that there is no suggestion that the Saxo clients previously had any interest in the collateral held by Berndale, the use of their money to procure its release to Berndale and ultimately BBY (and the Equities/ETO clients) meant that there were traceable proceeds of the $9.5 million in the Equities/ETOs CSA.

186 Fourthly, and at the very least, the balance of $2.5 million remained in the Equities Trust account 8694.

187 For those reasons, notwithstanding that BBY's obligation to pay ASX $9.5 million was primarily a "house" obligation, the use of Saxo trust money for that purpose, as well as the retention of the balance of $2.5 million in the 8694 account, resulted in a mixing of the Saxo trust money of $12 million with Equities/ETOs CSAs.

Was the transfer a breach of the s 981H trust of Saxo client money (s 981D)?

188 Once that payment was made, the funds were not being held by SmarTrader "for the benefit of the [Saxo] clients" in conformity with s 981H; accordingly there was, *prima facie,* a breach of the s 981H trust. However, use of Subdivision A money related to derivatives for general margining and related purposes related to derivatives trading by other clients is permitted by s 981D, and (as explained above) in those circumstances does not amount to a breach of trust, but a permitted borrowing:

> Despite anything in regulations made for the purposes of section 981C, if:
>
> (a) the financial service referred to in subparagraph 981A(1)(a)(i) is or relates to a dealing in a derivative; or

> (b) the financial product referred to in subparagraph 981A(1)(a)(ii) is a derivative;
>
> the money concerned may also be used for the purpose of meeting obligations incurred by the licensee in connection with margining, guaranteeing, securing, transferring, adjusting or settling dealings in derivatives by the licensee (including dealings on behalf of people other than the client).

189 The opponents of pooling contended that to the extent that any money paid by Saxo clients to Stonebridge/SmarTrader and transferred to the 0256 account was not within s 981A(2)(c) (as money paid for the acquisition of a financial product) – and I have concluded that none was – it was money of the kind referred to in s 981D, so that SmarTrader was at liberty to use it for general margining purposes, including for dealings on behalf of people other than the client.

190 The "money concerned" referred to in s 981D is (relevantly) the money referred to in s 981A(1)(a)(ii), that is to say "money … paid in connection with … a financial product held by a person (the client)". It was submitted, by the proponents of pooling, that s 981D does not apply to money paid by a client to Stonebridge/SmarTrader which, though called "margin", is required under the trading terms to open a trading account. However, the words "in connection with" are of wide import, and are not confined to a purchase price. As has been explained, a client opens an account and deposits money to protect Stonebridge from adverse market movements; in my judgment, all the money so paid is paid "in connection with" the financial product.

191 It was uncontroversial that the Saxo products were "derivatives". Accordingly, the money paid by Saxo clients to Stonebridge (and its successors) was paid in connection with a financial product held by the client, which was a derivative. Section 981D is therefore engaged.

192 Section 981D does not say that such money is not Subdivision A money, or is exempted from the s 981H trust, but permits its use in a way which would otherwise be inconsistent with such a trust. As explained in the first judgment, it amounts to a permission to the licensee to borrow trust money for specific purposes, and exercise of the permission results in the licensee becoming a

debtor to the client.[74] Accordingly, pursuant to s 981D, that money can be used by the licensee for its general margining purposes, without being in breach of the s 981H trust.

193 The real question is whether any relevant payment out – and in particular the $12 million transfer on 2 December 2011 - was for a purpose authorised by s 981D. As has been seen, the $12 million was used for the purpose of meeting a house obligation incurred by BBY in connection with its becoming a self-clearing participant and taking over the extant positions of Berndale in respect of ETOs - which, it is now accepted, are derivatives within the meaning of *Corporations Act,* s 761D.[75] While there is an argument that this may beyond what was contemplated by s 981D, again the wide words "obligations incurred by the licensee in connection with margining, … transferring, adjusting or settling dealings in derivatives by the licensee …" are sufficient to catch it.

194 However, the permission granted by s 981D is to use the money concerned for the purpose of meeting obligations incurred *by the licensee*, in connection with margining, guaranteeing, securing, transferring, adjusting or settling dealings in derivatives *by the licensee*. Although SmarTrader was, by 2 December 2011, BBY's wholly-owned subsidiary, they were different legal entities and, more importantly, distinct licensees; SmarTrader operated under its own distinct Australian Financial Services Licence. As at 2 December 2011, BBY did not itself provide a Saxo product line.[76] Any client who held a Saxo account at that time was a client of SmarTrader, not of BBY. SmarTrader, not BBY, held the eBridge Buffer account 0256. For the purposes of s 981D, "the licensee" in question was SmarTrader. The margin call on 2 December 2011 was a call on BBY, not on SmarTrader. The transferred funds were used to meet obligations incurred by BBY, not SmarTrader, in connection with dealings in derivatives by BBY, not SmarTrader. As BBY was not the relevant licensee for the purposes

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[74] See In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) [2016] NSWSC 1366 at [92]-[93].

[75] A derivative is an arrangement in relation to which the three conditions specified in s 761D(1) are satisfied, and also includes anything declared by regulation to be a derivative: s 761D(2). Exchange traded options are derivatives within the meaning of s 761D: Australian Securities and Investments Commission v Giann & Giann Pty Ltd (2005) 141 FCR 278; 23 ACLC 276; [2005] FCA 81.

[76] As later described, from 30 June 2012, some 7 months after the 2 December 2011 transaction, BBY commenced providing its clients with this facility and SmarTrader clients were then migrated to BBY.

of s 981D, the payment was not at that time permitted by s 981D, and was a breach of the s 981H trust.

195 Even if this conclusion be incorrect, then, as the PDS maintained, despite Stonebridge/SmarTrader's legal right to use Saxo trust money to meet obligations to meet obligations incurred in connection with dealings in derivatives by the licensee on behalf of people other than the client, additional protection was offered to clients through the protection trust. While I have held that insofar as the Account Terms endeavoured to negate Subdivision A, their qualification "to the extent permitted by law" rendered them ineffective, participants are not precluded from agreeing to protections additional to those insisted upon by law, and that is what the protection trust sought to achieve.

The Protection Trust

196 At this point it is necessary to consider the impact of the protection trust, in respect of which, as has been seen, the Buffer account 0256 was with effect from 18 August 2010 nominated as a "protection trust bank account".

197 Even if the moneys paid to Stonebridge/SmarTrader by Saxo clients were, for any of the reasons discussed above, not Subdivision A moneys subject to the s 981H statutory trust, and/or the Account Terms had the effect that Stonebridge/SmarTrader was relevantly "entitled" to those moneys, that does not exclude the possibility that they were in any event subject to and held upon the terms of the protection trust – as the PDS represented would be the case, and as is reflected in their payment into a designated protection trust bank account.[77]

[77] It may be arguable that, because the Account Terms make no reference to the Protection Trust Bank Account - which is mentioned only in the PDS, for the various classes of financial product that were offered for trading on the eBridge Platform – StoneBridge (and its successors) were not under any contractual obligation, when withdrawing funds from the eBridge Trust Account otherwise than payment to the counterparty Saxo Bank, to transfer the money into the Protection Trust – although a failure to do so would have had the result that a PDS previously given to a client would be defective, with potential consequences under Corporations Act, s 1022B and s 1022C. However, these questions need not be considered, because the money in question was in fact paid into a protection trust bank account.

Was there a Protection trust in existence on 2 December 2011?

198 In this respect, the first issue is whether as at 2 December 2011 the eBridge Buffer Account 0256 was a protection trust bank account, and its contents protection trust property.

199 As has been noted, Stonebridge executed the "Declaration of Limited Trust" constituting the protection trust on 31 May 2010, and the "Nomination of Trust" designating the eBridge Buffer Account 256 as a Trust Account for the purposes of the protection trust, on 18 August 2010. The Stonebridge Declaration of Limited Trust was not among the documents novated to SmarTrader pursuant the Deed of Novation of June 2011. However, at least by 3 May 2012,[78] SmarTrader had executed a Declaration of Limited Trust ("the SmarTrader Declaration") in identical terms to the Stonebridge Declaration; and a Nomination of Trust which designated the eBridge Buffer Account 0256, and the NAB High Interest Account 2428, as a trust account for the purposes of the SmarTrader Declaration.

200 Moreover, in July 2011, SmarTrader issued PDS for the financial products traded on the eBridge Platform, all of which contained reference to SmarTrader's use of the protection trust bank account; and defined the expression "Protection Trust" to mean "the trust created under the document 'Declaration of Limited Trust' for eBridge Contract Clients". These statements were contained in PDS, in respect of which provision is made for serious consequences if when issued it contains knowingly false or misleading statements.

201 Had the matter remained there, I would have concluded on the probabilities that the SmarTrader Declaration had been executed by July 2011, when the rebranded "SmarTrader" documentation was issued. However, the SmarTrader Declaration refers to a third account – protection trust account 874 – which was not opened until 23 January 2012. This is probative that the declaration could not have been executed until, at the earliest, 23 January 2012, and could not have been in existence on 2 December 2011. Accordingly, a question arises whether, as the SmarTrader Declaration was made *after* 2 December 2011, the

[78] Being the date of an email to which the documents mentioned were attached.

moneys in the eBridge Buffer Account 0256 as at that date were impressed in the hands of SmarTrader with a trust on the terms of the protection trust in favour of Saxo clients.

202 There is no doubt that before the assignment of the 0256 account to SmarTrader it was, in the hands of Stonebridge, impressed with such a trust. However, Mr Hutton invoked the provisions of clause 5.5 and 5.6 of the protection trust deed to argue that the trust had terminated and the trustee beneficially entitled to the trust property. Those provisions were as follows:

> 5.5 Termination of trust
>
> A Trust established by this deed terminates on the earlier of: ... (d) its termination by the terms of this deed, including when all transactions referrable to the Market Agreement terminate and Trustee does not owe any other payment to the Client under Client Agreement.
>
> 5.6 Distribution of residual Trust Property
>
> If the Trust is terminated and there remains any property which would have been Trust Property but for termination of the Trust, Trustee must distribute the remaining Trust Property to Trustee in its own capacity.

203 Mr Hutton argued that novation would have had the effect of terminating and extinguishing all "Market Agreements" between Stonebridge and Saxo Bank, and that once SmarTrader acquired all of Stonebridge's rights and obligations in relation to the eBridge Online Trading platform, with effect from 22 August 2011, Stonebridge would not have owed any payment to any Saxo clients. So, it was said, from 22 August 2011 onwards, the protection trust deed terminated, and Stonebridge became entitled to the eBridge Buffer account 0256 in its own right.

204 However, that argument overlooks that by then Stonebridge had assigned the Buffer account to SmarTrader. Stonebridge may well have had no further obligations as trustee of the protection trust after 22 August, but that does not mean that a transferee of the trust property – whether as a volunteer, or with notice – was not bound by the trusts.

205 At the time of the Stonebridge acquisition, SmarTrader was a wholly-owned subsidiary of Stonebridge Two – one of the Stonebridge vendor companies to BBY – and pursuant to the Stonebridge purchase agreement, Stonebridge Two sold all of the issued share capital in SmarTrader to BBY Holdings Pty Ltd.

Stonebridge Securities was also a wholly-owned subsidiary of Stonebridge Two. The Stonebridge group acted together to effect a sale to BBY (or its nominee), in a way which enabled BBY to obtain the benefit of contracts held by Stonebridge which were assignable only to a related party of Stonebridge. SmarTrader was such a related party, until its share capital was sold to BBY's nominee under the Stonebridge purchase agreement.

206 As at 23 June 2011:

(1) the directors of Stonebridge Two (the vendor of the shares in SmarTrader) were Basil Macris (also secretary), Robert Neil Topfer, Timothy Todhunter, Ian Knox, and Richard Arnold;

(2) the directors of Stonebridge Securities were Basil Macris (also secretary), Timothy Todhunter, and Ian Knox; and

(3) the directors of SmarTrader were Basil Macris (also secretary), Deborah Anne Kelly and Aaron Joseph Budai.

207 Thus Mr Macris was a director and secretary of all of Stonebridge Two, Stonebridge Securities and SmarTrader at the time the eBridge Buffer account was assigned. While Ms Kelly was not a director of Stonebridge Securities at the time of the assignment, she had been a director on 18 August 2010, and was a signatory on behalf of Stonebridge Securities to the Stonebridge Nomination, and was a director of SmarTrader at the time of the assignment by Stonebridge Securities of the eBridge Buffer account to SmarTrader.

208 As has been mentioned, on 25 May 2011, in connection with the Stonebridge Acquisition, Ms Kelly on behalf of Stonebridge sent to BBY a disclosure of “client funds on the Saxo platform” which disclosed as “cash held in multi-currency trust accounts with Stonebridge”:

AUD Buffer New – NAB	34,000,000
AUD Buffer Existing – NAB	1,709,331

209 The “New” account was undoubtedly the high interest account 2428, and the “Existing” account was the Buffer account 0256.

210 On 15 July 2011, Mr Macris on behalf of the Stonebridge Group wrote a circular letter to clients, explaining the basis on which their accounts were being taken over by BBY/SmarTrader: he explained that Stonebridge would “migrate any facilitation accounts used by Stonebridge to operate your eBridge

Online trading Account(s)" to SmarTrader, and that shortly afterwards, SmarTrader would be acquired by BBY; that the client's advisor would join BBY, and:

> You should note that, although rebranded, the SmarTrader eBridge Online terms of trading will not change as a result of the new arrangements and your trading on eBridge Online will be subject to the same terms and conditions as before.

211 It could hardly have been contemplated, by any participant, that SmarTrader would acquire beneficially what Stonebridge had held only on trust.

212 Further, as has been noted, in July 2011, SmarTrader issued PDS for the financial products traded on the eBridge Platform, all of which contained reference to SmarTrader's use of the protection trust bank account; and defined the expression "Protection Trust" to mean "the trust created under the document 'Declaration of Limited Trust' for eBridge Contract Clients". The SmarTrader documentation was in identical terms to the Stonebridge PDSs, and the inference that the Stonebridge documentation formed the basis of the SmarTrader documentation is inescapable.

213 There is no evidence that (and it would be very surprising in those circumstances if) the assignment from Stonebridge to SmarTrader occurred for value. Accordingly, upon receipt by SmarTrader of the 256 account as a volunteer, the funds were impressed with the trusts on which they had been held by Stonebridge.[79]

214 Moreover, having regard to the commonality of directorships between SmarTrader and Stonebridge, the circumstance that the SmarTrader documentation was prepared from the Stonebridge documentation, and the references in the SmarTrader documentation to the protection trust, I am satisfied that SmarTrader received the eBridge Buffer account with actual knowledge, through its directors and officers, of the trust previously constituted by the Stonebridge Declaration and the Stonebridge Nomination, and that the funds therefore remained impressed with that trust in its hands.[80]

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[79] Black v Freedman & Co (1910) 12 CLR 105 at 109; Re Diplock's Estate; Diplock v Wintle [1948] Ch 465 at 539 (Lord Parker).

[80] Barnes v Addy (1874) LR 9 Ch App 244 at 251; Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89 at [112].

215 Accordingly, as at 2 December 2011, the eBridge Buffer Account remained protection trust property, and was held by SmarTrader upon the trusts of the protection trust contained in the Stonebridge Declaration. Even if the money in the 0256 account on 2 December 2011 was not Subdivision A money, or even if clause 4.4 of the Account Terms effectively engaged reg 7.8.02, so that SmarTrader was for its purposes "entitled" to the moneys, it was impressed, in the hands of SmarTrader, with the trusts of the protection trust.

What are the rights of clients consequent on and after 2 December 2011?

216 The second issue then is whether - on the basis that the funds in account 0256 were, as I have found, impressed with the protection trust in the hands of SmarTrader as at 2 December 2011 - the payment on that day of $12 million out of that account to Equities Trust account 8694 involved a "Trigger Event" for the purposes of the protection trust, giving the beneficiaries of that trust a beneficial interest in the funds in account 0256 which can be followed into the funds in account 8694 on and after 2 December 2011.

