Supreme Court

New South Wales

Case Name:	In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation)
Medium Neutral Citation:	[2016] NSWSC 1366
Hearing Date(s):	22, 23 March 2016
Date of Orders:	27 September 2016
Decision Date:	27 September 2016
Jurisdiction:	Equity - Corporations List
Before:	Brereton J
Decision:	Refer to para [152]
Catchwords:	PROCEDURE – Miscellaneous procedural matters – Other matters – separate question – whether appropriate to answer – whether question was an advisory opinion, not judicial determination – held, not inappropriate to answer CORPORATIONS – financial services and markets – financial markets – where cash cover for margin returned to market participant following appointment of administrators to participant ("Returned Collateral") – whether, regardless of various unresolved issues, individual clients ("Relevant ETO Clients") to whose account cover was credited in records of ASX at direction of participant exclusively entitled to Returned Collateral – whether received by administrators impressed with equitable obligation to pay to relevant clients – held, no such obligation arises from regulatory and contractual framework or correspondence – whether sourced only in funds provided by relevant clients – held, not possible to determine at this stage that sourced solely in funds provided by relevant clients

– not possible to conclude that relevant clients entitled to Returned Collateral regardless of unresolved issues

CORPORATIONS – financial services and markets – financial services providers – dealing with clients' money – money related to derivatives – insolvency – where licensee in administration – where moneys "swept" from Relevant ETO Clients' personal accounts into pre-administration client segregated account ("CSA") pursuant to standing client authority after administrators appointed ("Erroneous Withdrawals") – whether, regardless of various unresolved issues, Relevant ETO Clients entitled to return of Erroneous Withdrawals – where purpose of payments was to cover margin obligations of licensee – where purpose of payment failed as licensee did not meet its margin obligations and clients' funds not used to cover those obligations – whether client moneys were paid into CSA "in error" – payment made in furtherance of payer's purpose and in accordance with payer's intention is not made in error – payment made on assumption that is later falsified is not made in error – amounts ought to have been paid into separate post-administration account and thus paid into CSA in error – whether reg 7.8.03(6) applies to moneys paid into account after insolvency event – held, it does not – held, relevant clients entitled to return of payments

Legislation Cited:

(CTH) Corporations Act 2001, s 446A, s 499, Part 7.8 Division 2 Subdivision A, s 981A, s 981B, s 981D, s 981F, 981H
(CTH) Corporations Regulations 2001, regs 7.8.01, 7.8.03.
ASX Clear Operating Rules

Cases Cited:

Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334
MF Global Australia Ltd (in liq), In the matter of (2012) 267 FLR 27; [2012] NSWSC 994
Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) (2012) 87 ACSR 442; [2012] FCA 75
Georges v Seaborn International Pty Ltd (2012) 206 FCR 408; [2012] FCAFC 140
All Class Insurance Brokers Pty Ltd (in liq), In the

	matter of; Vardy v Westpac Banking Corporation [2014] NSWSC 475
Category:	Procedural and other rulings
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 (first plaintiff) BBY Limited (Receivers & Managers appointed) (In liquidation) ACN 007 707 777 (second plaintiff) J Mazzetti Pty Ltd ATF J Mazzetti Pty Limited Staff Superannuation Fund & Ors (first defendant) Peter Brian Haywood and Bronwen Menai Haywood (ATF the Haywood Superannuation Fund) (second defendant) Clive Riseam (third defendant) Securities Exchange Guarantee Corporation Ltd (fourth defendant) David Nadin (fifth defendant)
Representation:	Counsel: I M Jackman SC w R M Foreman (plaintiffs) D J Williams QC w G J Parncutt (first defendant) P J Brereton SC w V Whittaker (second defendant) G E S Ng (third defendant) J J Hutton (fourth defendant) M S Henry (fifth defendant) Solicitors: Ashurst Australia (plaintiffs) Bamford Lawyers as agents for Partners Legal (first defendant) Mills Oakley (second defendant) Corrs Chambers Westgarth (third defendant) Clayton Utz (fourth defendant) Arnold Bloch Leibler (fifth defendant)
File Number(s):	2015/237028

JUDGMENT

1 The First Plaintiffs (“the Liquidators”) became the liquidators of the Second Plaintiff company (“BBY”), pursuant to (CTH) *Corporations Act* 2001, s 446A and s 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 (“St George”) appointed receivers and managers (“the Receivers”) to BBY and other companies in the BBY Group. Some of the BBY entities are now in liquidation, some are subject to pooled Deeds of Company Arrangement, and some have been returned to the control of their directors.

BACKGROUND

2 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 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" financial products, being foreign exchange contracts (“FX”); a variety of products, including FX contracts of difference and international products, offered by Saxo Capital Markets (“Saxo”); and other miscellaneous financial products, including financial products offered by Interactive Brokers LLC (“IBL”) and carbon trading (“Other Products”).

3 Client funds deposited with BBY were held by it 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 (referred to below as the “Returned Collateral”) has been placed by the Liquidators in a separate trust account. The Liquidators’ preliminary investigations indicated 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 appeared 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. There also appeared

to have been transactions between CSAs, both within and across different product lines.

The proceedings and the parties

4 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 – commenced proceedings in which they sought, by way of a number of directions and declarations, the Court's guidance as to how the amounts in the CSAs and other recoveries should be dealt with. The main questions raised in the proceedings are:

(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 amounts recovered by BBY since 17 May 2015, when the company went into administration, and amounts that may be recovered by the Liquidators in the future, are beneficially owned by BBY, or are held on trust for clients;

(4) whether positive client positions should be set-off against negative client positions, including across different product lines in respect of the same client;

(5) whether small client entitlements (less than $25) 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 earned on the CSAs 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.

5 Thousands of BBY clients potentially have an interest in the CSAs and recoveries, and for that reason representative defendants have been appointed. The First Defendant ("Mazzetti") represents all BBY clients with an ETO Account with open positions as at 15 May 2015. The Second Defendants ("Haywood") 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. The Fourth Defendant

is the Securities Exchanges Guarantee Corporation Limited ("SEGC"). The Fifth Defendant ("Nadin") represents all BBY clients with an account with BBY established in connection with financial products offered by IBL.

6 On 19 October 2015, the proceedings were set down for hearing for two days commencing on 22 March 2016. However, in February 2016, it became apparent that the complexities of the matter were such that the parties could not be prepared for a final hearing on all issues at that time. Thus 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 Relevant ETO Clients").[1] This course was taken (1) in order to make use of the time that had already been set aside for the hearing, and because (2) although the Liquidators' investigations were not sufficiently advanced to enable them to resolve certain factual issues, Mazzetti contended that the Relevant ETO Clients would be entitled to the Returned Collateral and/or the Erroneous Withdrawals, regardless of how those factual issues were ultimately resolved; (3) if so, it was desirable that those funds be returned to them expeditiously, without having to abide the outcome of factual issues in which they would then have no interest; and (4) even if the question was not resolved as Mazzetti sought, its argument would elucidate issues which would otherwise have to be addressed at the final substantive hearing, and thus save time at the final hearing.

7 The following summary of the background relevant to the separate question is in large part adopted from the helpful submissions of Mr Jackman SC and Mr Foreman, for the Liquidators.

ETOs

8 An ETO is an option in respect of an existing underlying instrument (such as a parcel of shares), which gives the grantee the right, but not the obligation, to sell (in the case of a "put" option) or to buy (in the case of a "call" option), the

[1] The separate question, as ultimately formulated, is set out at [23] below.

underlying instrument at a fixed price (the “strike price”), on or before a fixed date, irrespective of the market price on that date.