217 By clause 1.4(a) of the protection trust deed, until the occurrence of a trigger event, the trustee held all interests (legal and beneficial) in, rights to and entitlements in the trust property on the terms of the protection trust, without any client having any right to, beneficial interest in or other entitlement to the trust property (except the right to require the trustee to comply with the terms of the trust deed and otherwise perform the duties of a trustee), and by clause 2.3, was permitted to use trust property and act in relation to it as it determines, in the ordinary course of its business, without having to act in the best interests of the contingent beneficiary – including in managing hedge counterparty claims as the trustee sees fit. However, by clause 1.4(b), upon occurrence of a trigger event, then automatically by that event the trustee held all the trust property beneficially for all clients on the terms of the trust deed. Thus until a trigger event, the clients have no proprietary interest (legal or beneficial) in any funds in the eBridge Buffer account; however, upon a trigger event, the trust "crystallises" and becomes a fixed trust for the clients who thereupon acquire a beneficial interest.

218 By clause 5.8, a trigger event included a breach by the trustee of the deed that materially adversely affected the interests of clients as a class of beneficiaries. Clause 2.1(d) specified the only purposes for which the trustee was, before a trigger event, permitted to withdraw funds from the trust account:

> (d) Trustee may withdraw funds from the Trust Account only for any of the following purposes:
>
> (i) to pay to a bank account which is a trust account for the purposes of Part 7.8 of the Corporations Act 2001 (Commonwealth), for the benefit of a Client or for some or all Clients generally;
>
> (ii) to pay Clients (or as a Client directs) in full or partial satisfaction of Trustee's obligations under a Client Transaction;
>
> (iii) to pay itself or otherwise to appropriate for its own uses only those amounts to which it is entitled to be paid under a Client Transaction;
>
> (iv) to pay itself or otherwise to appropriate for its own uses amounts to which it is entitled to be paid under this deed for example in respect of interest earned on the Trust Account;
>
> (v) to meet some or all of Trustee's contractual obligations owed to its Hedge Counterparty corresponding with part or all of one or more of Client Transactions; and
>
> (vi) for any purpose it determines provided the withdrawal occurs after termination of the Trust by Trustee giving at least 20 Business Days' notice of that termination to Clients.

219 It was not suggested that the payment made on 2 December 2011 to the 8694 account was for any purpose permitted by clause 2.1 of the protection trust. It was therefore a breach of the protection trust deed. Nor is it seriously capable of dispute that the withdrawal from the trust of $12 million for the purpose of funding unrelated transactions of other clients in other product lines materially adversely affected the interests of “Clients” – being the clients whose money was in the protection trust account - as a class of beneficiaries: it placed in jeopardy a very large portion of the trust property, seriously eroding the “protection” that the trust was supposed to offer. Accordingly, the 2 December 2011 transaction was a trigger event for the purposes of the protection trust, with the consequence that the trust crystallised, and SmarTrader as trustee thereupon held the 0256 account beneficially for the clients whose moneys were in the account.

220 However, those opposing pooling argued that, if the trust so attached to the moneys in the account, nonetheless it did not attach to moneys that had

already left the account – and the $12 million had left the account before, even if only immediately before, crystallisation.

221 A number of reasons were advanced for rejecting this proposition.

222 The first was that a relevant breach (and trigger event) occurred before the transfer of the funds, on the evening of 1 December, when Mr Rosewall, the Chief Executive Officer, in consultation with Mr Maharaj, made the decision to use the Saxo trust money to meet the margin call associated with transferring clients that had previously had accounts cleared by Berndale. However, whether or not that decision, while it remained unimplemented and revocable, was a breach of trust, it is difficult to see that at that point there was any "materially adverse effect" on the interests of clients: their interests would be affected only upon the decision being implemented. I am unpersuaded that there was a trigger event on the evening of 1 December.

223 The second is that the trigger event occurred not later than immediately before the funds left the trust, upon such irrevocable steps having been taken and instructions given that it was inevitable that the transfer would take place. In my view this is correct: once the relevant instruction had been given to the bank to make the transfer – even if it was only momentarily before the transfer was made – there was a breach which had a material adverse effect of the interests of the clients.

224 The third, which in my view is also correct, is that a breach constituted by payment of trust funds other than for one of the permitted purposes necessarily has an adverse impact (by removing trust funds from the account in which they were to be preserved), and the trust crystallises *eo instante* the breach, so as to attach to the funds paid out as they leave the account. A floating charge can be fixed contemporaneously with the transaction that triggers it.[81] Clause 1.4 of the trust deed provides that upon a trigger event, clients have a beneficial interest in the trust property, as defined, which includes moneys in the

[81] Fire Nymph Products Ltd v The Heating Centre Pty Ltd (1992) 7 ACSR 365. It is true that the charge in that case provided that, in the event of a dealing by the charger with any of the mortgaged property other than in the ordinary course of business, it ipso facto became fixed to all the mortgaged property "at the moment immediately prior to such dealing", whereas in the present case it is "upon". But the judgment of Gleeson CJ recognises that while retrospective operation was not possible, but contemporaneous operation so as to catch the property the subject of the adverse dealing was.

accounts. A construction that includes within it moneys which were in the account but the transfer out of which was itself a trigger event is consistent with the protective purpose of the trust, while the alternative would defeat it by enabling a defaulting trustee to misappropriate the whole trust fund at once, leaving no trust property to which the trust would affix upon the trigger event. The trust should be construed in the context that a transfer out for other than a permitted purpose was precisely what it was intended to prevent. In that way, clauses 1.4 and 2.2 impose a trust not only over the moneys which remain but also those which were removed, the removal of which triggered crystallisation of the trust.

225 The fourth, which again in my view is correct, is that quite apart from the crystallisation of the trust upon a trigger event, the clients - or "contingent beneficiaries" – had the right to require the trustee to comply with the terms of the trust deed and otherwise perform the duties of a trustee. Although, until a trigger event, the beneficiaries had no proprietary interest in the trust property, it was nonetheless trust property, held by the trustee on the trusts of the protection trust. It is not essential to a trust that "where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else because it is an essential attribute of a trust that it confers upon individuals a complex of beneficial relations which may be called ownership".[82] The protection trust was "an express trust with two limbs", where the beneficial ownership of the trust property reposed in different persons, depending upon which limb was engaged at the relevant time.[83] Even where potential beneficiaries, as in a discretionary trust, have no vested proprietary interest, they are entitled to enforce the due administration of the trust. Although this is in any event the right given by equity,[84] it is specifically recognised by clause 1.4(a) of the protection trust. That they do not have any beneficial interest before the trigger event does not affect this. Thus, even before the occurrence of a trigger event, the funds were held upon terms of the trust, and the fact that the clients may not have had a beneficial interest does not mean that they

[82] CPT Custodian Pty Ltd v Commissioner of State Revenue (2005) 224 CLR 98 at 112 [25].
[83] See Re Australian Elizabethan Theatre Trust (1991) 30 FCR 491 at 500 (Gummow J).
[84] CPT Custodian Pty Ltd v Commissioner of State Revenue (2005) 224 CLR 98 at 110 [17].

cannot complain about a breach of trust, in the sense of a failure properly to administer it, or to adhere to its terms. Their rights including requiring and compelling restitution to the trust fund of money paid out in breach of trust – relevantly, in breach of clause 2.1(d) – and for that purpose to follow the money into the hands of the recipient in accordance with tracing principles.[85]

Conclusion

226 Accordingly, even if the $12 million payment made on 2 December 2011 to the 8694 account was not a breach of the s 981H trust, it was a breach of the protection trust, and resulted in protection trust money from the Saxo line becoming mixed in the Equities/ETOs CSAs. Because it also constituted a trigger event, the protection trust thereupon crystallised so as to attach to the transferred money, which became mixed in the Equities/ETOs CSAs. Alternatively, even if the protection trust did not upon crystallisation attach to the transferred money, the contingent beneficiaries of the protection trust were entitled to require restitution to the trust of money paid out in breach, wherever it may be traced. At least where the trust has on any view now crystallised - so that the right to follow and have restored the misapplied funds is now the beneficial property of the Saxo clients – that right amounts to an "entitlement" in the Equities/ETOs CSAs.

227 Accordingly, the $12 million transferred on 2 December 2011 into the 8694 account was trust property, held by SmarTrader for the benefit of its Saxo clients, and alternatively on the trusts of the protection trust. The transfer resulted in those funds, or their traceable proceeds, being mixed into the Equities/ETOs CSAs. The Equities/ETOs CSAs are, therefore, a "mixed fund", containing funds from two different beneficial sources: the Saxo clients, and the Equities/ETOs clients. As a result, the Saxo clients had an "entitlement" to funds in the Equities/ETOs CSAs.

[85] Campbell JC, "Republic of Brazil v Durant and the equities justifying tracing", (2016) 42 Aust Bar Rev 32 at 48, fn 57, 58, 59.

May 2012 - was the $12 million repaid?

228 There is a question whether certain transactions which took place between 7 and 10 May 2012 had the effect of restoring the $12 million, in whole or in part, to the Saxo accounts.

229 On 7 May 2012, the opening balance in SmarTrader's St George High Interest Account 5874 (which had been opened on 23 January 2012 and was designated by SmarTrader as a protection trust account for the Saxo line) was $29.89 only; there had been no previous material transactions on it. In the course of the day, a total of $11,999,970.11 was transferred into the account, leaving a closing balance of $12 million exactly. The funds transferred were sourced, as to $10.2 million from four separate Equities/ETOs CSAs; as to $1.5 million from NAB Operating account 0891 (a House account); and as to $0.27 million from the Equities General account 8643, also a House account.

230 The funds in the St George High Interest Account 5874 were disbursed, between 9 and 10 May 2012, as to $1.5 million back to NAB Operating account 0891, and as to $5.5 million back to the Equities/ETOs CSAs from which funds had been transferred. On 9 May 2012, Ms Yuen emailed Ms Fiona Bilton to confirm that "ETO and Eq trust accounts have been restored".

231 The context of these transactions emerges from email correspondence between ASIC and BBY. On 4 May 2012, Ms Charlotte Som of ASIC sent an email to several BBY personnel, including Peter Clavin, BBY's Head of Compliance:

> As discussed during the meeting, we would appreciate your views on the following questions:
>
> • Taking into consideration the operation of the Protection trust, please explain how it is intended that money will be distributed in the following circumstances:
>
> - insolvency of hedge counterparts but not of SmarTrader;
> - insolvency of SmarTrader but not of hedging counterparty; and
> - insolvency of both SmarTrader and hedging counterparts;
>
> • What is the basis of your view that client money in the protection trust will be distributed based on the provisions in the protection trust deed, rather than distributed in accordance with general insolvency provisions? Please include a description of any advice contained on this subject.
>
> Furthermore, please provide the following documents:

> • a copy of the report circulated created by Market Risk Manager and distributed to senior management for the date of 24 November 2011, as discussed during our meeting this morning;
>
> • daily reconciliation report for the SmarTrader Protection Trusts held with NAB and St George (account numbers: 0083-004 19-561-2428 and 332-027 553475874) for the date of 24 November 2011; and
>
> • statements showing the current balance held in the two protection trusts.

232 The first of the two accounts mentioned was the NAB High Interest Account 2428. The second was the St George High Interest Account 5874 which had been nominated by SmarTrader as a protection trust account for the purposes of the SmarTrader Declaration.

233 On 7 May 2012, Mr Clavin sent an email to Ms April Yuen, BBY's Finance Manager, with a copy to Mr Maharaj (emphasis added):

> Please forward the Daily Reconciliation Reports for the SmarTrader Protection Trusts held with NAB and St George (account numbers: 0083-004 19-561-2428 and 332-027 553475874) *for the date of 24 November 2011*.
>
> *Also, please forward statements showing the current balance held in the 2 accounts*.
>
> This will form part of BBY's response to our regulator which is due this Friday, please provide prior to Friday.

234 On 8 May 2012 at 7.29pm, Mr Clavin sent another email to Ms Yuen, with a copy to Mr Maharaj, asking her to forward "yesterdays [sic] statements" for the two previously mentioned protection trust bank accounts. On 9 May 2012 at 9.15am, Ms Yuen responded to Mr Clavin, attaching bank statements for the two accounts for 8 May 2012. The bank statement for the St George High Interest Account 5874 showed an opening balance on 8 May 2012 of $12 million, and no transactions during that day. Mr Clavin subsequently, by an email of 14 May 2012, provided those bank statements to Ms Som at ASIC.

235 As these communications reveal – and as became reasonably apparent in the course of Ms Bilton's oral evidence - following enquiries by ASIC, BBY procured funds to be paid into SmarTrader's St George High Interest account so that it appeared that the requisite $12 million was held in the protection trust on 8 May 2012. The funds sourced for that purpose were largely, though not exclusively, drawn from Equities/ETOs CSAs, which had benefited from the $12 million transfer. It seems that it was thought necessary to be able to demonstrate to ASIC, when it made its enquiries, that the $12 million remained

in the protection trust. This series of transactions also indicates, amongst other things, that the $12 million had not previously been restored - had it been, there would have been no need on 7 May to create the appearance that it was in a protection trust account. It is powerful evidence of a recognition on behalf of BBY and SmarTrader that the $12 million should not have been removed from the protection trust, and had not (at least to that point) been returned to it.

236 But having been temporarily restored for that purpose, $7 million was then promptly again disbursed – at least as to $5.5 million to the Equities/ETOs CSAs. Thus the email on 9 May 2012 “ETO and Eq Trust accounts have been restored”, and although Ms Bilton’s recollection was imperfect, it is clear that she (who was “Head of Clearing” for BBY) was at that time very concerned that those accounts should be restored.

237 $5 million of the transferred money remained for the time being in the St George High Interest account 5874. A deposit of $6.5 million was received into that account from Saxo Bank on 21 May 2012. Between 16 and 23 May, $1.5 million was transferred out to No 5 Trust account 7204. Between 24 May and 29 June 2012, there were Equities/ETOs funding transactions (more fully described below) from the 5874 account into the 541 account, which were repaid in full. On 29 June 2012, the balance of the 5874 account (then $10 million) was transferred to No 4 Trust account 5357, where it was used – again as described below – in Equities/ETOs funding transactions. Although to that extent it did not remain in Equities/ETOs CSAs, it was not restored to Saxo CSAs.

The Aquila transaction - 11-12 June 2014

238 BBY was facilitating the acquisition of $192 million worth of shares in Aquila Resources Limited (“Aquila”) for its client, Mineral Resources Ltd (“MRL”).

239 On Wednesday 11 June 2014, MRL made a security deposit of $29 million into the 541 account (which, as has been explained, was an Equities/ETOs CSA, used to fund and receive margin adjustment payments to and from ASX Clear). BBY thereupon executed the “buy” order for $192 million of Aquila shares. The transaction was due to settle on 15 June 2014.

240 On 12 June 2014, the Aquila share price fell and ASX Clear made a margin call on BBY for $40 million, comprising initial margin of $18 million, variation margin of $7 million, and additional Capital-Based Position Limits (“CBPL”) margin of $15 million. CBPL margin related to the settlement risk of a cash stock trade, and involved ASX Clear protecting itself against BBY’s counterparty risk; BBY was not entitled to call that margin from its client, or use client funds to meet it. BBY could not meet the call, and agreed with ASX that the CBPL be reduced to $5 million on 12 June to avoid a default.

241 On 12 June 2014, BBY paid ASX Clear $25.7 million (in respect of the initial and variation margin), and a further $5 million on account of the CBPL additional margin. This payment appears to have been funded by drawing on MRL’s security deposit of $29 million in the 541 account, which was transferred to (non-specific) No 1 Trust Account 9153, and thence to the facilitation account and on to ASX.

242 Then on 13 June 2014, BBY made a further payment to ASX Clear of $13.2 million, being the remaining $10 million of CBPL margin owing as a consequence of the margin call of the previous day, and an additional $3.2 million of variation margin required by ASX Clear to cover a further fall in the Aquila share price. This payment was funded, as to $1.8 million from the Saxo Buffer account 9356, as to $6.8 million from Futures CSA 9284, as to $2.5 million from Mr G Rosewall’s personal superannuation fund, and as to $2 million from “house” money in a subsidiary company. These funds were gathered in the (non-specific – that is to say, an account which was named “trust” but not apparently related to any specific product line) No 4 Trust Account 9372, where they were subdivided into payments of $4.7 million to (non-specific) No 1 Trust Account 9153, $3 million to (non-specific) No 3 Trust Account 9217, and $0.5 million to a house operating account 0891. Together, the amounts ultimately transferred to the No 1 and No 3 Trust Accounts, with their existing balances, comprised the $13.2 million which was transferred to the facilitation account and then to ASX. BBY then received $164 million from MRL, into the 541 account, to settle the trade. This amount was transferred to Equities No 2 Trust Account 9415.