9 An option may be bought and sold. The buyer of an option is said thereby to “open” a position, and it remains “open” until it expires, is exercised or is closed out. An “open position” can be “closed out” before expiry by an equal and opposite transaction – for example, the buyer of a call option sells an equivalent call option (with the same exercise price and expiry date) to close out the position. The seller of a call option has a contingent obligation to deliver the underlying instrument, while the seller of a put option has a contingent obligation to pay for the underlying instrument. The potential exposure of the seller of an option fluctuates as the value of the underlying instrument changes prior to expiry of the option.

10 BBY dealt in ETOs as a clearing participant of ASX Clear Pty Ltd. Trading of ETOs on the ASX involves the following:

(1) clients of market participants (such as BBY) place orders for ETOs with the market participant;

(2) the market participant places, on behalf of its clients, orders to buy or sell ETOs;

(3) those orders are matched with equal and opposite orders;

(4) upon the orders being matched, in order to facilitate the settlement of trades, the contracts formed as a result of the orders being matched are novated to ASX Clear, so that the clearing participant faces ASX Clear as its counterparty, rather than being exposed to the credit risk of the clearing participant(s) on the other side of the contract. The result is that ASX Clear becomes the central counterparty in each transaction – it becomes "the buyer to every seller and the seller to every buyer".

11 This means that a market participant 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. Such risks are covered by requiring the seller of an option to provide security in respect of its open position. The value of the security required by an exchange for an open position is referred to as the “margin”, which fluctuates with market movements. The market participant provides cash or other collateral (together called “cover”) to cover the margin. If a party who has provided cover defaults

(in respect of its contingent obligation to deliver, or to pay for, the underlying instrument), ASX Clear will apply the cover against any losses.

12 ASX Clear calculates and notifies the margin required in respect of any ETO each day, and the required margin may be more or less than on the previous day. Where it is more, the market participant is obliged to provide additional cover to meet the margin call, and to call cover from its clients sufficient to ensure that it is able to satisfy its margin obligations to ASX Clear. Where it is less, ASX Clear returns the excess to the market participant, which in turn returns it to its client. Where a participant has multiple ETO clients, the increases and decreases are netted off to result in a single adjusting payment.

Client cash management accounts

13 Typically, BBY's ETO and Equities clients held cash management accounts ("CMAs") with certain banks ("CMA Banks"). BBY was able to view the account balance of and/or transact on these CMAs. Where ETO clients had CMAs, those accounts were used to facilitate payment of ETO margin. Clients who did not hold a CMA generally provided BBY with a direct debit/credit authority, which authorised BBY to directly debit or credit their accounts ("direct entry accounts" or "DEAs"). Some BBY clients also made direct deposits into BBY's CSAs in anticipation of future trading activity.

BBY's processes in respect of cover for ETO margin

14 The daily business cycle in respect of BBY's Equities and ETO product line has been analysed by the Liquidators and is comprehensively explained in Mr Vaughan's affidavit of 23 December 2015, upon which the following summary is based.[2]

15 BBY, as a market participant, was obliged to lodge sufficient cover with ASX Clear for ETO margin, and to settle the net movement in its ETO margin obligations with ASX Clear at 10.30am each trading day. Each day, BBY generated a series of reports in connection with its Equities and ETO business, which showed the cash cover required from each client in respect of ETO margin, after accounting for non-cash collateral, for the following trading day; for each client, whether cover would be returned to that client, or the client

[2] Mr Vaughan's 23 December 2015 affidavit at [213]-[225].

would be margin-called and required to provide additional cover; the total amounts of cash cover to be returned to clients and the total amount of cash cover to be called from clients; whether, after taking into account the aggregate amount of cash cover held by ASX Clear for BBY clients, the aggregate value of non-cash collateral held by ASX Clear and the ETO margin for that day, BBY had a "cash excess" (in the case of a positive value) or a "cash shortage" (in the case of a negative value); and, for each account in the ETO ledger (including but not limited to client accounts), whether that account was in debit or credit. The credit balance for any individual account represented the amount of cash cover held by ASX Clear referable to those clients. Any "excess" or "shortage" was transferred from each client's ETO ledger to the client's corresponding Equities ledger.[3]

16 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 CMAs and 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, "DEA Files" were generated, which were loaded to the St George online banking portal, in order to initiate direct debits, as a result of which funds were generally received the following business day.

17 From about March 2015, BBY settled its ETO margin obligations with ASX Clear through a series of daily transfers between its "Facilitation Account" (which was a BBY "house" account in respect of which St George provided an overdraft facility with a limit of $8,000,000 to be used by BBY for clearing purposes), its "General Account" (which was a BBY "house" account), and the "'541 Account", which was the principal CSA for BBY's Equities and ETO business. The Facilitation Account was used to settle with ASX Clear at around

[3] The reason for this was that while GBST DCA (the accounting system used for BBY's ETO business) 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 (the accounting system used for BBY's Equities business) was able (while GBST DCA was not) to generate the CMA File required by the banks to process deposits to, and withdrawals from, CMAs.

10.30am each morning the amount receivable or payable by BBY for margin. Then, at around 2.30pm each day, amounts paid by BBY to ASX Clear in respect of ETO margin were recouped from the '541 Account into the Facilitation Account, via the General Account; while amounts received by BBY from ASX Clear were remitted from the Facilitation Account to the '541 Account. Since settlement of ETO margin between BBY and ASX Clear was conducted on a net basis, sometimes (where BBY was a net recipient of funds from ASX Clear) no payment would be made from the '541 Account, notwithstanding that BBY made margin calls on certain of its clients.

18 Prior to about March 2015, BBY had met its margin obligations to ASX Clear not initially from the Facilitation Account, but through a series of daily payments of the gross amount of margin, which also involved drawing on funds in the '541 Account.

19 At around 3.30pm each day, BBY generated further reports, which showed, *inter alia*, the current balance of the '541 Account (according to the ledger account corresponding to that bank account) and the total amount BBY regarded itself as required to hold on trust for clients at the end of that trading day. By comparing those amounts, BBY was able to determine whether the balance of the '541 Account was less than the aggregate amount that BBY was required to hold, in which case BBY would transfer funds from a house account to the '541 Account; or whether the balance of the '541 Account was more than the aggregate amount that BBY was required to hold in trust, in which case the surplus was transferred to the General Account.

The Returned Collateral

20 On 18 May 2015 at about 10:50am (that is, after settlement of BBY's ETO margin obligation for that day with ASX Clear – on a net basis, BBY was a recipient of funds), BBY's ASX market participation was suspended. At that time, BBY clients held 4,625 open ETO positions, and ASX Clear held cash and non-cash collateral in respect of those positions.

21 BBY did not settle its ETO margin obligation with ASX Clear after 18 May 2015. Following 18 May 2015, approximately 400 BBY clients' ETO positions were closed out; approximately 217 BBY clients' ETO positions and associated

cover were transferred to a new clearing participant, in accordance with a procedure prescribed by the ASX; and ASX Clear held, in respect of ETO margin, (a) a cash surplus, after applying cash cover to satisfy the cost of closing out ETO positions ("Returned Collateral"); and (b) a cash surplus after realising non-cash collateral to satisfy the cost of closing out ETO positions ("Cash Stock Refunds"). The Returned Collateral, being $3,400,115.54, was ultimately paid into a segregated trust account controlled by the Liquidators on 4 August 2015. The Cash Stock Refunds, totalling $232,430.61, were paid directly to the BBY clients who had provided the corresponding non-cash collateral, in about October 2015.