243 On 15 June, the seller failed to deliver the stock, and settlement was deferred. There was partial delivery the next day, whereupon $169.5 million (comprising the settlement money provided by MRL) was transferred from Equities No 2 Trust Account 9415 to the 541 account, and then to the facilitation account, from which $105 million was paid to settle the (partial) purchase, and $66 million was returned to the 541 account, and thence back to the Equities No 2 Trust account 9415 (which accounts for the $169.5 million earlier transferred into the facilitation account). A further $26 million was transferred drawn from a St George funding facility, through the facilitation account to a house account, BBY OD excess account 4516. $3 million was received into No 3 Trust account from Mr K Rosewall, which was presumably intended, but too late, to assist with funding the CBPL margin. A further $960,000 was transferred from No 4 Trust account 9372 to the 541 account, as “BBY Corp” funding.

244 On 17 June, the remaining stock was delivered, and BBY paid the remaining consideration of $84.5 million to settle ($60 million from No 2 Trust account, via the 541 account and the facilitation account). ASX returned $28 million in initial and variation margin, and $15 million CBPL margin, into the facilitation account. Of the CBPL margin return, $7.7 million was transferred directly from the facilitation account to No 4 Other Trust Account, and $8.8 million to the 541 account, from which $960,000 was paid to the General account and on to No 4 Trust account (in repayment of the sum advanced as “BBY Corp funding” the previous day). The $8.8 million transferred to the 541 account also included $2.511 million return of CMM margin requirement, and a further $6.3 million. From the 541 account, the “end-of-day sweep” transferred $3.17 million to the BBY General account. $26 million was transferred from the OD excess account back to the facilitation account, and then back to St George.[86]

245 On 18 June, $2.511 million was transferred from the General account to the facilitation account, to restore the CMM funding from the previous day. On 23 June, another $2.511 million was transferred from the General account to No 4 Trust account (designated “return of funds to BBY Corp – rebalance of CMM AQA”), to complete the return of the total amount of $10,216,946 funded from

[86] The returned initial and variation margin appears to have been applied to either to the settlement purchase money of $85 million, or to the return of this sum to St George.

"BBY Corp" sources on 17 June. On 24 June, No 4 and No 3 Trust respectively repaid the shareholder loans, $2.5 million to Mr G Rosewall and $3.0 million to Mr K Rosewall.

246 At this point, the $1.8 million of Saxo CSA funds and $6.8 million of Futures CSA funds which had contributed to the $13.2 million margin payment on 13 June were located in the No 4 Trust account. Then, on 25 June 2014, a total of $7.5 million was transferred out of No 4 Trust Account, into three separate term deposits of $1 million, $2 million and $4.5 million respectively; the remaining balance in No 4 Trust Account of $3.527 million was transferred to BBY General Trust account 002; and the No 4 account was closed on 26 June 2014. The funds so transferred and invested on 25 June included the $1.8 million of Saxo money and $6.8 million of Futures money.

247 At least to this point, none of the amounts withdrawn from the Saxo CSAs ($1.8 million) or the Futures CSA ($6.8 million) had been returned to their source CSAs. However, the Aquila transaction does not establish a mixing of Saxo or Futures money with Equities/ETOs. The CBPL margin payment to ASX Clear was a house obligation, not recoverable from clients. It was not made on behalf of Equities/ETOs clients, and relieved them of no obligation; it was BBY's own obligation. The satisfaction of that obligation by resort to Saxo/Futures client moneys did not result in those moneys becoming mixed with Equities/ETOs CSAs. The money returned to No 4 Trust account, from which the term deposits and the payment to the General Trust account were sourced, was as to $7.7 million transferred directly from the Facilitation account, and as to $2.511 million from the General account ("return of funds to BBY Corp – rebalance of CMM AQA"). Only $960,000 was via an Equities/ETOs account, being the 541 account, though which it passed via the 541 by way of repayment of "BBY Corp" funding. The Saxo and Futures money did not remain in any Equities/ETOs account; it was located in the term deposits, and the General trust account 002. When the term deposits matured between 4 August and 14 October 2014, their proceeds were also paid into BBY General Trust account 002. Ultimately, they were returned to Saxo client funds as part of the Saxo 1:1 upload, referred to below. They do not contribute to the balance in the Equities/ETOs CSAs.

The SCMA 1:1 upload and termination

248 During 2012, BBY assumed conduct of the Saxo product line which until then had been operated by its subsidiary SmarTrader. Then in 2014, BBY transferred its Saxo client money to SCMA. In early 2015, the contractual arrangements between BBY and SCMA were terminated, and the money was returned to BBY.

From SmarTrader to BBY

249 SmarTrader's Saxo business, by which it provided the eBridge platform for use by clients, was transferred to BBY in June 2012, when BBY commenced providing that facility directly, under the style BBY Online Trader, pursuant to a White Label Trading System Agreement and an Institutional Trading Agreement, with SCMA, both dated 21 June 2012. On or about 29 June 2012, an email was sent to SmarTrader's eBridge Contract clients, relevantly in the following terms:

> BBY is pleased to notify you that your Online Trading account will be offered to you by BBY Limited (as opposed to SmarTrader Limited) as of 30 June 2012.
>
> BBY is a related company of SmarTrader and is Participant of ASX and ChiX. Under your Online Trading Account Terms with SmarTrader, you agree that SmarTrader can transfer your Online Trading Account Terms and the online platform to a related body corporate of SmarTrader that holds an ASF licence and is adequately capitalised. BBY is such an entity. Please consider this as notice of the transfer from SmarTrader to BBY of your account terms, any open positions that you have and the platforms as of 30 June 2012.
>
> You do not need to do anything for this change to occur, nor should you notice any difference to your Online Trading Account when the change occurs.
>
> You should note that the account numbers that you use to fund your trading account will not change (although the name of the account will change from SmarTrader to BBY). The set of client documents and terms you are issued with will continue to apply as per usual, although references in the PDSs to SmarTrader should be read as references to BBY after 30 June 2012 …
>
> Alternatively, if you wish to receive a new PDS that reflects BBY as the issuer of your products either by email or in paper form, please contact your adviser who will send to you.

250 On 30 June 2012, BBY itself executed a Declaration of Limited Trust ("the BBY Declaration"), in terms similar to the earlier Stonebridge Declaration and SmarTrader Declaration, and a Nomination of Trust which nominated, as protection trust bank accounts for the purposes of the BBY Declaration,

amongst other accounts, the eBridge Buffer Account 0256 (now renamed as the "BBY Saxo Buffer (AUD)".

251 In June 2013, BBY issued new client documents for BBY Online Trader – its Saxo business - in June 2013, including "Online Account Terms", and "Online Trader PDS". They did not differ, relevantly or materially, from the corresponding predecessor Stonebridge and SmartTrader documentation. In particular, clause 4 of the Online Account Terms was in relevantly identical terms to clause4 of the Stonebridge Account Terms, and the BBY Online Trader PDS stated that client funds would be withdrawn from the BBY Trust Account and either paid to the hedge counterparty (now SCMA), or transferred into the protection trust bank account.

252 Also in 2013, certain bank accounts held by BBY with the NAB were moved to St George Bank. In particular, on 12 April 2013, the eBridge Buffer Account was transferred to St George Bank account 356 (called "the Saxo Buffer account"). The eBridge Buffer Account was closed on 30 June 2014. Although there is not in evidence any Nomination of Trust which identifies the Saxo Buffer account as a trust account for the purposes of the BBY Declaration, it was treated as a protection trust account, as is apparent from the following:

(1) the Saxo Buffer account was the account into which funds held in the eBridge Buffer Account were transferred in April 2011;

(2) the Online Trader PDS continued making reference to the protection trust and the protection trust bank account; and

(3) the Saxo Buffer account was used in the same manner as the protection trust bank account. Saxo clients deposited funds into a CSA (which the Liquidators call the "WLP Omnibus account"). Funds were then transferred to the Saxo Buffer account, which then dealt with "direct and bulk client deposits/payments, and transactions to/from SCMA".

253 The expression "Trust Account" is defined in the BBY Declaration to mean (emphasis added):

> any bank account opened by the Trustee before or after the execution of this deed, at a bank and branch specified by Trustee in its initial nomination of the Trust *and as later substituted* or nominated from time to time.

254 If the Saxo Buffer account was not nominated as a trust account for the purposes of the BBY Declaration, it was substituted for the eBridge Buffer

Account. That suffices to make the Saxo Buffer account a protection trust bank account.

The transfer of funds to SCMA

255 On 19 December 2013, the Institutional Trading Agreement between BBY and SCMA was amended, with the consequence that, whereas previously BBY had itself held its Saxo client money in the eBridge or Saxo Buffer accounts, such money (except for an agreed buffer of $3 million to assist BBY in management of redemptions), that client money would now be held by SCMA itself, and BBY was obliged to transfer all Saxo client funds held by it to SCMA, in three tranches, so that SCMA would hold 33.33% of total BBY Saxo client money by 1 April 2014, 66.67% by 1 September 2014, and 100% by 1 December 2014.[87]

256 By 1 April 2014, Saxo already held about $14.4 million of BBY Saxo client money. Between 1 April and 12 December 2014, BBY transferred to SCMA a total of $28.7 million. Of this $21.6 million was transferred from Saxo Buffer account 9356, which in turn was funded by transfers into that account during the same period, from three main sources: No 3 Other Trust Account (which was fed by the Saxo Omnibus account ($0.5 million), the FX Trust account ($1 million), and external related party sources), and a BBY house account ($3.3 million); the General Other Trust account 002 (into which the proceeds of the three term deposits which contained $1.8 million of Saxo client money and $6.8 million of Futures client money, used to meet the margin call on the purchase of Aquila shares, had been paid); and No 1 Trust Account (which was in turn fed by related party sources).

257 The total amount transferred to SCMA drawn from sources other than the Saxo CSAs totalled approximately $20 million; all in all, it appears to have been necessary to find about $20 million to meet a shortfall in Saxo client money. Thus the Liquidators' observe that there was a $20 million shortfall in the Saxo CSA funds as at 1 April 2014. It is reasonable to infer that this shortfall was attributable, in part, to the transfer of $12 million from the eBridge Buffer Account on 2 December 2011. However, it seems that that shortfall was, at least ostensibly, met by garnering funds from multiple other sources.

[87] This process was referred to as the "Saxo upload", or "Saxo 1:1".

The Saxo termination - 1 February 2015

258 On 1 December 2014, SCMA asserted that BBY had not complied with its obligations under the 1:1 funding agreement, and terminated its relationship BBY, with effect from 1 February 2015. Following termination, BBY's Saxo clients could become clients of SCMA (pursuant to an "introducing broker" arrangement between BBY and SCMA), or withdrawn their Saxo money, or transfer their Saxo money to a BBY account in another product line.

259 By late February 2015, the BBY client base which used the SCMA platform was being wound down, and many clients had moved directly to SCMA or other brokers. In the period following termination, there was a considerable volume of daily deposits by SCMA into the BBY Saxo Buffer account. Some were made via FX Trust accounts for currency conversion purposes, and then into the Saxo Buffer account; and others were made directly from SCMA into the Buffer account.

260 The opening balance of the Saxo Buffer account 356 on 1 February 2015 was $673,251, and the closing balance on 17 May 2015 was $62,088. During that period, $53 million was received into the account, and $54 million paid out. That includes a total of about $50.5 million returned by SCMA to BBY, of which $0.5 million was paid to a Futures CSA, $1.1 million to an FX CSA, $4.3 million to various BBY House accounts, and about $41.8 million to BBY Saxo clients in relation to the closing out of their accounts on the Saxo platform (either by return to the clients ($33 million), or by transfer to another BBY product line account ($8.8 million)).

261 Thus, some money repaid by SCMA to BBY appears to have been applied to repay (in part) FX and Futures for funds which had been taken from them in connection with the "upload", and some appears to have been paid to the General account for purposes unrelated to the Saxo product line - including $139,000 on 16 March to assist in meeting a settlement obligation with ASX Clear in respect of ETOs – which was reimbursed to the Operating account, but not to the Saxo Buffer account, on 16 March.

Conclusion

262 At least arguably there was a mixture of $139,000 from the returned funds, but it is no longer in the Equities/ETOs accounts, and in the scope of things is very small. More significantly, although as the Liquidators suggest there may have been a shortfall in Saxo client money of in the order of $20 million, which BBY had to cobble together from elsewhere to meet its "upload" obligations, it seems that the Saxo client money was in that way ostensibly reconstituted by December 2014. Then it was returned in early 2015, and most of the Saxo client positions closed out before the administration date. This suggests that most of BBY's former Saxo line clientele were no longer clients by the administration date. Of the returned funds of $50.5 million, $41.8 million had been returned to clients. This suggests that the remaining deficiency in the Saxo CSAs is more to be attributed to the manner in which Saxo money was dealt with following the SCMA termination, than to the $12 million transfer on 2 December 2011.

Other transactions of interest

263 There are a number of other, less complex transactions of interest. Some at least potentially concern Equities/ETOs CSAs; others do not.

Transactions relevant to Equities/ETOs

16 Dec 14

264 On 16 December 2014, BBY incurred failed trades of about $5 million, which necessitated funding, for which money from five product lines external to Equities/ETOs all contributed: the Saxo Omnibus account (a s 981B account), Carbon Trading CSA, IB, FX and Futures were all drawn on, as well as a number of house accounts and related parties, to contribute moneys to No 3 Other Trust Account 217. In all, about $1.88 million was sourced from those CSAs. $1.37 million was then transferred from No 3 Other Trust Account to General Account 002, which formed part of $4.1 million then transferred into the 541 account (designated "BBY Corp funding"). Funds were then transferred to the facilitation account, and the full amount of the facilitation account overdraft limit was paid to ASX Clear.

265 On 17 December, as part of a larger transaction, $4.8 million was transferred from the 541 account and the facilitation account to the General Account, and then to General Trust Account 002. Payments of $2.905 million from the 541 account were funded by a deposit from Equities No 2 Trust Account 9415 (into which money had been paid from the 541 account itself), from a house operating account, and from No 1 Other Trust Account 546 (which amount had been transferred that day from No 3 Trust Account 349). In this way, the $4.1 million was ultimately, albeit indirectly, restored to the General Trust account 002. Thus, although there was no return of the $1.37 million to the CSAs from which they originated, those funds did not remain in the Equities/ETOs CSAs.

18 Dec 14 - $300,000

266 On 17 December 2014, $300,000 was transferred from the FX Trust account 268 to the Equities No 2 Trust account 9415. Apart from the 2 December 2011 $12 million transaction, this is the only instance of a payment directly from another product line CSA into an Equities CSA.

267 However, on the same day, $276,000 was transferred from the General Trust Account 002 to the 541 account. It will be noted that this and the previous transaction total $576,000 to Equities/ETOs CSAs.

268 Then, on 18 December, $600,000 was transferred from General Trust account 002 (non-specific) to No 3 Trust Account 349, and thence to FX Trust account 268, to fund a payment to an FX client payment of $600,000, and so was transferred to the 541 account. It does not appear to have been restored to the General Trust Account 002 by FX.

269 Also on 18 December, so that the Equities/ETOs CSAs would hold at least the amount that BBY regarded itself as obliged to hold for its ETO clients, BBY transferred the end of day trust obligation adjustment from Equities No 2 Trust account to the 541 account, amounting to $576,000, and including the $300,000 drawn from the FX Trust, and the $276,000 from General Trust Account 002. $576,000 was then transferred from the 541 account into the General Trust account 002 (designated “Return of funds to BBY Corp”). Funds do not appear to have been returned from General Trust account 002 to the FX account.

270 Thus, on the same day, FX 268 was paid an amount of $600,000 by General Trust Account 002, and contributed an amount of $300,000 to Equities/ETO, which subsequently repaid that amount to Other Trust 002. There is no net benefit to Equities/ETOs.

271 Even if this is incorrect, this transaction of itself would not likely mean that FX money (amounting to $300,000) is so "mixed" in the Equities/ETOs CSAs as to justify a pro-rata distribution of them to Saxo/FX/Futures clients. But for the repayment to General Trust Account 002, it may have resulted in Equities/ETO owing FX the sum of $300,000.

272 Moreover, as will be seen, on 16 January 2015, the sum of $250,000 was transferred from the 541 account to a FX trust account. That would then leave a net entitlement in favour of FX clients of $50,000, which would not likely warrant a pro-rata distribution of the Equities/ETOs CSAs to them.

16 Jan 15 - $0.5 million

273 On 16 January 2015, $250,000 was transferred from the 541 account to the FX Trust account. Another $250,000 was transferred from a house account to the FX Trust account. $500,000 was then paid from the FX Trust account to an FX client – suggesting that the FX Trust account had insufficient funds to meet the obligation to the client. No repayment from the FX Trust account has been found. However, this offsets the $300,000 referred to in respect of 18 December 2014.

March 2015

274 On 13 March 2015, $750,000 was transferred from the Saxo Buffer account 356 to BBY House General Account 576, where it was combined with $2.8 million from the facilitation account, to fund a transfer of $3,717,213.63 to the Equities/ETOs 541 account. But on 14 March, the sum of $5,171,354.58 was paid from the Equities/ETOs 541 account to the House General Account, thus returning the $3,717,213.63, including the $750,000, to the House General Account.

275 On 16 March 2015, $139,000 was transferred from the Saxo Buffer account 356 to BBY House General Account 576, apparently for the purpose of funding an ETO margin call where the overdraft account BBY used to meet such calls

lacked sufficient funds. Reference has already been made to this transaction. There is no evidence that this money actually reached, or was applied for the benefit of, an Equities/ETOs account.

276 Still on 16 March, a total of $889,000 – being the sum of these two transactions – was transferred from House General account 576 to Operating Account 0891. Neither sum was restored to the Saxo Buffer account.

277 If these sums were paid in breach of trust from the Saxo Buffer to the House Account, the House Account was impressed with that trust. The $139,000 never made it to an Equities/ETOs account, and while the $750,000 did, it did not remain there, and was returned to the House Account. Both sums ultimately sat in the 0891operating account, and did not contribute to the balances of the Equities/ETOs CSAs.

Non Equities/ETOs transactions

278 There were a number of transfers of money from Saxo to FX, Saxo to Futures, Futures to FX and FX to Saxo.

279 On 8 December 2014, $850,000 was transferred from the Saxo Buffer account to the FX Trust account, in order to settle a withdrawal of funds by two FX clients.

280 On 24 December 2014, US$600,000 was withdrawn from the FX Trust USD account and used to make a payment to a Saxo client, in circumstances where the opening balance of the Saxo USD Buffer account on that day was only $338,691.04.

281 Also on 24 December 2014, US$383,000 was transferred from Futures SEC USD account to the FX Trust USD account. $151,000 was subsequently restored.

282 On 12 January 2015, $500,000 was withdrawn from the WLP Omnibus account (a Saxo CSA) and paid to an FX client, apparently because there were insufficient funds in the FX Trust account on that day – it had an opening balance of $415,535.70.

283 On 21 January 2015, each of the Saxo Buffer account and Trust Account 3 (Other Trust) contributed $250,000 to the FX Trust account, from which $500,000 was withdrawn to meet a withdrawal request by an FX client.

284 On 26 February 2015, $500,000 was transferred from the Saxo Buffer account to the Futures Client Segregated account, to meet a withdrawal request by a Futures client.

285 Save to the extent that has been mentioned in connection with the 24 December USD transaction, the money so transferred does not appear to have been returned to its source account.

286 These six transactions establish some mixing of Saxo, FX and Futures client money. They do not involve mixing with Equities/ETOs money.

"BBY Corp" transfers: Equities/ETOs funding transactions

287 Commencing with the $12 million transfer on 2 December 2011, and continuing almost until the administration date, there were transfers between a number of other accounts and Equities/ETOs CSAs, using the notation "BBY Corp", which appears to denote transfers – ostensibly from "House" or "BBY Corp", to fund a shortfall on reconciliation of the Equities/ETOs CSAs (in particular, in the 541 account); and there were also transactions between some of the "BBY Corp" accounts. The Liquidators have reported:

> **Funding from Other Trust:** During our investigations, we also noted regular overnight funding being provided to Equity/ETO from Other Trust accounts (Trust Account 4 between February 2013 and June 2014 and General Trust 002 between June 2014 and December 2014). From our view of the BBY bank movements' [sic] records and Equity/ETO bank statements, it appears that these funding movements related to funding of aged Equity client debts. We have been unable to trace the source of funds in Trust Account 4 back to 2013 due to limitations of availability of electronic bank statements, however the source of funds in the General Trust account 002 appears to be CSA funds utilised during the Aquila transaction. It therefore appears that CSA funds from other products were being used by BBY House to provide overnight funding to the Equity/ETO business. The funds movements between the [541 Account] and Other Trust, and the Aquila funds movements, are discussed further in sections 6.5, 6.6 and 6.8, respectively.

288 In explaining the operation and use of the "Other Trust Accounts", the Liquidators observed:

> From our review of the bank statements and our discussions with former BBYL staff, we understand that a number of the Other Trust accounts were used for

> specific client placements, such as Equity placements or IPOs ... . However a number of these accounts also appear to have been used by the Strategy Team for House funding purposes and/or specific projects.

289 In relation to one particular “Other Trust Account”, namely General Trust account 002, they said:

> From our review of the bank statements, and the Equities/ETOs funds flows (discussed further in section 6.2.4), we noted regular overnight funding being provided from the General Trust account 002 to the [541 Account] between June 2014 and December 2014. This funding appears to relate to the BBYL House obligation in relation to aged Equity debtors, provided to the [541 Account] in order to meet the Equities Trust Obligation at the end of each business day. A particular transaction of interest between the [General Trust Account] and the [541 Account] is discussed in section 6.6.3. The General Trust Account was also utilised during the upload of funds to SCMA, which is discussed in section 6.9.

Equities/ETOs funding transactions

290 The Liquidators identified a number of particular instances of this practice, involving the apparent use of money from Other Trust Accounts to fund the Equities/ETOs businesses, namely:

(1) $818,229.04 was transferred from the General Trust Account to the 541 Account on 1 September 2014, and returned from the 541 Account to the General Trust Account on 2 September 2014. The Liquidators noted:

> The movement of funds from [the General Trust Account] to [the 541 Account] on 1 September 2014, and the return of funds on 2 September 2014, is an example of the regular funding pattern between Other Trust and Equity/ETO, in respect of equity debtors, identified during our investigations (as outlined in section 6.2.3 and 6.2.4).
>
> Our email searches identified correspondence … from the Equity/ETO finance team to the Strategy team stating that this amount was required by Clearing for funding to cover:
>
> > "… failing trade coverage for Broker Dealers as well as the outstanding Mark to Mark…, Today Derivatives, and old Dishonours's [sic] items."
>
> BBYL's bank movements' [sic] records label this funds movement as 'Funds from BBY Corp'.

(2) $460,749.02 was transferred from the General Trust account to the 541 Account on 23 September 2014, and returned from the 541 Account to the General Trust Account on 24 September 2014. Related email correspondence stated that those funds were required to cover "*failing trade coverage for >30 days Broker Dealer Trades & Today's Derivatives positions*". The label "*Funds from BBY Corp*" was used in the Bank Movement Workbook in relation to these transactions.

(3) A total of $1,881,968 was transferred on 16 December 2014 from various accounts - including FX, Futures, Saxo, IB and Other Products

CSAs - to No 3 Trust Account. The total amount withdrawn from CSAs was $1,371,772. The total amount deposited to No 3 Trust Account (that is, $1,881,968) was then transferred, in two separate payments, to the General Trust Account. That amount formed part of a larger payment of $4,092,210 made from the General Trust Account to the 541 Account. The amount of $4,092,210 transferred from the General Trust Account to the 541 Account was returned on 17 December 2014 to the General Trust Account, as part of a larger transfer of $4,868,209. No evidence that the amounts withdrawn from CSAs on 16 December 2014 were restored to the CSAs from which they were withdrawn has been found. The Liquidators reported (emphasis added):

> [We identified] some email correspondence which explains that *BBYL incurred an unusually high value of failed trades on 16 December 2014 (c. $5 million) – see correspondence attached at Confidential Exhibit 85. The fact that funds were taken from a number of sources, including other product CSAs and related party account [sic], suggest that House have insufficient fund to cover these client debts. From our review of the bank statements, we note that the opening balance on the General House account 576 on 16 December 2014 was $5,162.85.*

In relation to the transfer of approximately $4.1 million from the General Trust Account to the 541 Account:

> BBYL's bank movements records labelled this funds movement as "Funds from BBY Corp – Funding". An extract of BBYL bank movement schedule is included at Confidential Exhibit 84. This extract also shows that $8 million Facilitation Account facility was fully utilized on this date, with available funds of only $3.34.

291 This is indicative that the General Trust Account, to which BBY usually had recourse for funding, had insufficient funds on the day, and so the additional moneys required were sourced from other product line CSAs.

292 Reference has already been made to the transaction on 17 December 2014, whereby $276,053.60 was transferred from the General Trust Account 002 (which was not an Equities/ETOs account) to the 541 Account, and $300,000 was transferred from an FX CSA to the Equities No 2 Trust account. The Liquidators observed that this was "apparently so that the balance of the Equities Trust 2 account was at least the amount BBYL regarded itself as obliged to hold for its ETOs clients". On 18 December 2014, $576,053.60 (the arithmetic total of the preceding amounts) was returned from the 541 Account to the General Trust Account 002.

293 Each of these instances occurred during the period prior to March 2015. Under the procedures then in place, BBY would settle with ASX Clear from the

Facilitation Account, then reimburse the Facilitation Account from the 541 Account later that day, and then - if the 541 Account was deficient against the amount BBY regarded itself as obliged to hold on trust for Equities/ETOs clients - it would "*top up*" the 541 Account from an external source. It appears that that external source was commonly the Other Trust Accounts (which were not CSAs), but when that resource was insufficient, additional funds might be drawn from other product line CSAs (as appears to have happened on 16 December 2014).

294 Under the procedures which applied after March 2015, BBY instead paid the Facilitation Account using funds from an external source - including Other Trust Accounts - rather than resorting, in the first instance, to funds in the 541 Account. In this way, the circumstance that the 541 Account was deficient until subsequently "*topped up*" was avoided. However, as appears from the following transactions, BBY continued to use funds in “Other Trust” Accounts for the purpose of funding settlement with ASX Clear:

(1) On 2 March 2015, funds were transferred from the Saxo Buffer account ($563,000), a Futures CSA ($300,000) and an FX CSA ($369,000) to the General Account. Those deposits total $1,232,000. Later on the same day, $1,232,000 was transferred from the General Account to the General Trust Account, from which three separate payments were made, returning the money withdrawn to the product line CSAs. The Liquidators observed:

> The funds flows suggest that the CSA funds from Saxo, Futures and FX were used by House in order to provide intra-day funding to other parts of the business, further suggesting that House was short of funds at this time.

(2) On 4 March 2015**,** a total of $1,520,000 was transferred from five CSAs in the Saxo, Futures, FX, and IB product lines to the General Account on 4 March 2015. In the same way as for the transaction just described, the same amount was subsequently transferred, on the same day, from the General Account to the General Trust Account and was from that account returned, in amounts equal to those originally withdrawn, to the source CSAs.

295 Following publication of their initial report, the Liquidators received historical bank statements from St George and NAB, which enabled further analysis of historical transactions between “Other” Trust Accounts and Equities/ETOs CSAs. In their supplementary report, the Liquidators summarised the position as follows:

In section 6.2.4 of the CSA Report, we reported regular transfers between the Equity/ETO CSAs and the STG Trust Account 4 (between February 2013 and June 2014) and the General Trust Account ending 002 (between June 2014 and December 2014). Those transfers were often described as transfers to or from 'BBY Corp' in BBYL's bank movement schedules. In the CSA Report we noted the transfers appeared to be 'funding movements related to funding of aged Equity client debts'.

…

Our further analysis indicates that:

- these transfers commenced on 2 December 2011 with a deposit of $12 million to the Equities Trust account ending 8694 (discussed in section 4.3 above, and shown in the funds flow diagram on page 105 of the CSA Report); and
- these transfers occurred between a variety of BBYL bank accounts referred to as 'BBY Corp' (on the one hand) and Equity/ETO CSAs and House accounts used for the Equity/ETO business (on the other) between December 2011 and May 2015.

296 The term "*BBY Corp*" appears to have been used in a general way to refer to what ought to have been BBY "house" accounts. For example, when cash collateral for was returned by ASX Clear following the Aquila transaction, the deposit to St George No 4 Trust Account was described as "ASX funds return re CMM for AQA to BBY Corp". The accounts referred to as "BBY Corp" in connection with Equities/ETOs Funding Transactions were identified as follows:

(1) December 2011 - eBridge Buffer account (a Saxo protection trust account);

(2) May 2012 to June 2012 - 874 account (a Saxo protection trust account);

(3) June 2012 to August 2012 - NAB No 4 Trust account (a non-specific trust account, but Saxo money was at times paid into it);

(4) September 2012 to June 2014 – St George No 6 Trust account (non-specific trust);

(5) June 2013 to June 2014 - St George No 4 Trust account (non-specific trust); and

(6) June 2014 to December 2014 – General Trust account 002 (non-specific trust).

297 At least four of those six “BBY Corp” accounts were not Saxo, FX or Futures CSAs, and were not necessarily trust accounts at all. The NAB No 4 Trust Account 5357, the St George No 6 Trust Account 7408, the St George No 4 Trust Account 9372 and the St George General Trust Account 0002 are each

described by the Liquidators as not appearing to be aligned to any particular product line. The Liquidators deemed them to be trust accounts on the basis of their account names, although they did not appear as client trust accounts on the BBY Bank Account Schedule Apr15.

298 A number of transactions were identified which involved either deposits of money from the Saxo product line into the "*BBY Corp*" remitting accounts, or subsequent transfers of money between the "*BBY Corp*" remitting accounts. In particular:

(1) the eBridge Buffer account, a Saxo protection trust account, contained Saxo client money;

(2) the 874 Account received a deposit of $6.5 million from Saxo Bank A/S on 21 May 2012;

(3) NAB No 4 Trust account received $8.2 million from the eBridge Buffer account (a Saxo protection trust account) on 29 June 2012, $10 million from the 874 Account (a Saxo protection trust account) on 29 June 2012, was on 29 June 2012 described as the "temporary location of the Saxo funds", and between 6 November 2012 and 29 November 2012 received a total of $5 million from SCMA;

(4) St George No 6 Trust Account received $2 million from NAB No 4 Trust Account on 29 August 2012, described as "TFR from BBY Corp"; and

(5) St George No 4 Trust Account received $2 million from NAB No 4 Trust Account on 4 December 2012.

The Adjusted BBY Funding Ledger

299 In an attempt to quantify the net effect of Equities/ETOs Funding Transactions, the Liquidators analysed three ledgers, maintained in GBST,[88] which appeared to include records of Equities/ETOs Funding Transactions. Those ledgers are called: "BBYCORP", "BBYFUNDING", and "FINREMIT". None was a complete record of Equities/ETOs Funding Transactions, and so the Liquidators constructed a ledger, called the "Adjusted BBYFUNDING Ledger", of the transactions identified by them relating to the Equities/ETOs business which they did not regard as business as usual. As the Liquidators observed:

> These transactions include instances in which the Equity/ETO Funding Transactions appear to have been:

[88] GBST DCA was the accounting system used for BBY's ETO business, and received data from the ASX which allowed it to calculate the value of open positions and equipped it to calculate ETO margin obligations; GBST Shares was the accounting system used for BBY's Equities business.

- funded out of the running balance of the 'BBY Corp' remitting account (as opposed to coinciding with a transfer of funds from other sources into the remitting account for the purpose of making the particular transfer); and
- indirectly funded from other product line CSAs by way of other transfers occurring on the same day. We note that in each of those instances there were otherwise insufficient funds in the 'BBY Corp' remitting account.

300 The result was a net movement of $1,251,350.02 to the Equities/ETOs business. The Adjusted BBY Funding Ledger was tested for completeness and reliability, resulting in the exclusion of two transactions which appeared not to be Equities/ETOs Funding Transactions, and the recalculation of the net movement to the Equities/ETOs business to $2,022,426.02.

301 No-one has disputed the accuracy of the Adjusted BBY Funding Ledger so far as it goes, though all acknowledge that it has limitations. First, the source ledgers record only the movement of money between groups of bank accounts (ie, "BBY Corp" remitting accounts and Equities/ETOs accounts) and not particular bank accounts. Secondly, the bank accounts referred to as "BBY Corp" change over time. Thirdly, the ledger sheds no light on how the funds in the "BBY Corp" remitting accounts were originally sourced, nor on whether funds used for Equities/ETOs Funding Transactions were, to the extent they were returned to the "*BBY Corp*" remitting account, subsequently repaid to the accounts from which they had originally been sourced. Fourthly, it is apparent that Equities/ETOs Funding Transactions occurred between Equities/ETOs CSAs as well as house bank accounts associated with the Equities/ETOs business (namely, the General Account).