The Erroneous Withdrawals

22 The Receivers undertook a reconciliation of transfers of funds into and out of the '541 Account in the period from 18 May 2015 to 31 August 2015, and identified 197 payments, totalling $2,396,157.41, which they described as "invalid margin calls" ("Erroneous Withdrawals"). The Receivers so classified these payments because they were payments by clients referable to ETO margin payments that BBY would have been required to settle with ASX Clear at about 10.30am on 19 May 2015; but BBY did not in fact settle its ETO margin obligation with ASX Clear on 19 May 2015 (or at any time thereafter), its market participation having been suspended. Other than in respect of two identified clients (who had shortfalls of $3,090 and $1,676 respectively), ASX Clear held sufficient cover to close out all open ETO positions. While the Liquidators have not undertaken a complete verification of the Receivers' reconciliation, they have performed some checks, which tend to confirm that 180 of the 197 payments were in respect of ETO margin, but have been unable to match the remaining 17 payments, postulating that the discrepancies may be explained, in part, by some of the relevant BBY clients having an insufficient balance in their CMA to permit withdrawal of the entire ETO margin amount.

THE SEPARATE QUESTION

23 The separate question was refined and amended, and in its ultimate form is as follows ("the Separate Question"):

Whether the First Defendants are entitled to the return of the Returned Collateral and the Erroneous Withdrawals in priority to other claims on those funds other than the liquidators' charge and costs, regardless of:

(a) whether the '541 account is able to be reconciled;

(b) whether the '541 account contained funds of clients in different product groups;

(c) whether the '541 account was in shortfall as at the appointment of the First Plaintiffs;

(d) whether the '541 account was in shortfall as at the time BBY paid moneys to ASX Clear by way of lodgment of what is now the Returned Collateral;

(e) the date(s) used to assess clients' entitlements;

(f) the basis on which any contingent clients' entitlements should be assessed;

(g) whether any clients are also debtors of BBY and, in this regard, any issues relating to set-off;

(h) whether the '541 account was in shortfall at the time BBY reimbursed itself in respect of collateral paid to ASX Clear;

(i) whether the withdrawal of the Erroneous Withdrawals from client CMAs occurred as a result of an automatic process that BBY failed to disable or as a result of positive actions taken by employees of BBY and/or the Receivers;

(j) whether BBY was authorised to withdraw the Erroneous Withdrawals from client CMAs;

(k) whether the moneys paid by BBY to ASX Clear by way of lodgement of what is now the Returned Collateral contained funds of clients other than those represented by the First Defendant, and those moneys were paid pursuant to the instruction or authority of some of those clients; and/or

(l) whether as at 19 May 2015, the Erroneous Withdrawals or any part of them might have been required to satisfy the ultimate cost to close out any open ETO position.

24 The question was formulated in this manner (1) because Mazzetti contended that the "regardless" matters were irrelevant to its entitlement, and (2) because the requisite evidence to resolve the "regardless" matters was not yet complete.

Is it inappropriate to answer the separate question?

25 It is convenient to address at this point the Third Defendant's contention that it is inappropriate to answer the separate question. The submission was

advanced on the basis that the question sought, in essence, not a judicial determination, but an advisory opinion. Reference was made to what was said in *Bass v Permanent Trustee Co Ltd*[4] concerning the essentiality of facts, either agreed or established, to the exercise of judicial power.

26 However, those submissions overlook a number of fundamentals. The first is that in its corporations jurisdiction, the Court has jurisdiction to give advice to liquidators, just as it has jurisdiction to give advice to trustees; despite the advisory character of that jurisdiction, it has not been suggested that it is other than an exercise of judicial power. The second is that, if the question is resolved in the affirmative, that will determine that Mazzetti (and those they represent) are entitled to the funds in question. The third is that while it may be that the application of law to a particular factual situation is characteristic of judicial power, that does not necessitate that every fact be ascertained and found: only those that are necessary for the decision need be established. The point of the “regardless” matters is that, on Mazzetti’s case, it can be determined that the Relevant ETO Clients are entitled to the Returned Collateral and the Erroneous Withdrawals without having to resolve the “regardless” matters – or in other words, that their resolution one way or the other would make no difference to entitlement to the funds in question.

27 This does not necessarily mean that the Court can determine the question without making any assumptions about the so-called “regardless” matters; it is necessary to consider whether the alternatives embraced by each “regardless” matter could make a difference to the answer. Thus to answer the question in the affirmative, the Court must be satisfied that the answer to any of the "regardless" matters would not affect Mazzetti’s entitlement to the Returned Collateral and the Erroneous Withdrawals.

28 Accordingly, it is not inappropriate that the separate question be answered.

The positions of the parties

29 The Liquidators adopted “a neutral approach in respect of controversial issues in the proceedings, while providing submissions to assist the Court, consistent with the proper approach in a "trust dispute" recognised in, for example, *Sons*

[4] (1999) 198 CLR 334 at 359-360 [56]-[59].

of Gwalia Ltd v Margaretic [2006] FCAFC 92; (2006) 232 ALR 119 at [6]*"*.[5] While the Liquidators took issue with some of the factual propositions initially advanced by Mazzetti, by the conclusion of the hearing there was limited factual dispute of relevance.

30 Haywood, Riseam and Nadin contended that the separate question should be answered "no", in respect of both the Returned Collateral and the Erroneous Withdrawals, on the basis that that the Court could not be satisfied that the funds should properly be paid out immediately to the persons represented by Mazzetti, in the absence of findings in relation to at least some of the "regardless" matters. SEGC took no position in respect of the Returned Collateral, but as to the Erroneous Withdrawals contended that the question should be answered in the negative. For convenience, I refer to the defendants other than Mazzetti collectively as "the Opposing Defendants".

STATUTORY AND REGULATORY FRAMEWORK

31 The legal relationships between clients, market participants such as BBY, and ASX Clear, and relating to clients moneys, are regulated by (CTH) *Corporations Act* 2001, Part 7.8 Division 2 Subdivision A; (CTH) *Corporations Regulations* 2001, Part 7.8; and the ASX Clear Operating Rules ("the ASXC Rules").

Corporations Act and Corporations Regulations

32 The relevant statutory regime includes *Corporations Act*, s 981A to s 981H, and *Corporations Regulations,* reg 7.8.01 to reg 7.8.05.[6]

33 Section 981A provides that Subdivision A applies (subject to irrelevant 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

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[5] In the matter of MF Global Australia Ltd (in liq) (2012) 267 FLR 27; [2012] NSWSC 994 ("MF Global") at [2].
[6] These provisions have been considered in Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) (2012) 87 ACSR 442; [2012] FCA 75 ("Sonray") (e.g. at [74]-[81]) (Gordon J); and in MF Global (e.g. at [25]-[40]) (Black J); see also 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).

the licensee in the licensee's capacity as a person acting on behalf of the client.

34 Section 981B(1) and reg 7.8.01(5) require a licensee to ensure that the funds are paid into a trust account, and to hold all moneys paid into the account – *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 person entitled to the moneys. Section 981B provides:

> (1) 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) The licensee may, for the purposes of this section, maintain a single account or 2 or more accounts.

35 Reg 7.8.01(5) provides:

> For paragraph 981B(1)(c) of the Act, a financial services licensee must:

> (a) operate an account to 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.

36 Thus moneys paid into CSAs in connection with margin calls which the licensee is obliged to make do not have to be held on trust for the benefit of the client who paid them. Moreover, s 981D provides that client money provided in connection with dealings in derivatives may also be used for the licensee to margin, secure or settle dealings in derivatives by the licensee, *including dealings on behalf of people other than the client*:

> 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).

37 In *Sonray,* Gordon J observed:[7]

> 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".

38 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". For that purpose, reg 7.8.03 applies if the licensee "is the subject of … the appointment of an administrator". Regulation 7.8.03(6) then prescribes:

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[7] Sonray at [77]; see also MF Global at [40]. What is involved in the concept of permitted use of such funds to meet obligations in connection with margining and securing dealings on behalf of clients other than the depositing client is further considered at [91]-[93] below.

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.

39 Section 981H(1) provides that money to which the Subdivision applies 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.

ASX Clear Operating Rules

40 The ASXC Rules form part of the regulatory and contractual architecture that governs the relationship and dealings between a market participant such as BBY and its clients.[8]

41 By Rule 2.10.1:

(1) "Cash Cover" means the cash balance or balances credited by ASX Clear to a Participant to satisfy the amounts determined by ASX Clear under Rule 14.6.1;

(2) "Client" means, relevantly, a Client with whom the Participant has a Client Agreement;

[8] As will be seen (at [73]-[74] below), Clients acknowledge that they are bound by the ASXC Rules, through their Client Agreements with the Participant.

(3) "Client Account" means an account established by the Participant under paragraphs (a) or (b) of Rule 10.1.1 for the purpose of registering Derivatives Market Contracts;

(4) "Client Agreement" relevantly means the agreement between a Participant and its Client referred to in Rules 7.1.2, 7.1.3 or 7.1.4;

(5) "Collateral" means property acceptable to ASX Clear which is pledged or otherwise secured in favour of ASX Clear in respect of some or all of the obligation of a Participant to ASX Clear, and may include bank guarantees, money market securities or shares;

(6) "Cover" means Cash Cover and Collateral;

(7) "Derivatives CCP Contract" means one of the two matching contracts between ASX Clear and a Participant which arise when a Derivatives Market Contract is registered and novated to ASX Clear under Section 12;

(8) "Excess Cash" means a cash balance credited by ASX Clear to a Participant which is not Cash Cover; and

(9) "Participant" means a person admitted by ASX Clear as a Participant under Rule 3.1.

42 Section 7 of the Rules (Client Requirements) deals with the contractual relationships between Clients and Participants. Rules 7.1.1 and 7.1.2 require that Participants enter into a Client Agreement with their Clients, incorporating the terms set out in Schedule 5 to the Rules (entitled "Derivatives Client Agreement – Minimum Terms"), and any other terms and conditions agreed between the Participant and the Client that are not inconsistent with the terms set out in that Schedule.

43 Section 10 (Accounts) deals with the establishment of Accounts for the registration of, and the recording of Cash Cover, Collateral and Excess Cash in respect of, Derivatives CCP Contracts. It relevantly provides as follows:

10.1 GENERAL

10.1.1 Participant to establish Accounts

A Participant must establish with ASX Clear, in accordance with the Procedures, the following Accounts in the name of the Participant:

(a) a general Client Account for the registration of Derivatives Market Contracts of Clients other than where Derivatives Market Contracts are to be registered in a Client Account established under paragraph (b);

(b) one or more Client Accounts for the registration of Derivatives Market Contracts for:

(i) each Client that requests a separate Client Account;

…

(iv) each Client for whom the Participant wishes to register Derivatives Market Contracts separately;

(c) one or more House Accounts for the registration of Derivatives Market Contracts undertaken by the Participant on its own account; and

(d) a Cash Market Account for the registration of Cash market Transactions or transactions under an Offsetting Transaction Arrangement.

…

10.2 RESPONSIBILITY, RECORDS AND INTEREST

…

10.2.2 Record of Cash Cover

ASX Clear will record the amount of Cash Cover credited to a Participant in respect of each Account.

If Derivatives CCP Contracts referable to more than one Approved Listing Market Operator are registered in the same Account, ASX Clear may if the Participant requests it, or will if ASX Clear determines it necessary, also record separately the amount of Cash Cover credited in respect of each Approved Listing Market Operator.

…

10.2.4 Record of Excess Cash

ASX Clear will record:

(a) the amount of Excess Cash credited to a Participant in respect of its Cash Market Account; and

(b) the aggregate amount of Excess Cash credited to a Participant in respect of all House Accounts and, separately, all Client Accounts for a particular Approved Market Operator.

…

10.3 APPLICATION OF CASH COVER AND EXCESS CASH

10.3.1 Cash Cover and Excess Cash represents property of ASX Clear

All Cash Cover and Excess Cash credited by ASX Clear to a Participant in accordance with Rule 10.2.2 or Rule 10.2.4 is the absolute legal and beneficial property of ASX Clear and represents a debt equal to the credit balance of the Cash Cover and Excess Cash owing by ASX Clear to the Participant. The Participant has no proprietary right or proprietary interest in Cash Cover and Excess Cash credited to it.

10.3.2 Treatment of Cash Cover and Excess Cash relating to Client Accounts for different Approved Market Operators

ASX Clear must not, unless the Client is the same legal entity, apply or set off any amount of Cash Cover and Excess Cash recorded under Rule 10.2.2 or Rule 10.2.4 in respect of Client Accounts established for

an Approved Listing Market Operator in or towards payment or satisfaction of the Participant's obligations to ASX Clear in respect of Client Accounts established for any other Approved Listing Market Operator.

10.3.3 Treatment of Cash Cover and Excess Cash relating to Client Accounts, House Accounts and Cash Market Accounts

ASX Clear must not, except in accordance with Rule 10.3.4 or Rule 12.17.3, apply or set off any amount of Cash Cover recorded under Rule 10.2.2 in respect of a Client Account or any amount of Excess Cash recorded in respect of Client Accounts under Rule 10.2.4 in or towards payment or satisfaction of the Participant's obligations to ASX Clear in respect of Derivatives CCP Contracts registered in any House Account, or any Cash CCP Transaction registered in a Cash Market Account.

10.3.4 Insolvency of Participant

If a Participant becomes insolvent, ASX Clear will not apply or set off any amount of Cash Cover recorded under Rule 10.2.2 in respect of a Client Account or Excess Cash recorded in respect of Client Accounts under Rule 10.2.4 in or towards payment or satisfaction of the Participant's obligations to ASX Clear in respect of Derivatives CCP Contracts registered in any House Account or Cash CCP Transaction registered in any Cash Market Account provided that (and only to the extent that) the liquidator confirms in writing to ASX Clear that:

(a) the liquidator will deposit that amount in the account maintained by the Participant under Rule 4.1.1(c)(ii) for the holding of Client money, if ASX Clear pays that amount to the Participant; and

(b) the liquidator will either distribute that amount to Clients of the Participant or apply that amount to discharge liabilities of the same amount that Clients owe to the Participant.

Nothing in this Rule 10.3.4 affects the operation of Rule 10.3.1 or creates any proprietary right or interest in any Cash Cover or Excess cash in favour of the Participant or its Clients.