302 An idea of the frequency and extent of funding provided to the Equities/ETOs business from the "*BBY Corp*" remitting accounts can be gleaned from the following features of the Adjusted BBYFUNDING Ledger:

(1) the first entry is the $12 million transferred directly from the eBridge Buffer account on 2 December 2011;

(2) the last entry relates to funding provided on 5 May 2015; and

(3) there are 632 journal entries on the ledger (counting movements in both directions), and those representing movements of funds to the Equities/ETOs business total $372,813,480.

What does the Adjusted BBY Funding Ledger mean?

303 The main conclusion to which the Liquidators' Adjusted BBY Funding Ledger leads is that over the period commencing with the 2 December 2011 $12 million transaction, BBY's Equities/ETOs business received regular funding from a series of accounts, designated "BBY Corp", resulting in a net movement to the Equities/ETOs business of about $2 million. When it is appreciated that the Adjusted BBY Funding Ledger commences with the 2 December 2011 $12 million transaction, it will be apparent that if it were excluded, the movements on the ledger would otherwise net adversely to Equities/ETOs. This reinforces the criticality of the 2 December 2011 transaction to the notion that Saxo (or other) client money is in the Equities/ETOs CSAs.

304 The balance of the ledger represents the net movement of funds from the BBY Corp accounts to the Equities/ETO accounts. Overwhelmingly, the transactions were "reversed", directly or indirectly: of the 632 transactions in the Ledger, only 16 contribute to the ultimate imbalance: the others are matched pairs (or sometimes multiple) transactions, which together have the effect that the funding transaction was reversed. One of the sixteen is the 2 December 2011 $12 million transfer, in respect of which no matching reversal was identified. Moreover, that $10 million in net terms flowed back to BBY Corp accounts does not establish that it flowed back to any CSAs in other product lines from which it may have originated.

305 On the other hand, the Adjusted BBY Funding Ledger does not identify the ultimate source of funds transferred from BBY Corp accounts to Equities/ETOs accounts, if they were sourced, for example, from CSAs in other product lines. Nor does it establish that funds returned to BBY Corp accounts from Equities/ETOs accounts were *not* then on-forwarded to any CSA from which they may have originated. That is because the ledgers from which it was constructed were in the GBST system, which related only to the Equities/ETOs business, so it is not possible from the ledgers alone to ascertain whether client money from CSAs in other product lines was used for Equities/ETOs funding transactions. Payments from the non-specific "other" trust accounts, which contained funds from a variety of sources and had fluctuating balances, does

not without more establish that Saxo/FX/Futures client money was paid into the Equities/ETOs CSAs.[89]

306 Other than the 2 December 2011 $12 million transfer, the only “direct” transactions appear to be:

(1) The restoration on 9 May of $5 million to Equities/ETOs from the SmarTrader 874 account, into which $10.2 million from those accounts had been deposited on 7 May. However, this is fully accounted for by the 2 December 2011 transaction, as the $10.2 million was itself a “restoration”, albeit temporary, of those funds.

(2) $1.4 million on 24 May 2012, and $1.5 million on 28 June 2012, both of which were reversed the following day; and

(3) The $300,000 on 17 December 2014, which was revered as part of the $576,000 transaction the following day.

307 Apart from those so-called “direct” transactions - chiefly the 2 December 2011 $12 million transfer – the proponents of pooling point to the other transactions, referred to above, which involve transfers from Saxo/FX/Futures accounts to BBY Corp accounts, from which accounts Equities/ETOs funding transactions took place. However, the Equities/ETOs CSAs do not become “mixed” funds in the relevant sense merely because money was paid into them from accounts that were not Saxo/FX/Futures trust accounts (and may not have been trust accounts at all), but into which at some point Saxo/FX/Futures client money had been deposited. The Equities/ETO CSAs will only be a mixed fund on this basis if (1) money was paid in breach of trust into the “BBY Corp” (house or other trust accounts), and (2) they were then paid into the Equities/ETOs CSAs, and at the time of the payment the relevant “BBY Corp” account was not only mixed (which *ex hypothesi* it was), but also deficient – because the trustee is presumed to use its own money first.

308 The transactions summarised above as involving either deposits of money from the Saxo product line into the "*BBY Corp*" remitting accounts, or subsequent transfers of money between the "*BBY Corp*" remitting accounts, support the Liquidators observation that “the most significant inflows into Trust account 4

[89] A seventh possible “BBY Corp” account identified by the Liquidators, General Account 576, was a House account, and the working general account that processed business cash requirements each business day. Its use to provide funding also does not of itself support any Saxo/FX/Futures entitlement to funds in the Equities/ETOs CSAs.

ending 5357 in the period 29 June 2012 to 14 June 2013 … were from Saxo product line sources”. Assuming that those inflows of Saxo client money were in breach of trust, the No 4 Trust account became a mixed fund, and the Saxo clients held an equitable charge over the entire fund and its traceable proceeds to the value of their contributions, or were equitable tenants in common of the mixed fund as a whole, including its traceable proceeds. However, the Equities/ETOs CSAs would become impressed with the same charge as a result of transfers from the No 4 Trust Account, only if the transfers to them were made at a time when the No 4 Trust account was deficient.

309 While the evidence does not distinctly establish this, on balance I think it likely occurred. That is because there would have been no need to draw on the Saxo money for Equities/ETOs funding if there was sufficient house money for the purpose. However, the significance of this is much reduced by the circumstance that, but for the $12 million transaction, the net impact on Equities/ETOs CSAs was negative. During the period between 29 June 2012 and 14 June 2013, Equities/ETOs accounts were net contributors to NAB No 4 Trust account by $2.6 million, and Saxo accounts were net contributors by $7.6 million. The net payees were House as to $8.1 million, and the St George No 4 Trust account as to $2 million. This is not supportive of a material contribution by Saxo to Equities/ETOs. Moreover, the Liquidators acknowledge that they “cannot exclude the possibility that particular transactions that they have identified as “uncorrected” were in fact corrected by indirect means that are not readily identifiable”.

310 Thus, although some Saxo/FX/Futures client money was indirectly transferred into the Equities/ETOs CSAs in circumstances that would amount to relevant mixing had it remained there, it does not appear to have remained there. This is fundamentally because, but for the $12 million direct transfer, the net movement was adverse to Equities/ETOs.

Should pooling be directed?

311 It is uncontroversial that CSAs in the same product line should be pooled, as the books and records maintained by BBY purport to record the amounts owed (presently or contingently) to clients, rather than amounts held in a particular

CSA. As the Liquidators point out, this conclusion is reinforced for the FX, Futures and Saxo product lines by the lack of any correspondence between the amount of claims denominated in particular currencies and the amount held by BBY in its CSAs denominated in those currencies, even when Recoveries are also included. However, whether the Liquidators can or should pool all or some of the CSAs *across* product lines and apply regulation 7.8.03(6) to that pool, is contentious.

312 Mr Smith SC submitted that the transfer of funds from the eBridge Buffer account in December 2011 justifies not only pooling the funds in Equities/ETO CSAs with those in the Saxo CSAs, but also including the Futures and FX CSAs in that pool, because:

(1) the $12 million of Saxo client money transferred to Equities/ETOs on December 2011, which was never returned, resulted in both a shortfall in Saxo CSAs and a surplus in Equities/ETOs CSAs; this involved a mixing of Saxo client money with Equities/ETOs client money in the Equities/ETOs CSAs, such as to warrant their pooling;

(2) the Aquila transaction involved BBY misusing $1.8 million from Saxo funds and $6.8 million from Futures, which were not restored, but $6.8 million was paid into the General Trust Account (an Equities/ETOs account), thus involving mixing of Futures funds with Equities/ETOs funds; this involved mixing of Saxo client money with Futures and FX client money; and

(3) the pooling of all CSAs was warranted because, after 2 December 2011, Saxo and Equities/ETOs client moneys were mixed, then Saxo and Futures funds were mixed with Equities/ETO, then Saxo funds were mixed with Futures and FX.

313 The real issue is whether the Equities/ETOs CSAs (in which there is no deficit) should be pooled with the others (which are in deficit). Little attention was given as to whether the Saxo, Futures and FX CSAs should be pooled if Equities/ETOs were not included.

314 The transfer of $12 million from the eBridge Buffer Account on 2 December 2011 was ultimately the only relevant transaction that directly contributed to Equities/ETOs CSAs. (Although it was suggested that the 18 December 2014 $300,000 transfer from FX to Equity/ETO did so, for reasons already explained it is offset by other transactions). As already explained, the Aquila transaction did not result in a mixing with Equities/ETOs CSAs, and the Saxo and Futures

client money that was used in it was (after the term deposits amounting to $7.5 million matured) ultimately paid to SCMA in the Saxo 1:1 upload, and thus returned to Saxo clients. The Equities/ETOs Funding transactions did not result in a net benefit to Equities/ETOs CSAs – the Adjusted BBY Funding Ledger indicates that apart from the 2 December 2011 $12 million transaction, the net movement was adverse to Equities/ETOs by $10 million. The 2 December 2011 $12 million transaction is therefore the foundation of the case for pooling.

315 In that context, whether pooling should be directed requires consideration of:

(1) the submission of Mr Williams QC for Mazzetti, that by reason of BBY's daily reconciliation procedures for its Equities/ETOs business, money from other product line CSAs could not be in the Equities/ETOs CSAs (and in particular, in the 541 account); and

(2) whether such mixing as has been established is such as to render it appropriate in all the circumstances to regard current (as at the administration date) Saxo (and Futures and FX) clients as having a rateably equal interest with the current Equities/ETOs clients in the Equities/ETOs CSAs.

The impossibility argument

316 Mr Williams QC, for the first defendant, submitted that it was not possible that funds from other product line CSAs remained in Equities/ETOs CSAs – or at least, in the 541 account.[90] The submission went that the processes inherent in BBY's daily business cycle in respect of its Equities/ETOs product line, by which each day the money required to be held at ASX Clear as collateral for ETO clients was adjusted up or down, depending on trades and market movements, by a net payment to or from BBY, and the amount held in trust for clients adjusted accordingly, made it impossible for money from other sources that were not Equities/ETOs client money to be or remain in the Equities/ETOs CSAs, and in particular in the 541 account.

317 Founding on those procedures and the evidence of Ms Bilton, Mr Williams QC submitted that any money from other CSAs that entered the 541 account in this way promptly left it. The underlying theory is that the money in the 541 account at end-of-day must equal the amount of money received from clients, as shown by the credit balances on the Detailed Trust Position Report. In her affidavit,

[90] A related submission, restricted to the Returned Collateral, is considered below.

Ms Bilton stated that the money in the 541 account necessarily equalled the credit balances on the Detailed Trust Position Report each day (and that the debit balances were funded by BBY); that if there was a surplus, it would be swept back to BBY Finance at the end of the day; and so it was "impossible" that money from other CSAs remained inside the 541 account. A non-paying client was treated as a debtor to House, who had (ultimately) paid ASX. In this way, there should be no shortfall in the 541 Account at any point during a trading day, and no need to "top up" the account from other sources.

318 Those were the post-March 2015 arrangements. However, prior to March 2015, after payments of margin to ASX Clear were made from the Facilitation Account, the Facilitation Account was in turn reimbursed by the 541 Account. While the theory was that any deficit would be replenished by deposits from clients as a result of calls made on them, that would not occur if for any reason the funds were not collected from one or more clients. To the extent that the closing balance of the 541 Account would otherwise have been less than the sum of BBY's trust obligations to its Equities/ETOs clients, as recorded in the Detailed Trust Position Reports, funds were transferred from other accounts to make up the difference. In theory, that should have been house money, as Ms Bilton believed it was; she would simply request the Finance department to provide the requisite "BBY Corp funding", assuming that it was house money. However, the Liquidators have identified instances where it appeared that CSAs in other product lines were "essentially, the ultimate source of funding if you like to support that house obligation". By that, they mean that the account from which the obligation was met contained funds which had at some stage come from a CSA in another product line. Consequently, at least prior to March 2015, it was likely that the closing balance of the 541 Account at the end of any trading day was made up not only of funds deposited by Equities/ETO clients or otherwise held on their behalf, but also of funds transferred from the so-called "BBY CORP" accounts, which sometimes themselves contained funds drawn ultimately from CSAs corresponding to other product lines.

319 That the 541 Account was reconciled each day does not provide a basis to conclude that there was no mixing of other trust funds with 541 account trust funds. The reconciliation of the amount which ought to be held with the amount

in the bank does not reveal where the top-up funds were ultimately sourced, and whether they contained funds from other product line CSAs. It does not follow from the fact that there is not a surplus in the 541 Account that all Equities/ETOs Funding Transactions must have been reversed, even as between the "*BBY Corp*" remitting account and the Equities/ETOs accounts. First, as the Liquidators state in the Supplementary CSA Report:

> We would not expect [the surplus] to be the same as the balance of the Adjusted BBYFUNDING Ledger if there were Equity/ETO debtors to BBYL at the date of our appointment in respect of whom BBYL had settled with ASX Clear using funds in the [541 Account].

320 In other words, account must be taken of debtors. Secondly, as stated above, Equities/ETOs Funding Transactions did not exclusively occur in relation to Equities/ETOs CSAs (as distinct from house accounts used for the purpose of that business). Thirdly, the possibility cannot be excluded that funds which might otherwise have been used to replenish a "*BBY Corp*" remitting account at the end of a trading day were instead swept to the General Account.

321 On this basis Ms Bilton, in cross-examination, ultimately accepted that it was not impossible that funds from other product line CSAs might find their way into the 541 account. Her affidavit evidence to the contrary, and the submission based on it, depended on her incorrect if understandable assumption that the procedures which were in place involved, if there were a shortfall between trust obligations and money in bank, a contribution from house to meet the deficit, and did not consider the reality that sometimes the contribution came, ultimately from CSAs in other product lines.

322 It is likely that, prior to the change in procedure in March 2015, the balance of the 541 Account at least from time to time included some funds which ultimately originated from CSAs corresponding to non-Equities/ETO product lines. The Liquidators have found no evidence that anything was done when transitioning from the Pre-March Procedures to the Post-March Procedures to ensure that no money that might be regarded as referable to other clients of BBY (which may have been transferred to the 541 Account to cover debtors incurred before March 2015) remained in the 541 Account.

323 However while, particularly under the Pre-March 2015 Procedures, there may from time to time have been such money in the 541 account, pending recovery from debtor clients, it is unlikely that this was a persistent or large-scale phenomenon, for three reasons. First, debts were typically recovered from clients on the same day, via the CMAs, or the next day, from the DEAs, which would replace the external money; so the situation was, if the debt collection procedures were successful, transient. In such a case, where the "BBY Corp" money is promptly returned to the donor account, it has not been mixed in any meaningful way in the Equities/ETOs CSA, and there is no ongoing benefit to the Equities/ETOs account. Upon recovery from the client, despite the transient use of external funds, ultimately the money paid to ASX Clear has been funded by the relevant Equities/ETOs clients, and not by "House" or "Other Trust accounts", and it cannot be said that in any meaningful way the BBY Corp money contributes to the balance of the Equities/ETOs account.

324 Secondly, the arrangements in place for debtors involved automatic sweeping by direct debit from clients' cash management accounts or DE accounts, which ensured a high level of prompt recovery. Thirdly, if the client did not pay, BBY was entitled to liquidate the client's position - which, aside from extreme market movements, included a sufficient buffer to protect BBY – and was incentivized to do so: it is difficult to see why BBY would carry debtors when they could recover immediately by liquidating their position.

325 Accordingly, while I do not accept that it is impossible that funds from other product line CSAs remained in Equities/ETOs CSAs, including in the 541 account, their other than transient use on a large scale appears unlikely. Such money would likely represent only a small proportion of the account balance at any time - including at the administration date. This is relevant to the next issue, whether given the mixing and the difficulty of tracing, pooling is appropriate.

Is pooling appropriate?