44 Section 12 (Registration, Novation, Netting and Settlement) deals with the novation, netting and settlement of transactions. In Rule 12.2 (Novation), Rule 12.2.3 provides as follows:

12.2.3 Obligations and rights

The obligations and rights under Cash CCP Transactions and Derivatives CCP Contracts between the Seller and ASX Clear and between the Buyer and the ASX Clear are owed by and to the parties as principals to each other notwithstanding that the Seller and Buyer may be acting as agent for another person or that ASX Clear's obligations are discharged in the Approved Settlement Facility by another person acting on behalf of ASX Clear.

The obligations of ASX Clear are for the benefit of the Participant as principal and for the benefit of no other person.

45 The Opposing Defendants submitted that Rule 12.2.3 meant that all rights and obligations between ASX Clear and a Participant – including in respect of margin and cover – were owed and held as principals. However, Rule 12.2.3 is concerned only with obligations and rights under novated "Derivatives CCP Contracts", and means that on those contracts, only the Participant (and not a client) can sue ASX Clear, and vice versa. It is not concerned with rights and obligations under the Rules in respect of margin and cover.

46 Section 14 (Risk Management) provides powers to enable ASX Clear to manage its counterparty risk exposure by calculating margin and calling for Cover in respect of Derivatives CCP Contracts, and requiring Participants to deposit or provide to and maintain with ASX Clear cash or other collateral for the purpose of discharging their margin obligations. Relevantly:

> **14.5 MARGINS**
>
> **14.5.1 ASX Clear to determine Initial Margin and other margin obligations**
>
> ASX Clear will in respect of Derivatives CCP Contracts and Cash CCP Transactions, calculate for each Account of a Participant, Initial Margin and other margin obligations for contracts and transactions registered in the name of the Participant at the time, in the manner and using methods and assumptions specified in the procedures.
>
> **14.5.2 ASX Clear to notify total margin obligations**
>
> ASX Clear will notify each Participant, in the manner and at the time specified in the Procedures, of the amounts calculated under Rule 14.5.1.
>
> **14.6 COVER**
>
> **14.6.1 Participants to provide Cover (including additional Cover)**
>
> A Participant must deposit or provide to, and maintain with, ASX Clear cash or Collateral for its Initial Margin and other margin obligations determined under Rule 14.5.1 in the amount, manner and form determined from time to time by ASX Clear and specified in the Procedures or notified to the Participant. …
>
> ...

47 Rule 14.6.3 provides that Cover must not be subject to any interest (whether legal, equitable or statutory) by way of security at the time it is provided, and must not become subject to any such interest other than in favour of ASX Clear at any time while it held by ASX Clear, unless ASX Clear has otherwise agreed. Rule 14.6.4 makes provision for the attribution of the security to

individual accounts, and for a Participant, with the consent of ASX Clear, to change the attribution of some or all of the security that it provides:

> **14.6.4 Attributing Cover**
>
> For the purposes of enabling ASX Clear to record Cash Cover and Collateral in accordance with Rules 10.2.2 and 10.2.3, Cash Cover and Collateral will be attributed in accordance with the Procedures:
>
> (a) to an Account or Accounts; and
>
> (b) if Derivatives CCP Contracts referable to more than one Approved Listing Market Operator are registered in the same Account, to an Approved Listing Market Operator.
>
> The Participant may, with the consent of ASX Clear, change the attribution of some or all of the Cover in accordance with the Procedures.
>
> …

48 Rule 14.7.1 requires a Participant to call margin from its Clients:

> **14.7 RELATIONSHIP BETWEEN PARTICIPANTS AND CLIENTS IN RESPECT OF MARGIN CALLS FOR DERIVATIVES CCP CONTRACTS**
>
> **14.7.1 Participant obligation to call Cash or Collateral**
>
> Where a Derivative 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.
>
> **14.7.2 Time to respond to calls**
>
> Subject to Rule 14.7.4, the call to any Client must be made no later than 24 hours after ASX Clear notifies Participants of the Initial Margin payable under this Rule.
>
> **14.7.3 Settlement amounts**
>
> A Participant is also entitled to call from its Client an amount sufficient to cover amounts which the Participant has been required to pay pursuant to the close out, settlement or daily settlement or other risk management of Derivatives CCP Contracts under these Rules.
>
> …
>
> **14.7.5 Payments due to Participant**
>
> 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 14.7.3; or
>
> (b) provide security for those amounts which is acceptable to the Participant.

49 Thus, as between ASX Clear and a participant, the obligation to provide cover for margin is that of the participant as principal (r 14.6.1). However, the participant must call cover from its client to enable it to satisfy its obligation to ASX Clear in respect of a derivatives contract that relates to that client (r 14.7.1), and the client is obliged to pay or provide security for those calls (r 14.7.5). For the purposes of enabling ASX Clear to record cash cover, it is attributed to an account or accounts established under r 10.1.1.

50 Section 15 (Default) sets out what constitutes an event of default, and the powers of ASX Clear if an event of default by a Participant occurs. Under Rule 15.1.1(h), the specified events of default include if the Participant becomes, or takes any step which might result in it becoming, or reasonably suspects that it may become, an externally-administered body corporate as defined in section 9 of the *Corporations Act*. Pursuant to Rule 15.2.1(l), if an event of default occurs, ASX Clear may, *inter alia*, subject to Rule 19.5, suspend or terminate the Participant's authority to clear all or any category of Market Transaction, or impose restrictions as new conditions on its authority to clear a category of Market Transaction. Rule 19.5.1 (Suspension) provides as follows:

> If ASX Clear suspends a Participant's authority to clear all or any category of Market Transaction under Rule 15.2.1(l):
>
> (a) the initial period of suspension must not exceed one month although ASX Clear may extend that period for additional periods of not more than one month at a time if it reasonably believes an extension is necessary or desirable;
>
> (b) the Participant must not hold itself out as a Participant in any relevant respect during a period of suspension; and
>
> (c) during a period of suspension, ASX Clear may, pursuant to its powers under Rule 15.2.1 but subject to Rule 19.5.2, terminate the admission of the Participant.

51 Rule 19.5.2 (No termination without hearing) provides that ASX Clear must not terminate the admission of a Participant under Section 15 without affording the Participant an opportunity to be heard. Thus suspension does not of itself involve termination of a Participant's admission.

RETURNED COLLATERAL

52 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.[9] Because BBY ceased trading ETOs on behalf of clients upon going into administration on Sunday 17 May 2015, the clients whose open ETO positions were closed out on 21 and 22 May can only be the Relevant ETO Clients, being those who held such positions as at close of business on Friday 15 May 2015, and are in these proceedings represented by Mazzetti.

53 Mazzetti contends that the Returned Collateral comprises post-appointment funds, which were not mixed with any other client funds as at the administration date and have not been mixed since, and that any question of pooling CSAs generally (to be determined pursuant to the Liquidators' Originating Process) can have no application in respect of such post-appointment receipts. The fundamental question is whether the only way in which the Returned Collateral could be dealt with in accordance with law is by return to the Relevant ETO Clients. The two suggested alternatives are *first,* that the Returned Collateral may (depending on the "regardless" matters) be held for all ETO clients, or all ETO and Equities clients (that is, including those without an open position at 17 May, but who had money in the '541 account, which held ETO and Equities clients' money), or all BBY clients; and *secondly,* that it is at least possible that even if the Returned Collateral is held on behalf of the Relevant ETO Clients, it would be "pooled" with the '541 Account (and possibly with other CSAs) on the basis that they have all potentially contributed to the '541 account, through the mixing of client funds across product lines.

54 The proposition that the Returned Collateral was held exclusively for the Relevant ETO Clients was advanced on a number of bases. Initially, in written submissions, Mazzetti argued that the Liquidators received 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

[9] The Returned Collateral is distinct from the cash surplus that was held by ASX after realising non-cash collateral to satisfy the cost of closing out ETO positions (referred to as Cash Stock Refunds).

them. This argument was rightly not maintained at the hearing, as the correspondence contained no such undertaking. However, Mazzetti contended (1) that the course of correspondence between the Liquidators and ASX Clear was such that the Liquidators received the Returned Collateral impressed with an equitable obligation to pay them only to the clients to whom the cover had been attributed pursuant to the arrangements between ASX Clear and BBY, namely the Relevant ETO Clients; and (2) that the Relevant ETO Clients had funded the cover which produced the Returned Collateral, and the arrangements between them, BBY and ASX Clear were such that no-one but they could have acquired any interest or entitlement in it.

The correspondence

55 On 5 June 2015, ASX wrote to the Liquidators (then *qua* administrators) and the Receivers, advising that it had that week completed "the orderly close out of all the net open derivatives positions and net unsettled cash market transactions registered in BBY's accounts with ASX Clear, other than for open derivatives positions which were either transferred to another participant or proceeded to expiry", and enclosing spreadsheets showing the transactions that closed out net open derivatives positions, closed out net unsettled cash market transactions, and realised collateral held in respect of BBY's derivative accounts. The spreadsheets included reconciliations for each of BBY's client-related derivatives accounts, showing the net amount payable in respect of each client account following close-out or expiry of open derivatives positions in the account; and the cash market account of BBY, showing the net amount payable by ASX Clear in respect of that account following close-out of net unsettled cash market transactions – all as at 5 June 2015. Under the heading "BBY's Client-related Derivatives Accounts", the letter stated (emphasis added):

> In relation to the client-related derivatives accounts, ASX Clear:
>
> • is ready to pay to BBY the total amount of remaining cash margin held in respect of BBY's client-related derivatives accounts as stated in the relevant enclosed spreadsheet (i.e. $3,401,907.54 in aggregate). We intend to pay this amount to BBY's ETO client trust account (BSB 332-027 Account Number 0000553XXX012) by direct deposit transfer on Tuesday, 9 June 2015. You must advise ASX Clear in writing by 12pm on Tuesday, 9 June 2015 if you wish that money to be paid into an alternative client trust account operated by BBY. *The money is to be held, and dealt with, in accordance with all applicable*

laws (including the Corporations Act) on behalf of clients entitled to the moneys; and

• intends to release from the subposition in its favour in CHESS, the financial products recorded as collateral in respect of BBY's client-related derivatives accounts which were not realised by ASX Clear in the management of BBY's default, as stated in the enclosed spreadsheet, on Tuesday, 9 June 2015.

56 The formula "to be held, and dealt with, in accordance with all applicable laws (including the Corporations Act) on behalf of clients entitled to the moneys" would, as will be seen, become a recurrent one.

57 On 8 June 2015, the Liquidators responded, relevantly (emphasis added):

1.2 The position regarding client monies

a) Our understanding is that it is common ground between all parties that St George Bank's security interest does not attach to client monies. We have made that position clear in previous correspondence and our understanding is that no dispute arises in that regard between the receivers, the Voluntary Administrators and the ASX.

b) We have noted in previous correspondence to keep client funds segregated for the purposes of *subsequent adjudications on client entitlements and distributions*. In due course it will be *the responsibility of the Voluntary Administrators of BBY and, if appointed, the liquidators of BBY, to deal with client monies and to ensure that client entitlements to those monies are satisfied in accordance with applicable law*.

…

2 RESPONSE TO ASX CORRESPONDENCE

Having made those comments, the Voluntary Administrators' response to the ASX's correspondence is as follows:

a) Thank you for the various spreadsheets and information on ASX Clear's close out and liquidation methodology which we are working through. We will be in touch if we have questions once we have completed our review.

b) In respect of the $3,401,907.54 in remaining cash margin you intend to pay to BBY Limited, we are unable to confirm whether the BBY ETO trust account as referred to in your letter is the right account into which to deposit the funds. The records in our possession indicate this is a dormant account. We understand the relevant account may be STG 553XXX541. We suggest you confirm this directly with St George Bank and the Receivers, who are managing the business and have access to this information.

58 One of the points that that letter was making was that the funds that would constitute the Returned Collateral were client moneys, not "house moneys", and thus not caught by St George's security interest. But the references to "subsequent adjudications on client entitlements and distributions", and to "the responsibility of … the liquidators of BBY, to deal with client monies and to ensure that client entitlements to those monies are satisfied in accordance with

applicable law", indicate that the Liquidators did not accept that entitlements to the funds to be returned were fixed.

59 On 9 June 2015, ASX wrote to the Receivers (emphasis added):

> As noted in the ASX Letter 5 June 2015 and the [Administrators'] Letter 8 June 2015, we intend to pay the net amount of cash margin held in respect of BBY's client-related derivatives accounts, in accordance with the ASX Clear Operating Rules. We agree with you, and the Administrators of BBY, that this payment should not be made to a general operating account of BBY but instead should be made into a client trust account maintained by BBY (payment in this manner is provided for in the Operating Rules).
>
> …
>
> ASX Clear stands ready to pay the net amount as soon as the trust account details are provided by you. *The payment which we make into the account which you notify us will be made on the basis that the money will be dealt with in accordance with the applicable law, including the Corporations Act*.
>
> We confirm that the net amount that we intend to pay is $3,400,115.54. The ASX Letter 5 June 2015 referred to the amount as $3,401,907.54. The difference follows from our re-checking of the spreadsheets provided to you on 5 June 2015.

60 On 11 June 2015, K&L Gates, the solicitors for the Receivers, responded to ASX, relevantly as follows:

> **BBY Client Monies**
>
> The Voluntary Administrators of BBY will, in due course, adjudicate on client entitlements and distributions and deal with client monies to ensure that client entitlements to those monies are satisfied in accordance with applicable law.
>
> We understand the Voluntary Administrators will provide you with relevant account details for the return of these monies in due course. That being so, it does not appear to be appropriate for our client to act as agent for ASX in the payment of the Surplus Proceeds (as referred to in your letter of 5 June 2015) and, instead, our client intends to make available the relevant books and records to the Voluntary Administrators to facilitate their adjudication on client entitlements and distribution and the return of client funds.

61 Although emanating from the Receivers and not the Liquidators, that letter conveyed to ASX the understanding that there would in due course be an adjudication by the Liquidators as to client entitlements and distributions in respect of what would become the Returned Collateral.