326 There is no doubt that, as a result of the 2 December 2011 transaction, Saxo client money was mixed into the Equities/ETOs CSAs, creating a "mixture" not only in the 8694 account into which it was initially paid, but also through its

traceable proceeds (in the form of the Berndale returns) in other Equities/ETOs CSAs. It is universally accepted that, because of the multitude of transactions between accounts, and the state of the records, a tracing exercise to reconstitute the separate accounts is not reasonably and economically practical.[91] However, the circumstance that some degree of mixing has been established, and that a tracing exercise is not reasonably and economically practical, does not mean that pooling across product lines must be directed. For example, as Mr Smith SC accepted, the existence of "relatively clear property interests" would preclude the possibility of pooling, notwithstanding the mixing of money between different trusts. As I have indicated, pooling will be appropriate only if, in all the circumstances, it is appropriate to regard the Saxo clients (as at the administration date) as having a rateably equal interest with the Equities/ETOs clients in the Equities/ETOs CSAs, and in reaching that conclusion the Court adopts a pragmatic approach, having regard to considerations of proportionality and economy, and fairness between the beneficiaries, being informed but not controlled by the equitable principles pertaining to mixed funds.

327 I have, above, rejected the proposition that a trustee's misconceived attitude or practice in resorting to one fund to replenish or meet obligations of another is a relevant consideration. Accordingly, I do not accept that the circumstance that BBY may have, whether as a matter of practice or desperation, resorted to client money in other CSAs, as adding anything to the case for pooling beyond the fact of mixing.

328 I do not accept that it is a relevant consideration against pooling that Saxo clients in purchasing OTC Products, whereas Equities/ETOs clients purchased exchange-traded products, may have thereby assumed a greater level of risk, such that their claims should on that account be treated as in some way less meritorious. The short answer is, as Mr Smith SC submitted, that they did not

[91] While in theory the transfer of 2 December 2011 could be simply reversed - it was a single, large transaction – it was one of many that contributed to the net position, and to reverse it alone would be to ignore the others (which, according to the BBY Funding Ledger, were adverse to Equities/ETOs on a net basis). Further, for reasons discussed below, the $12 million is no longer represented substantially, if at all, in the Equities/ETOs CSAs, and the constituency of current Saxo clients differs, probably very substantially, from those as at 2 December 2011.

assume the risk of a breach of trust. While a rateable distribution is less likely to be directed where the "claimants fall into particular classes such that one class has a higher priority for the charge it can establish than does the other class",[92] that observation speaks to "priorities", not to some assessment of the relative risk assumed by the different classes.

329 Nor do I accept that it is of relevance that a greater burden may be cast on the National Guarantee Fund, which the SEGC administers, if there is pooling, than if there is not. The relevant considerations of fairness must be between the (innocent) beneficiaries, not their "insurers". Moreover, the interest of the "insurer" could not rise higher than that of the "insured".

330 However, consistent with the equitable principles, according to which all contributories have a charge over a mixed fund *to the value of their contributions,* it is relevant to have regard to the relative extent to which the mixed fund (the Equities/ETOs CSAs) relatively represents the respective contributions of the Saxo clients and the Equities/ETOs clients. As has been said, it is not reasonably and economically practical to work this out precisely. On the other hand, this is not a case where the liquidator – or the Court – knows "nothing more than that the fund is held on trust, and that there are a number of potential claimants to the fund, whose merits he cannot on any rational basis distinguish between".[93]

331 In this context, the proposition that the $12 million was never "restored" requires some qualification. First, the "Adjusted BBY Funding Ledger", while an incomplete and imperfect exercise, provides a basis for supposing that the Equities/ETOs CSAs received a net benefit from "funding transactions" of only about $2 million – not $12 million. That is not to say that $10 million was returned, in whole or in part, to Saxo CSAs; but in deciding whether Saxo clients should be regarded as having a rateably equal interest in the Equities/ETOs CSAs, it is relevant (though not decisive) to look at the extent of any remaining benefit to the recipient fund from the donor fund. The weight of

[92] See Re French Caledonia Travel Service Pty Ltd (2003) 59 NSWLR 361; 204 ALR 353 at 407 [188]; 48 ACSR 97; [2003] NSWSC 1008

[93] See Re French Caledonia Travel Service Pty Ltd (2003) 59 NSWLR 361; 204 ALR 353 at 407 [186]; 48 ACSR 97; [2003] NSWSC 1008

the Saxo contribution is further diminished by the circumstance that on no view were Saxo and other product line CSAs the only source of the "BBY Corp" funding accounted for in the ledger: some came from "House". This not only emphasises the centrality of the 2 December 2011 transaction to the pooling argument, but also illustrates that on a net basis its impact in terms of the contribution it has made to the Equities/ETOs CSAs in their current state has been much dissipated.

332 Further, although it may be correct that the $12 million was never "restored" from the Equities/ETOs CSAs to Saxo CSAs, it appears that the Saxo client moneys were (at least ostensibly) fully reconstituted, as part of the SCMA 1:1 upload. It is not at all clear that upon completion of that transaction, there was any ostensible deficiency in the Saxo client money. While it may well be that the $12 million transfer was a cause of the deficit in Saxo client funds as at December 2014, when BBY was required to complete the transfer of its Saxo client money to SCMA, that deficit was then (ostensibly) made good, when BBY garnered, from multiple sources (including CSAs in the other product lines, but apparently not Equities/ETOs CSAs), the $21.6 million it needed to pay to SCMA. While this meant that those other product lines were mixed with and contributed to Saxo client money, it does not involve Saxo client money (or other product lines) contributing to Equities/ETOs.

333 Perhaps most significantly, upon termination of the BBY/SCMA arrangements with effect from January 2015, the BBY Saxo client base was wound down. Many clients moved directly to SCMA, or to other brokers. Of the $44.7 million in client moneys returned to BBY by SCMA (which ought to have represented the whole of the Saxo client money), $33 million was paid to Saxo clients in relation to the closing out of their Saxo accounts, and $8.8 million was transferred to other product line accounts held by Saxo clients. Only $889,000 appears to have been transferred, indirectly, to Equities/ETOs CSAs; and as discussed above it did not remain in them. Thus, there was at this point a significant change (reduction) in the constituency of the Saxo client base, and a significant return to Saxo clients upon closure of their positions.

334 The impact of this is reinforced by the submission, advanced by Mr Brereton SC, that it cannot be concluded that the BBY Saxo clients who currently have claims against Saxo CSAs reflect, to any substantial extent, those who had any interest in the eBridge Buffer account 0256 as at 2 December 2011. Although - given what appears to have been the arrangements, first between Stonebridge and SmarTrader, and then between SmarTrader and BBY - it can be concluded that virtually all Saxo clients of Stonebridge as at June 2011 became clients of SmarTrader, and virtually all who were clients of SmarTrader as at June 2012 became clients of BBY, how long any of those who were so transferred remained clients is unknown. But what is known is that the positions of what appear to be most of BBY's Saxo clients were closed in early 2015.

335 Mr Smith SC sought to emphasise that the circumstance that as at the administration date, in the context of an overall shortfall in BBY CSAs of between $17 million and $18 million, the funds in the Equities/ETOs CSAS were in surplus to the extent of $650,000, while the funds in the Saxo CSAs were significantly deficient, as pointing to an inference that the $12 million subtracted from the Saxo CSAs in 2011 and mixed into the Equities/ETOs CSAs was the explanation. This submission is deprived of much of its force by the foregoing analysis, and of the remainder by the revised position of the Liquidators: although their initial report suggested a surplus of $1.599 million in Equities/ETOs,[94] this was reduced first to $1.0 million,[95] and ultimately to only $0.1 million (which is, in substance, a "rounding" entry).[96]

336 The interest of the Saxo clients in the Equities/ETOs CSAs is also diluted by the volume of transactions that passed through the Equities/ETOs CSAs after 2 December 2011. The $12 million transfer occurred more than three years before the administration date.[97] Between then and the administration date, in Equities Trust Account 8694 alone (being the account into which the $12

[94] In their s 439A report as administrators, dated 12 June 2015.
[95] In their Client Segregated Accounts Report of 23 December 2015.
[96] In their Supplementary Client Segregated Accounts Report of 15 June 2016.
[97] This may be compared with MF Global, in which the period of transactions in and out of the relevant client accounts reviewed by the liquidators was only the 3-month period before the appointment of the administrators.

million was initially transferred),[98] a total of $246,228,619.37 was deposited, $212,200,826.99 was paid out, the lowest closing balance was $32,398.31 (as at I I July 2013), and the closing balance was $1,067,641.18 as at 17 May 2015 and $1,026,579.29 as at 28 May 2015. It is true that the payments out of this (already mixed) account included payments to other Equities/ETOs CSAs before 11 July 2013 (the date of the lowest intermediate balance), including $4 million on 24 January 2012 to Equities No 2 Trust, $1 million on 6 February 2012 to the 541 account, $1 million on 7 February 2012 to the 541 account, $2 million on 8 February 2012 to the 541 account, and $2 million on 15 February 2012 to the 541 account, which would themselves have been traceable. For that reason, the lowest intermediate balance in the 8694 account $32,398.31 on 11 July 2013 does not of itself define the extent of the remaining mixture. But those amounts are modest – as is the $12 million transfer itself - when compared to the total volume of transactions in the account. And that is only the 8694 account, and does not include transactions which may have passed only through other Equities/ETOs CSAs.

337 Given the passage of time since 2 December 2011, the movements in and out of the Equities/ETOs CSAs since then, the “restoration” of the Saxo client money through the SCMA 1:1 upload, the closing out of Saxo client positions to the extent of in excess of $40 million consequent upon the SCMA termination, the change in the constituency of Saxo clients between 2 December 2011 and the administration date, and the processes and procedures in place for the daily cycle of Equities/ETOs reconciliations which would tend to minimise, though not necessarily exclude, the retention of money from other CSAs in the 541 account, it seems to me that the balance in the Equities/ETOs CSAs as at the administration date was overwhelmingly, if not exclusively, attributable to deposits made after 2 December 2011, and that the current Saxo client constituency is not representative of those whose money comprised the $12 million transfer.

[98] These figures are taken from Mr Hutton’s reply submissions, where they are said to be extracted from Bank Movements Workbook 2011—2013; Bank Movements Workbook 2013 - 2014 (Exhibit 114 to Vaughan First Affidavit); Bank Movements Workbook 2015 (Exhibit 130 to Mr Vaughan’s first Affidavit).

338 Contrary to the submission of Mr Smith SC, there is no intractable inconsistency between pooling the CSAs within the Equities/ETOs product line, but not across product lines. First, no-one has argued against pooling within product lines, and so it has not been necessary to examine the question in detail. Secondly, it appears that within the Equities/ETOs product line, there was a main working account (the 541 account), and a number of other "trust" accounts which served as repositories or conduits of funds, through which there were a multitude of transfers, in and out. The distinction does not involve (as was submitted) any conclusion that the property interests of clients are so unclear as to merit pooling of CSAs within the Equities/ETOs product line, but sufficiently clear to warrant the exclusion of those CSAs from pooling across product lines. Rather, it depends on acceptance (as there was, by all parties) that the mixing of the Equites/ETOs CSAs *inter se* was such that it is reasonable to regard the interests of each client in one account as being identical to those in others in the same product line, while the different degree and quality of mixing between product lines does not produce the same result.

339 There is no impracticality in not pooling across product lines, because the moneys in each CSA are known. It was submitted that the state of BBY's records of the positions of individual clients, and the consequent difficulty of determining and quantifying their interests, weighed in favour of pooling. However, the record-keeping in respect of the Equities /ETOs product lines did not suffer from the same deficiencies as others, or at least to the same extent. It was the subject of review by the ASX in March 2015, when the only problem identified by ASX was the premature drawing from the 541 account in pre-March 2015 procedures, which was remedied post March 2015. In any event, this says nothing about whether or not it is appropriate to pool across product lines: determination of the individual claim of each client will involve no less difficulties if the accounts are pooled, than if they are not.

340 In those circumstances, in my view, it would be wrong to regard the current Saxo clients who have claims against the Saxo CSAs as having an entitlement that is (rateably) identical to that of the Equities/ETOs clients in the Equities/ETOs CSAs. While there was, in December 2011, a mixing of Saxo client money into Equities/ETOs CSAs, the number and extent of intervening

transactions, including the net detriment to Equities/ETOs from the other BBY Funding transactions, and notably the Saxo 1:1 upload and SCMA Termination, mean that the funds in the Equities/ETOs CSAs as at the administration date include Saxo client money – and in particular money of current BBY Saxo clients – only to a minor extent, if at all. Indeed, where the Equities/ETOs CSAs balance, but there is a great deficiency in the Saxo CSAs, and there has already been a very substantial redemption of Saxo clients post the SCMA termination, it would work a disproportionate windfall to current Saxo clients, and a considerable injustice to Equities/ETOs clients, to direct pooling on the basis that an amount of Saxo money had once been mixed into the Equities/ETOs CSAs many years ago, while the current amount in the Equities/ETOs CSAs represented almost exclusively the moneys of current Equities/ETOs clients.

341 Accordingly, the Equities/ETOs CSAs should not be pooled with other product line CSAs. This conclusion does not involve accepting BBY's "intentional allocation of loss to specific beneficiaries",[99] being the Saxo clients. Rather, it involves adopting the approach which, within constraints of what is reasonably and economically practical and proportionate, is most likely to approximate the respective interests of contributories.

342 In *French Caledonia,* Campbell J referred to the potential for a situation in which "there might be facts which show that claimants fall into particular classes, such that the amount of the charge which one class has on the assets which remain is likely to be a smaller proportion of the amount of their money which went in than is the case with another class", in which case it may be some should receive a smaller dividend on the amount of their claim than others, and that "in carrying out such calculations, estimation and inference can be appropriate if precise evidence is not available".[100]

343 Although this approach was not the subject of submissions, I have given close consideration to whether on this basis some part of the money in the Equities/ETOs CSAs should be set aside for Saxo clients. But doing the best I

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[99] Re Global Finance Group Pty Ltd (in liq) (Supervisor Appointed) (2002) 26 WAR 385 at 424 [194].

[100] Re French Caledonia Travel Service Pty Ltd (2003) 59 NSWLR 361; 204 ALR 353 at 407 [187]; 48 ACSR 97; [2003] NSWSC 1008.

can with estimation and inference, noting the net balance of the BBR Funding Ledger at $2 million, against the enormous amounts that have since 2 December 2011 passed through the Equities/ETOs CSAs, the (beneficial) impact on Saxo clients of the SCMA 1:1 upload and the Saxo termination, and the change in constituency of Saxo clients, I am unable to conclude that *current* Saxo clients appear to have any more than a *de minimis* interest in the Equities/ETOs CSAs.

Should the Saxo, Futures and FX CSAs be pooled without Equities/ETOs?

344 The proponents of pooling contended that it should apply across all product lines. Their opponents were those representing Equities/ETOs, who were indifferent to whether the Saxo, FX and Futures CSAs be pooled, so long as Equities/ETOs were excluded. Little attention was given as to what should happen with Saxo, FX and Futures CSAs if Equities/ETOs CSAs were excluded from any pooling; as Mr Smith SC pointed out, his client represented all three.

345 Reference has been made to six transfers, between 8 December 2014 and 26 February 2015, from Saxo to FX, Saxo to Futures, Futures to FX and FX to Saxo, which do not appear to have returned to their sources, but which did not involve mixing with Equities/ETOs. Because this issue was not the subject of argument, I am content for the parties with an interest in it to make further submissions if they wish; however I incline to the view that the size of these transactions relative to the quantum of the funds in issue is such that pooling would not be a proportionate response, but that given the relative recency of the transactions – all occurred within three months before the administration date – the Liquidators may be justified in simply reversing them, except insofar as the amount paid to FX does not exceed the $1 million from FX sued in the SCMA 1:1 upload.

DISTRIBUTION OF RECOVERIES

346 The next question is whether certain Recoveries are beneficially owned by BBY or are held on trust for its clients, and how they should be distributed having regard to the Regulations (to the extent that such Recoveries are found to be held for the benefit of BBY's clients). This includes the question whether

the clients represented by Mazzetti are entitled to the Returned Collateral to the exclusion of other clients of BBY.

347 Largely, these questions depend on whether it can be said that the Recoveries were received by BBY, albeit in administration, "on behalf of" clients, as distinct from in its own right. Except in relation to the Returned Collateral, these issues were not contentious, and the following therefore largely adopts Mr Healey's most helpful submissions.

348 In *MF Global,* Black J held that, in relation to exchange-traded (ET) Recoveries, the licensee acted on the authority conferred under client agreements to pay margin due to the counterparty from CSAs in which client monies were commingled (and s 981D permitted money deposited by client A to be used to margin for client B); and the resultant recovery was therefore, for the purposes of s 981A(1)(b)(iii), paid to the licensee "on behalf of" the clients who had contributed to the relevant CSA, collectively, and was impressed with a trust for their benefit.[101] In relation to OTC Recoveries, although payments to the counterparty in respect of margin for hedge contracts were permitted by s 981D and the authority conferred in client agreements,[102] and the statutory regime did *not* provide for an extension of the s 981H trust to choses in action acquired by the licensee as a consequence of payments made to counterparties,[103] and it was a fundamental obstacle to the attachment of a non-statutory express purpose trust to OTC Recoveries at the time of their receipt that the relevant purpose had, by then, been achieved,[104] nonetheless OTC Recoveries were received "on behalf of" the OTC clients (collectively, it seems for the same reason given in relation to ET Recoveries), in light of the definition of that term in *Corporations Act,* s 9, and the general meaning of those words, and because the hedge transactions were "also undertaken for the benefit of OTC clients, so far as they supported MFGA's capacity to discharge its obligations to OTC clients under the relevant client agreements".[105]

[101] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [197].
[102] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [216].
[103] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [220].
[104] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [237].
[105] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [242].

349 This appears to proceed on the basis of a nexus between the clients who have authorised the licensee to pay margin from a commingled account, and the clients on whose "*behalf*" (within s 981A(1)(b)(iii)) the resultant recovery is received. That is not directly capable of application to the situation where there are clients who are entitled, by reason of mixing, to money in a CSA which has been used to pay margin to a counterparty, but who did not authorise a margin payment of that kind.

350 In the appeal in *Sonray*, the Full Federal Court held that in circumstances where a client had paid into a CSA which was deficient and had become mixed (and as a result of which clients had equitable charges over the whole of the account), and the licensee acquired an asset from its own resources, on the instructions of that client, and appropriated the money paid into the CSA by way of book entry, the principles applicable to deficient mixed trust funds applied to the asset so acquired.[106] The consequence is that the asset is held upon a constructive trust for the clients as if it were part of the mixed fund.

351 In my view, for the purposes of s 981A(1)(b)(iii), a licensee will receive money “on behalf of” not only clients who have deposited money in a CSA and authorised the licensee to pay margin from that CSA, including in respect of other clients' positions (as Black J held); but also clients who have deposited money which has become mixed in a CSA from which the licensee has paid margin, where the use of that money for that purpose was unauthorised, on the basis that the licensee receives the proceeds as constructive trustee.

Futures Recoveries (ET recoveries)

352 BBY acted as the agent of its Futures clients in placing orders with a "*Market Participant*", and disclosed that trust money received would be placed in a client segregated account, which would not protect the funds from being used by BBY to meet the obligations of BBY as agent for other clients. There is a shortfall in the Futures CSAs, and it is probable that there has been a shortfall for a considerable period of time. BBY’s counterparties ABN AMRO and ADM did not maintain sub-accounts for BBY's underlying clients, and margin was calculated by them on a net basis. As it is not possible to identify the Futures

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[106] Georges v Seaborn International Pty Ltd (2012) 206 FCR 408; [2012] FCAFC 140 at [59]-[60].

clients entitled to particular money in particular CSAs, it is also not possible to identify a subset of Futures clients in respect of whom payments to ABN AMRO or ADM were made.

353 In that situation, the observations of Campbell J in *French Caledonia,* about a liquidator who knows no more than the money is held on trust and who are the claimants, are apt. In those circumstances, it is appropriate to conclude that BBY acted "on behalf of" the contributories to the Futures CSAs collectively in making payment to counterparties, and that the Recoveries are in turn received by BBY on that basis. The Liquidators would be justified in proceeding on the footing that the Recoveries from ADM and ABN AMRO are held, on the s 981H trust, for the clients entitled to money in the Futures CSAs. No party appears to contend otherwise.

FX Recoveries (OTC recoveries)

354 BBY dealt with its FX clients as principal, and disclosed that funds deposited by individual clients were not segregated, were commingled, and that the client money provisions may not insulate client funds from a "default in BBY's segregated trust account", so that assets belonging to non-defaulting clients were potentially at risk. A protection trust arrangement was disclosed (which arguably forms part of the contract), although the protection trust does not appear to have been implemented.

355 There is a shortfall in the FX CSAs, and it is probable that there has been a shortfall for a considerable period of time. BBY’s counterparties Halifax and CMC Markets did not maintain sub-accounts for BBY's underlying clients, and margin was calculated on a net basis. As it is not possible to identify the FX clients entitled to particular money in particular CSAs, it is also not possible to identify a subset of FX clients in respect of whom payments to CMC Markets or Halifax were made.

356 Again, in that situation the observations of Campbell J in *French Caledonia,* about a liquidator who knows no more than the money is held on trust and who are the claimants, are apt. In those circumstances, it is appropriate to conclude that BBY acted "on behalf of" the contributories to the FX CSAs collectively in making payment to counterparties in respect of hedge transactions, and that

the Recoveries are in turn received by BBY on that basis. The Liquidators would be justified in proceeding on the footing that the Recoveries from Halifax and from CMC Markets are held, on the s 981H trust, for the clients entitled to money in the FX CSAs. No party appears to contend otherwise.

Saxo Recovery (OTC recovery)

357 The Online Account Terms applicable to the Saxo product line provided that certain transactions were entered into with BBY as principal, and that others were entered into with BBY acting as the client's order placement agent "unless the Client is told otherwise". Clients were "told otherwise" by the Saxo PDS, which explained that all products were synthetic derivatives, issued by BBY.

358 For the reasons given above in connection with the receipt by Stonebridge in March 2011 of $25 million from Saxo Bank, it follows that any recovery from SCMA was received by BBY “on behalf of” its relevant clients, and because it is held on trust, pursuant to s 981H, for the clients entitled to money in the Saxo CSAs. Because it is not possible to identify the Saxo clients entitled to particular money in particular CSAs, it is also not possible to identify a subset of Saxo clients in respect of whom payments to Saxo or SCMA were made, and so it may be concluded that it is held for such clients collectively.

359 If that were incorrect, then – a trigger event for the purposes of the protection trust having occurred on 2 December 2011, and an "Insolvency Event" and thus another trigger event having occurred on appointment of the administrators - Saxo clients have a beneficial interest in the "Trust Property", which includes “Hedge Counterparty Claims”, being claims against Saxo Bank A/S, and later SCMA, for "recovery of property". Clause 2.4 of the BBY Declaration provides:

> After a Trigger Event occurs, Trustee must manage Hedge Counterparty Claims in the best interests of Clients as a class of beneficiaries, without being obliged to have regard to specific circumstances of each Client. Trustee may take action as it considers appropriate to realise or to preserve Trust Property or to mitigate or limit potential loss (including not to pursue a Claim or to settle, compromise or end a Claim).

360 The proceeds of any such claim would necessarily be received on behalf of the beneficiaries of the protection trust, which so far as I can conceive is co-extensive with clients entitled to money in the Saxo CSAs.

361 The Liquidators would be justified in proceeding on the footing that any recovery from Saxo Bank or SCMA is held on trust for the clients entitled to money in the Saxo CSAs. No party appears to contend otherwise.

The Returned Collateral (ET recovery)

362 As explained in the first judgment, the "Returned Collateral" comprises $3,400,115.54 received by the Liquidators from ASX Clear and paid into a segregated trust account controlled by the Liquidators on 4 August 2015 - long after the administration date - which reflected surplus cash cover held by ASX Clear in respect of ETO margin, after satisfying the cost of closing out of various ETO Clients' open positions on 21 and 22 May 2015. In the first judgment, where the background is set out in detail,[107] I concluded that:[108]

> (1) The Liquidators did not receive the Returned Collateral upon an undertaking to ASX Clear that they would deposit the funds into an account designated for the holding of client money, and either distribute the funds to the relevant ETO Clients or apply it to amounts owed to BBY by them.
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> (2) The correspondence does not otherwise found the imposition of any equitable obligation on the part of the Liquidators, upon receipt of the Returned Collateral, to distribute it only to the clients identified in the ASX Clear reconciliation, being the Relevant ETO Clients. The only obligation acknowledged in or arising from the correspondence, attached to receipt of the Returned Collateral, was to deal with it "in accordance with the applicable law, including the Corporations Act".
>
> (3) The contractual and regulatory framework does not have the necessary consequence that only those to whom Cover is attributed as recorded by ASX Clear are beneficially entitled.
>
> (4) *MF Global* does not dictate that if it can be seen that in reality individual clients have funded the Returned Collateral, it must nonetheless be held for a wider class, just because the funds were momentarily drawn from the 541 account, to which the wider class had contributed. However, it is not possible to proceed, at this stage, on the basis that there was complete reimbursement of the 541 account, such that the Returned

[107] In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) [2016] NSWSC 1366 at [52]-[96].

[108] In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) [2016] NSWSC 1366 at [147].

Collateral could be said to be sourced solely in funds provided by the Relevant ETO Clients.

(5) Moreover, conceivably, some Relevant ETO Clients may be debtors to BBY, and ASXC Rule 10.3.4(b) expressly contemplates that BBY could apply the Returned Collateral to satisfy the obligations to it of any such Relevant ETO Clients. Regardless matter (g) precludes an affirmative answer to the separate question in respect of the Returned Collateral.

(6) As it is not possible to conclude at this stage that the Returned Collateral is held exclusively on behalf of the Relevant ETO Clients, it is unnecessary to resolve the further submission that, even if it were, it would be premature to exclude the possibility that other clients might be entitled to participate in it on a pooled basis.

363 I have above concluded that pooling across product lines should not be directed. As Equities/ETOs CSAs are not deficient, that has the probable consequence that it matters not whether the Mazzetti class is exclusively entitled to the Returned Collateral. However, lest I be wrong in respect of pooling, or costs or other imposts erode the available funds, it is desirable to address the question.

364 In the first judgment, the chief obstacle to answering the question in the affirmative was that having regard to the basis on which the separate question must be considered, it was not open to proceed on a finding or assumption that drawings on the 541 account to fund margin payments in respect of the Relevant ETO Clients were fully replenished: they may have been, but the possibility that on one or more occasions they were not, with the consequence that the funds of other clients contributed, could not then be foreclosed. Moreover, because of the permissible use of one client’s moneys to fund margin obligations in respect of another, some Relevant ETO Clients might be debtors to BBY. This meant that it is not possible to conclude, at that stage, that the Returned Collateral was sourced solely in funds provided by the Relevant ETO Clients, or that whether any clients were also debtors would make no difference. A further reason was that even if the Returned Collateral were held exclusively on behalf of the Relevant ETO Clients, it might be premature to exclude the possibility that other clients might be entitled to participate, on a pooled basis, in a distribution of funds from the Returned Collateral, where depending on the outcome of the “regardless matters”, it may transpire that it should be pooled with the ‘541 account (and perhaps other

CSAs), on the basis that those accounts had provided a source of the cash that was paid to ASX and funded the Returned Collateral.

365 The “regardless” matters which constrained the factual basis of the preliminary question no longer apply. The daily business cycle, described above, of BBY’s Equities/ETOs business ensured that BBY margin-called clients for any collateral it was required to lodge in respect of ETOs. Even if – particularly under the pre-March 2015 procedures – collateral was transiently funded with other’s money, by the end of the day (or in the case of DEA clients the next day) it was funded by the relevant ETO client. If the client defaulted, then BBY could – and was incentivized to - liquidate the client’s position.

366 Mr Smith SC submitted that because the Returned Collateral is referable to a series of receipts and payments dating from 2 December 2011, it should form part of the pool. However, if that series of earlier receipts and payments is reflected in the current composition of the Returned Collateral at all, its contribution is likely to be relatively slight. I have accepted that it is not impossible that there was money from other product line CSAs in the 541 account, and there was certainly money from other Equities/ETOs clients in that account. Such money would (at least under the pre-March 2015 procedures) have been used, transiently, to fund collateral pending replenishment by the client. But it would have been promptly replaced by the client meeting the margin call, and in the case of default, liquidation of the client’s position. And although I have accepted that the reconciliation of the 541 account does not exclude the possibility of money from other CSAs being in the 541 account, it does to a high degree render it improbable that, before its return to BBY, the Returned Collateral was, in substance, funded by anyone other than the relevant ETO client.

367 Both prior to and after March 2015, the money that funded the Returned Collateral was paid to ASX Clear from house (the facilitation account). Prior to March, it was then temporarily funded from the 541 account, sometimes using the money of other Equities/ETOs clients in that account, and probably sometimes the money of other product line clients. But within a day, it was funded by the relevant ETO clients in respect of whose account the payment to

ASX Clear was made. After March 2015, there was no such drawing on the 541 account, but again within a day it was funded by the relevant ETO clients in respect of whose account the payment to ASX Clear was made. At least after the clients had make good own obligation to BBY by meeting the margin call, what BBY had lodged with ASX Clear was held for the benefit of those clients who had paid. On return or adjustment of the collateral in the ordinary course, BBY would have adjusted the individual accounts of each of the relevant clients by crediting the returned collateral to them, and not to all the Equities/ETOs clients with money in the 541 account.

368 The essential difference between the Returned Collateral and the other Recoveries to which reference has been made is that with the Returned Collateral it is possible to identify that subset of ETOs clients who contributed and for whom it was held by BBY. There is no suggestion that the records maintained by ASX Clear are incorrect, or do not match BBY's records, or that there is any other difficulty in matching entitlements of relevant ETO clients to the Returned Collateral. Their relatively clear property interests are not to be altered on account of common misfortune.

369 Even if there is some scope for the money of other clients to have contributed to the Returned Collateral, it is in relative terms so slight that it is proper to regard the circumstances of the Returned Collateral as facts which show the relevant ETO clients as claimants who fall into a particular class, such that they have a higher priority for their charge than the other classes.[109]

370 Subject to their entitlement to set-off the amounts owed by any such clients who are debtors,[110] the Liquidators would therefore be justified in proceeding on the footing that the Returned Collateral was received by BBY on behalf of the ETO clients whose position it secured, namely those with open positions as at 15 May 2015 – that is, the Mazzetti class.

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[109] Re French Caledonia Travel Service Pty Ltd (2003) 59 NSWLR 361; 204 ALR 353; 48 ACSR 97; [2003] NSWSC 1008 at [188].

[110] A few Returned Collateral clients may have been debtors to BBY on the administration date. If they have not contributed the full amount of margin reflected in the Returned Collateral, those debtor clients could not be entitled to participate fully in it, and their debts should be set-off.

THE OTHER QUESTIONS

371 I turn now to the other issues raised in the Liquidators' proceedings.

Calculation of entitlements

372 The question is how each client's "entitlement" to CSAs and Recoveries should be calculated, and the date at which they should be calculated.

373 In their initial submissions, the Liquidators appeared to propose that while generally entitlements be calculated as at 15 May 2015, being the last trading day before reg 7.8.03(6) was triggered by the appointment of administrators, for ETO positions which open at the administration date and forcibly closed out on 21 and 22 May 2015, the date of closure be the valuation date. This was advanced on grounds of practicality. The first defendants responded that this would produce an inconsistent and unjust result, and that it was not impractical to value all entitlements as at 15 May. In their reply submissions, the Liquidators expressed agreement that the methodology proposed by the first defendants would permit valuation as at 15 May 2015, and that consistency favoured a uniform calculation date. They said they were considering the implications of adopting 15 May in circumstances where settlements occurred on 18 May for the ETO business, and would confer with the First defendants.

374 The issue was not further addressed in oral submissions, and I infer that it may have been resolved. If it has not, I will allow the parties an opportunity to provide a short submission.

Set-off

375 The question is whether the Liquidators are entitled to set off positive net account balances against negative net account balances in all accounts owned by the same BBY Group client. The issue arises because some clients may have positive account balances in one product line but negative account balances in another, that is to say they owe money to BBY as a client debtor. The Liquidators submitted that if necessary there was such a right, but because the relationship between BBY and a client was on a “single account” basis, this was unnecessary. As no party contended against there being such a right of set-off, the following discussion of this issue again largely reflects Mr

Healey's submissions, which, to the extent they are reflected below, I gratefully adopt.