62 On 16 June 2015, King & Wood Mallesons, the solicitors for ASX Clear, wrote to K&L Gates and to the Administrators (emphasis added):

> **1 BBY Client Monies**

> The ASX Letter 5 June 2015 and the ASX Letter 9 June 2015 indicate that ASX Clear will pay the net amount of cash margin held in respect of BBY's client-related derivatives accounts, in accordance with the ASX Clear Operating Rules. ASX Clear understands that the Voluntary Administrators and the Receivers and Managers agree that the payment should be made into a client trust account maintained by BBY.
>
> ASX Clear was advised by the Voluntary Administrators in BBY Letter 8 June 2015 that the Voluntary Administrators were unable provide it with the relevant client trust account details as they did not have access to the relevant information and were not in a position to disburse client monies until they had carefully reviewed BBY's records and taken advice on their position. The K&L Gates Letter 11 June 2015 indicates that the Voluntary Administrators will be providing ASX Clear with the relevant account details and that the Receivers and Managers of BBY will be providing to the Voluntary Administrators the relevant books and records to facilitate the return of client funds.
>
> As notified in each of the ASX Letter 5 June 2015 and the ASX Letter 9 June 2015, ASX Clear stands ready to pay the net amount as soon as the client trust account details are provided to it. ASX Clear requests that the Voluntary Administrators confirm the position indicated by the solicitors for the Receivers and Managers and provide to it the relevant client trust account details for return of client monies at their earliest convenience.
>
> Following the provision of the relevant account details, *ASX Clear will pay the relevant monies into this account on the basis that the money will be dealt with in accordance with the applicable law, including the Corporations Act.*

63 The letter refers to the "return of client monies" on the basis that the money would be dealt with in accordance with the applicable law, including the *Corporations Act*; it does not stipulate return to the particular clients identified in the ASX Clear reconciliation.

64 On 19 June 2015, K&L Gates responded to King & Wood Mallesons, noting that ASX Clear was waiting upon certain confirmations and provision of the relevant client trust account details by the administrators, and raising an issue – not relevant for present purposes – in respect of deductions from "house money" by ASX Clear. On 20 July 2015, K&L Gates wrote to King & Wood Mallesons, pointing out that a month had passed since their 19 June letter, and relevantly (emphasis added):

> On the issue of client monies, the Liquidators have confirmed that, in due course, they intend to adjudicate on client entitlements, make distributions and deal with client monies to ensure that client entitlements are satisfied in accordance with the applicable law.
>
> As to paragraph 2 of Our Letter relating to the Liquidators providing to ASX Clear the relevant account details for the return of client monies in due course, in circumstances where the Liquidators intend to shortly seek Court directions it is appropriate that the client monies be paid into a bank account in the name of BBY for the purpose of holding the client monies *on trust for the relevant*

> *clients*. ASX Clear already has BBY's ETO client trust account details (being BSB 332-027 Account Number 0000553XXX012) as so ASX Clear is able to transfer the funds into that account without any further delay.
>
> In relation to ASX Clear's close out and liquidation methodology (that was enclosed with and referred to in your 5 June 2015 letter), the Liquidators have taken the position that they simply note the methodology used and calculations carried out by ASX Clear, but the Liquidators do not acknowledge the accuracy of any calculations nor have they carried out, nor are they obliged to carry out, their own calculations to check the accuracy of ASX Clear's calculations. The Receivers and Managers take a similar position and are of the view that any calculations undertaken by ASX Clear, and the accuracy of those calculations, are matters and responsibilities of ASX Clear.

65 Again, this letter, although emanating from the Receivers, referred to the Liquidators' intention "to adjudicate on client entitlements, make distributions and deal with client monies to ensure that client entitlements are satisfied in accordance with the applicable law". It is also to be noted that the accuracy and correctness of ASX Clear's calculations which resulted in the Returned Collateral and its allocation was not accepted by the Liquidators or the Receivers. The suggestion that "it is appropriate that the client monies be paid into a bank account in the name of BBY for the purpose of holding the client monies *on trust for the relevant clients*" must be read in that light, and in the context that this is correspondence from the Receivers to ASX (albeit copied to the Liquidators).[10]

66 On 22 July 2015, King & Wood Mallesons wrote to K&L Gates and to the Liquidators (emphasis added):

> **1 BBY Client Monies**
>
> The ASX Letter 5 June 2015, the ASX Letter 9 June 2015 and the KWM Letter 16 June 2015 indicate that ASX Clear will pay the net amount of cash margin held in respect of BBY's client-related derivatives accounts, in accordance with the ASX Clear Operating Rules. ASX Clear understands that the Liquidators and the Receivers and Managers agree that the payment should be made into a client trust account maintained by BBY.
>
> In the ASX Letter 5 June 2015, our client suggested that the payment of this money be paid into the account of BBY understood to be BBY's ETO client trust account. ASX Clear was advised by the Voluntary Administrators in BBY Letter 8 June 2015 that the Voluntary Administrators were unable to confirm that this was the correct account. However, in that letter, the Voluntary Administrators did suggest a different account may be appropriate but stated that they were unable to provide ASX Clear with the relevant client trust account details as they did not have access to the relevant information and

[10] For reasons explained at [71] below, the "relevant clients" referred to were those who would in due course be found to be entitled – not necessarily those identified in the ASX Clear reconciliation.

were not in a position to disburse client monies until they had carefully reviewed BBY's records and taken advice on their position.

However, in the K&L Gates Letter 20 July 2015, the Receivers and Managers stated that *the Liquidators have confirmed that they intend to adjudicate on client entitlements, make distributions and deal with client monies to ensure that client entitlements to those monies are satisfied in accordance with the applicable law*. K&L Gates then provided the following client trust account details (these are different to the details of the account suggested by the Voluntary Administrators).

BSB: 332-027

Account number: 0000553XXX012

As notified in each of the ASX Letter 5 June 2015, the ASX Letter 9 June 2015 and the KWM Letter 16 June 2015, ASX Clear stands ready to pay the net amount as soon as the client trust account details are confirmed to it. However, as there has been some discrepancy between the communications received by ASX Clear from the Liquidators (as they now are) and the receivers and Managers, ASX Clear requires clear, written instructions from both the Liquidators and the Receivers and Managers before it proceeds to disburse the client monies into a trust account.

Accordingly, as was requested in the KWM Letter 16 June 2015, ASX Clear requests that the Liquidators confirm the details provided by the solicitors for the receivers and Managers as most recently provided in the K&L Gates Letter 20 July 2015. Of course, if the relevant client trust account details for return of client monies differ from those listed above, ASX Clear requests both the Liquidators and the Receivers and Managers to advise ASX Clear of the correct client trust account details in writing.

Following the confirmation in writing of the relevant account details by the Liquidators in writing, ASX Clear will pay the relevant monies into this account on the basis that the money will be dealt with in accordance with the applicable law, including the Corporations Act.

67 Thus ASX were apprised (1) that the Liquidators had stated that they were not in a position to disburse client moneys until they had carefully reviewed BBY's records and taken advice on their position, and (2) that the Liquidators intended to adjudicate on client entitlements, make distributions and deal with client moneys to ensure that client entitlements to those moneys are satisfied in accordance with the applicable law.

68 On 30 July 2015, Ashurst, the solicitors for the Liquidators, replied to King & Wood Mallesons:

1. BBY CLIENT MONIES

1.1 As you have identified, it is common ground between all parties that St George's security interest does not attach to client monies. We have made this position clear in previous correspondence and our understanding is that there is no dispute regarding this matter between the receivers, the Liquidators or ASX Clear.