376 In *MF Global,* Black J said:[111]

> In *Sonray*, the liquidators sought a direction as to whether they were entitled to set off positive cash balances against negative cash balances in all accounts owned by the same client. Gordon J held (at [115]) that the contractual terms between Sonray and each client entitled the liquidators to set off or nett off positive cash balances with negative cash balances. I do not consider that s 981E of the Corporations Act requires a different result. That section relevantly provides that money to which the Subdivision applies is not capable:
>
> (a) of being attached or otherwise taken in execution; or
>
> (b) of being made subject to a set off, security interest or charging order, or to any process of a similar nature;
>
> except at the suit of a person who is otherwise entitled to the money or investment.
>
> In my view, that section is directed to protecting clients' interests in CSAs against third parties exercising rights of set off against or taking security from the licensee over the CSAs and does not prevent an agreement between a client and a financial services licensee to set off positive and negative balances on different accounts in determining the client's nett position.
>
> …
>
> I am satisfied that MFGA is entitled to exercise a right of set off and I am satisfied that, on balance, it is appropriate for the Liquidators to do so although this will give the affected clients the benefit of 100 cents in the dollar in their positive balances, in the interests of the efficient distribution of the relevant client monies. I will make a direction to that effect.

377 In the present case, the client agreements (Account terms) give a contractual right of set-off. Moreover, the nature of the arrangement with clients was that the client had a single account, with a sub-account for each particular product traded, and although each sub-account was separately recorded, they formed part of one account.

Contractual right of set off

378 Each of the following client agreements contains an express contractual right to set off positive and negative account balances.

ASX, APX and International Trading Terms

379 The ASX Terms contain an express right of set-off. Clause 9.2 authorises BBY to appropriate "credits, payments receipts or amounts to which you are entitled

[111] In the matter of MF Global Australia Ltd (in liq)(2012) 267 FLR 27; [2012] NSWSC 994 at [157] and [159].

(including amounts standing to the credit of any trading or cash management trust account)" and set them off "against any amount due or owing by you to BBY". Clause 9.3 provides that credits in respect of sales are not available until the latest of certain events including "all amounts due and payable by you to BBY have been paid." In clause 9.5 (which relates to failure to settle), clause 9.5(j) provides that BBYL may "apply any cash held by BBY on your account to which BBY has access, or payments received for or from you, to reduce your liability to BBY".

380 There are a number of schedules by which clients are also bound. Schedule 4 (Options Trading), clause 19.3 provides that BBY is "entitled to set off any monies received from the sale of financial products on your behalf against any monies due to BBY by you on any account". Clause 19.4 deals with client default: if a client fails to pay amounts payable to BBY (clause 19.4(a)) then, without the need for prior notice, BBY may apply any cash held by BBY on the client's account or to which they have access or payments received from the client in reduction of the client's liability to BBY (clause 19.4(q)). Schedule 5 contains the sponsorship agreement terms and conditions. Clause 48 provides a right of set-off: "We may set off any amount we owe you against any amount you owe us or any of our related companies".

Futures Terms

381 Clause 4 - which applies not only to futures trading but across the whole of the range of financial products offered by BBY - provides as follows:

> If the Client trades in other products offered by BBY, then the Client may have one or more Trading Accounts with BBY. Since the method of dealing may differ significantly with little interaction among those Trading Accounts, the calculations, reporting and administration may be performed by BBY separately for each Trading Account, so that (among other things, without limitation):
>
> (a) Margin calculations are managed and enforcement action is taken for each Trading Account separately; and
>
> (b) BBY may at any time aggregate one or more Trading Accounts (for reporting or managing Margins or otherwise for the purposes of these Terms).

382 Clause 19.1 deals with events of default, including where any money owing by the client to BBY under the terms are "not fully and punctually paid to BBY or

satisfied as and when they become due …”. In those circumstance, clause 19.2(j) provides that BBY may:

> (j) combine, consolidate, merge or apply all or any part of any credit balance standing to any account of the Client with BBY or any amount available to BBY (including funds held in the client’s account for which BBY has authority over) by way of set-off, lien or counterclaim in or towards satisfaction of any money due and payable by the Client to BBY or by BBY to the Client under these Terms;
>
> …
>
> BBY will not lose any of its rights under this clause by reason of any delay in the exercise of any right under this clause and it may do so at any time and in any manner.

383 BBYL went into administration in March 2015; if clients have unpaid balances, they are undoubtedly in default now.

Desk FX Terms

384 Clauses 8 and 9.1 relate to clients who default in paying amounts owing, and have terms to a similar effect to the preceding default terms.

Online Account Terms

385 Clause 1.7 is similar in effect to clause 4 of the Futures Terms described above. Clauses 10.1(a) and 11.1(g) relate to clients who default in paying amounts owing, and have terms to a similar effect to the preceding default terms.

Single account

386 Several documents make clear that there was a single account between BBY and each client, although within it there were, or could be, multiple sub-accounts, called trading accounts, for each product in which the client traded.

387 The client application form allowed the client to select one or several different financial products in which to trade. Section 1 instructed that “To open an account with BBY (Account) you need to complete the Application Form … By completing this Application Form, you authorise an Account to be opened for you.” That is, one account covering one, some or all BBY financial products.

388 The ASX Terms refer, before clause 1, to “the terms and conditions which apply to your trading account with BBY”. The corresponding PDS, the Exchange Traded Options Product Disclosure Statement, speaks of Accounts

and Trading Accounts distinctly; in the Glossary in Section 7, those terms are defined as follows:

> *Account* means your account with BBY established under the account terms, including all Trading Accounts and all transactions recorded in them.
>
> *Trading Account* means your account with BBY established under the Account Terms for a specific method of dealing, and is part of the Account. You may have several Trading Accounts.

389 In the Futures Terms, clause 4 provides that "If the Client trades in other products offered by BBY, then the Client may have one or more Trading Accounts with BBY". The Desk FX & Commodities PDS also contemplate that an account can comprise several trading accounts. The definition of BBY Account means "your account with BBY established under the foreign exchange terms, including all Trading Accounts and all Open Transactions in them".

390 In the Online Account Terms, clause 1.4 provides that the client has a BBY Online Trading Account, and clause 1.5 provides that within that account "the Client may have one or more Trading Accounts". Clause 1.7 was to the same effect as clause 4 of the Futures Terms. The corresponding Online Trader PDS defines "*Account*" to mean "your account with BBY established under the Account Terms, including all Trading Accounts and all transactions recorded in them".

391 Thus, BBY is entitled to combine the balances of product line accounts, being the individual "Trading Accounts", to calculate the net position of individual clients, without any need for set-off.

Conclusion

392 Accordingly, conformably with the client agreements, all the sub-accounts or trading accounts may be aggregated, to produce a single amount owing either from or to BBY; and in addition, BBY is entitled to set off and/or combine "Trading Accounts". Consistently with *Sonray* and with *MF Global,* the Liquidators are entitled to:

(1) combine the balances of product line accounts (being individual "Trading Accounts") to calculate the net position of individual clients, without any need for set-off; and/or

(2) set off positive net account balances against negative net account balances in all accounts owned by the same BBY Group client.

Low balances

393 The question is whether the Liquidators are justified in treating clients, in respect of client accounts with a balance of $100 (or some other amount) or less, as having no entitlement to participate in CSAs or Recoveries, in respect of each such account.

394 All affected parties agree that the Liquidators would be justified in treating clients, in respect of client accounts with a balance of $100 or less, as having no entitlement to participate in CSAs or Recoveries in respect of those amounts.

395 Such a direction was made on 12 October 2016, in relation to the Erroneous Withdrawals. A similar direction was made in *Sonray.*[112]

396 Such a direction gives pragmatic effect to the reality that the costs to the administration (and thus creditors generally) associated with administering a claim for the amount specified are disproportionate to the benefit to the claimant.

397 I will give such a direction.

Interest

398 The question is whether interest earned on CSAs and Recoveries is beneficially owned by BBY or held on trust for its clients. All parties, including the Receivers, are in agreement that interest earned on CSAs and Recoveries should be held for the benefit of the clients entitled to the relevant principal amount. In *MF Global* Black J held (at [179]) that this was a consequence of reg 7.8.03(6) in circumstances of a shortfall. I will give a direction accordingly.

CONCLUSION AND ORDERS

399 My conclusions may be summarised as follows:

400 While the theoretical basis for pooling is the principle that all contributors to a deficient mixed fund hold an equitable charge over the entire fund and its

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[112] Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) (2012) 288 ALR 240 at 303 [307]; 87 ACSR 442; [2012] FCA 75.

traceable proceeds to the value of their contributions, subject to any dealings and costs, or are equitable tenants in common of the mixed fund as a whole, including its traceable proceeds, subject to such deductions, so that each contributor has an “entitlement” in each fund, the pragmatic nature of the jurisdiction to give advice and directions to a liquidator means that neither strict proof of mixing such as would entitle a beneficiary to an equitable proprietary remedy, nor absolute impossibility of tracing, is required; pooling may be directed where the identification and tracing of the interests of individual clients is not in the circumstances of the particular case reasonably and economically practical, on the basis that it is reasonable in the circumstances that the funds be regarded as irreversibly deficient and mixed. However, because the effect of pooling two or more accounts is to treat each client’s entitlement to one as identical to its entitlement to the other(s), and so to treat each client as having a rateably equal interest in each fund, it will be warranted only when the funds have become so intertwined that each client’s entitlement to one account may reasonably be regarded as identical to its entitlement to the other(s), and this will be so when it is reasonable in all the circumstances to regard each as having a rateably equal interest in the mixed fund. The combination of mixing and impracticability of tracing does not of itself mean that it will necessarily be reasonable to treat each client’s entitlement to one account as identical to its entitlement to the other(s), and to regard each as having a rateably equal interest in the mixed fund. Whether that will be so is influenced by the scale of the mixing, and the relative sizes of the funds and the deficiencies, and above all the extent of the interest of the contributing fund in the mixed fund. That requires the Court to form a view, if it can – albeit an imprecise and impressionistic one – as to what is likely to be the extent of the interest of the beneficiaries of each fund in the other(s). In doing so, the Court is informed, but not controlled, by equitable tracing principles.

401 The money returned by Saxo Bank to Stonebridge in respect of hedging was received by Stonebridge in its capacity as a person "acting on behalf of the [Saxo] client[s]" for the purposes of s 981A(1)(b)(iii), and so was Subdivision A money, to which the s 981H trust applied. The “Margin” paid by Saxo clients was not a purchase price for a product, but the establishment of a running

account which was required to be maintained at a sufficient level to cover the risk assumed by Stonebridge. Section 981A(2)(c) is not engaged to except their margin payments from Subdivision A. Clause 4 of the Account Terms did not have the legal consequence that Stonebridge/SmarTrader became “entitled” for the purpose of reg 7.08.02(1)(a) or (c) to money paid to them which was otherwise caught by s 981A(1), and was not effective to remove, or authorise the removal of, such money from the s 981H statutory trust. It follows that all the money in the Buffer Account 0256 – whether sourced in the Saxo Bank receipts or in client deposits, was Subdivision A money, and even if it was not held in an s 981B account, was nonetheless impressed with the s 981H trust for the benefit of Saxo clients.

402 Notwithstanding that BBY’s obligation to pay ASX Clear $9.5 million on 2 December 2011 was primarily a “house” obligation, the use of Saxo trust money for that purpose resulted in its traceable proceeds, being the receipts from Berndale of at least $6.1 million, remaining in the Equities/ETOs CSAs - as well as in the retention of the balance of $2.5 million in the 8694 account, resulted in a mixing of Saxo trust money with Equities/ETOs CSAs. As BBY was not the relevant licensee for the purposes of s 981D, the $12 million transfer was not at that time permitted by s 981D, and was a breach of the s 981H trust.

403 Alternatively, as at 2 December 2011, the eBridge Buffer Account remained protection trust property, and was held by SmarTrader upon the trusts of the protection trust contained in the Stonebridge Declaration. Even if the money in the 0256 account on 2 December 2011 was not Subdivision A money, or even if clause 4.4 of the Account Terms effectively engaged reg 7.8.02, so that SmarTrader was for its purposes “entitled” to the moneys, it was impressed, in the hands of SmarTrader, with the trusts of the protection trust. Accordingly, even if the $12 million payment made on 2 December 2011 to the 8694 account was not a breach of the s 981H trust, it was a breach of the protection trust, and resulted in protection trust money from the Saxo line becoming mixed in the Equities/ETOs CSAs. Because it also constituted a trigger event, the protection trust thereupon crystallised so as to attach to the transferred money, which became mixed in the Equities/ETOs CSAs. Alternatively, even if

the protection trust did not upon crystallisation attach to the transferred money, the contingent beneficiaries of the protection trust were entitled to require restitution to the protection trust of money paid out in breach, wherever it may be traced. At least where the protection trust has on any view now crystallised - so that the right to follow and have restored the misapplied funds is now the beneficial property of the Saxo clients – that right amounts to an “entitlement” in the Equities/ETOs CSAs.

404 While I do not accept that it is impossible that funds from other product line CSAs remained in Equities/ETOs CSAs, including in the 541 account, their other than transient use on a large scale appears unlikely, and such money would likely represent only a small proportion of the account balance at any time - including at the administration date.

405 While there was, in December 2011, a mixing of Saxo client money into Equities/ETOs CSAs, the number and extent of intervening transactions, including the net detriment to Equities/ETOs from the other BBY Funding transactions, and notably the Saxo 1:1 upload and SCMA Termination, mean that the funds in the Equities/ETOs CSAs as at the administration date include Saxo client money – and in particular money of current BBY Saxo clients – only to a minor extent, if at all. In those circumstances, it would be wrong to regard the current Saxo clients who have claims against the Saxo CSAs as having an entitlement that is (rateably) identical to that of the Equities/ETOs clients in the Equities/ETOs CSAs. Indeed, where the Equities/ETOs CSAs balance, but there is a great deficiency in the Saxo CSAs, and there has already been a very substantial redemption of Saxo clients consequent upon the SCMA termination, it would work a disproportionate windfall to current Saxo clients, and a considerable injustice to Equities/ETOs clients, to direct pooling on the basis that an amount of Saxo money had once been mixed into the Equities/ETOs CSAs many years ago, while the current amount in the Equities/ETOs CSAs represented almost exclusively the moneys of current Equities/ETOs clients. Accordingly, the Equities/ETOs CSAs should not be pooled with other product line CSAs.

406 As to pooling Saxo, FX and Futures and excluding Equities/ETOs, I incline to the view that the size of the relevant transactions relative to the quantum of the funds in issue is such that pooling would not be a proportionate response, but that given the relative recency of the transactions – all occurred within three months before the administration date – the Liquidators may be justified in simply reversing them, except insofar as the amount paid to FX does not exceed the $1 million from FX used in the SCMA 1:1 upload. Because this issue was not the subject of argument, I am content for the parties with an interest in it to make further submissions if they wish.

407 As to Recoveries:

(1) The Liquidators would be justified in proceeding on the footing that the Recoveries from ADM and ABN AMRO are held, on the s 981H trust, for the clients entitled to money in the Futures CSAs.

(2) The Liquidators would be justified in proceeding on the footing that the Recoveries from Halifax and from CMC Markets are held, on the s 981H trust, for the clients entitled to money in the FX CSAs.

(3) The Liquidators would be justified in proceeding on the footing that any recovery from Saxo Bank or SCMA is held on trust for the clients entitled to money in the Saxo CSAs.

(4) The Liquidators would be justified in proceeding on the footing that he Returned Collateral was received by BBY on behalf of the ETO clients whose position it secured, namely those with open positions as at 15 May 2015 – that is, the Mazzetti class - subject to their entitlement to set-off the amounts owed by any such clients who are debtors.

408 There should be directions that the Liquidators:

(1) combine the balances of product line accounts (being individual "Trading Accounts") to calculate the net position of individual clients, without any need for set-off; and/or set off positive net account balances against negative net account balances in all accounts owned by the same BBY Group client;

(2) treat clients who have an entitlement of $100 or less in respect of any account as having no entitlement in respect of each such account; and

(3) allocate interest earned on CSAs and Recoveries for the benefit of the clients entitled to the relevant principal amount.

409 The issue of the date of calculation of entitlements was not further addressed in oral submissions. If it has not been resolved, I will afford a limited opportunity to provide a further submission. Nor was the Receivers' application addressed

by the Liquidators, and again I will if desired allow a limited opportunity for further submissions.

410 The Court directs that the plaintiffs bring in short minutes on a date to be fixed to give effect to these reasons.

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