> 1.2 On this basis, we ask that your client immediately pay all funds remaining in any BBY client-related derivative accounts, which we understand to be approximately $3.4 million, into the following bank account as soon as possible:
>
> > **Account Name:** BBY Ltd (in Liq)(R&M Apptd) – E/ETO Trust Account 1
> >
> > **BSB:** 084-004
> >
> > **Account No:** 24-XXX-6043
> >
> > **Bank:** National Australia Bank Limited
>
> 1.3 So our clients can undertake a reconciliation of all monies returned as against the books and records of BBY, we request that ASX Clear provide our clients with an itemised breakdown of the funds returned:
>
> > (a) identifying the affected clients with entitlements to the funds according to ASX Clear's records;
> >
> > (b) the terms on which ASX Clear held those funds on behalf of BBY;
> >
> > (c) if the funds were held on behalf of clients of BBY, identifying the affected clients, and specifying the terms on which those funds were held by the ASX on behalf of clients; and
> >
> > (d) an itemised list of any application of those funds in favour of ASX Clear, with an explanation of the basis on which ASX Clear proposes to make that application (we understand that there are no such amounts).

69 Thus the Liquidators communicated to ASX Clear that they intended to reconcile all moneys returned with BBY's records. The request for information does not convey acceptance or agreement by the Liquidators that the Returned Collateral would simply be distributed in accordance with the ASX Clear reconciliation, but represents an attempt by the Liquidators to gain information to assist with their adjudication.

70 On 3 August 2015, King & Wood Mallesons wrote to K&L Gates and to Ashurst (emphasis added):

> Consequently, ASX Clear intends to pay the net amount of client monies to the account details supplied by the Liquidators by direct deposit transfer during the afternoon of Tuesday 4 August *on the basis that the money will be dealt with in accordance with the applicable law, including the Corporations Act.*

71 As has been mentioned, Mazzetti did not press its original contention that the Liquidators received 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. There was no such undertaking. Nor

does the correspondence 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. Consistently, the correspondence refers to the funds being paid and received "on the basis that the money will be dealt with in accordance with the applicable law, including the *Corporations Act*", and contemplates that the Liquidators will take advice and make adjudications as to entitlements. Mazzetti submits that there was no suggestion that the funds so paid would be used for clients other than "relevant clients", or pooled with other client money. However, the term "relevant clients", which was used in the K&L Gates 20 July letter, emanated neither from ASX Clear nor from the Liquidators, but from the Receivers, and is non-specific; in context it meant no more than those who were in due course found to be entitled in accordance with law – not necessarily those identified in the ASX Clear reconciliation. The only obligation acknowledged in or arising from the correspondence associated with receipt of the Returned Collateral was to deal with it "in accordance with the applicable law, including the *Corporations Act*".

Regulatory and contractual framework

72 Mazzetti submitted that the applicable regulatory and contractual framework had the effect that only those to whom the cover was attributed in the individual client accounts, as reflected in the ASX Clear reconciliation, could be entitled, any earlier equities having been extinguished.

73 As required by ASXC Rule 7.1.1, BBY entered into client agreements with its clients, relevantly BBY's "ASX, APX and International Trading Terms March 2014", Schedule 4 of which was entitled "Option Trading Agreement (Derivatives Client Agreement)" ("the Option Trading Terms"), and relevantly provided as follows:

> **10. APPLICATION OF ASX OPERATING RULES AND ASX CLEAR OPERATING RULES (ASX MINIMUM TERM 1, ASX CLEAR MINIMUM TERM 1 AND ASIC MINIMUM TERM (1)(d)(vii))**
>
> You and BBY agree that the terms of your relationship in respect of Derivatives Contracts, and any dealings between you concerning derivatives Contracts are subject to, and that you are bound by the *Corporations Act*, the ASIC Market Integrity Rules, the ASX Operating Rules, the ASX Clear Operating Rules and the procedures, customs, usages and practices of ASX,

ASX Clear and their related entities, as amended from time to time, in so far as they apply to derivatives Contracts. You acknowledge that each derivative Product registered with ASX Clear is subject to the ASX Clear Operating Rules and the practices, directions, decisions and requirements of ASX Clear.

…

13. MARGIN CALLS AND COVER

13.1 BBY may call for funds or security [ASX Clear Minimum Term 6]

BBY may call for payment of money or the provision of other security (Cover) which BBY considers, in its absolute discretion, appropriate in connection with the obligations incurred by BBY in respect of Derivative Contracts entered into on your account. You acknowledge that BBY is entitled to call for Cover under this clause of an amount or value which exceeds the amount of the Cover which BBY is required to provide to ASX Clear in respect of the Derivative Contracts registered with ASX Clear in your Client Account. The time by which you must pay any amount called or provide any security is of the essence. You must pay the amounts, or provide the relevant security, within 24 hours of the call for payment.

13.2 Application of funds or financial products to satisfy calls

You authorises [sic] BBY to withdraw or otherwise apply funds or financial products held on your behalf to partially or fully satisfy such calls.

…

19. PAYMENTS AND DEFAULT

19.1 Client funds and property [ASX Clear Minimum Term 15]

BBY must deal with any money or property paid or given to BBY in connection with the BBY/client relationship in accordance with the *Corporations Act* and the ASX Clear Operating Rules.

19.2 Combination, deposit and use of funds [ASX Clear Minimum term 15]

(a) You acknowledge that your monies and the monies of other clients of BBY may under the ASX Clear Operating Rules be combined and deposited by BBY in a trust account or clients' segregated account. You acknowledge that all monies credited to your segregated account maintained by BBY may be used by BBY to meet the default of any other client of BBY.

(b) Despite clause 19.2(a), BBY agrees that it will only pay your monies into a trust account.

74 Thus the client acknowledged that it was bound by, *inter alia,* the *Corporations Act* and the ASXC Rules, and that BBY was entitled to call for Cover from the client of an amount which exceeded the amount of the Cover that BBY was required to provide to ASX Clear in respect of derivative contracts registered with ASX Clear in its client account; authorised BBY to withdraw and apply its funds to meet such calls; and acknowledged that under the ASXC Rules its moneys and those of other BBY clients may be combined and deposited by

BBY in a trust account or CSA, and that all moneys credited to its CSA may be used by BBY to meet the default of any other BBY client.[11]

75 BBY established separate client accounts with ASX Clear for each client (Rule 10.1.1(b)), and ASX recorded the amount of cash cover credited to BBY in respect of each such account (Rule 10.2.2). Cash cover so credited by ASX Clear became the absolute legal and beneficial property of ASX Clear, and BBY had no proprietary right or proprietary interest in it; but there was a corresponding debt owed by ASX Clear to BBY for the amount of the credit balance (Rule 10.3.1). In the event of insolvency of BBY, ASX Clear could not apply any amount of cash cover recorded in respect of a client account in or towards payment or satisfaction of BBY's obligations in respect of transactions on house accounts (provided that the liquidator confirmed that the liquidator would deposit that amount in the account maintained by the participant for the holding of client money, if ASX Clear paid that amount to BBY; and would either distribute that amount to BBY clients or apply it to discharge liabilities of the same amount that clients owe to BBY); but this created no proprietary right or interest in any cash cover in favour of BBY or its clients (Rule 10.3.4).

76 Accordingly, BBY's rights against ASX Clear in respect of cash cover are those of creditor against debtor. However, in respect of cash cover on client accounts, BBY is not entitled to receive the debt for itself, but must apply it for the benefit of its clients. Thus, while cash cover is the property of ASX Clear, it is represented by a debt due from ASX Clear to BBY, which debt BBY holds upon trust for its clients.

77 The Opposing Defendants submitted that the act of attributing the cover proffered by a participant to a client account served no more than a record-keeping function for ASX Clear's purposes, and that the fact that an attribution was variable would tend to undermine any suggestion that any attribution by ASX Clear amounted to a recognition of a particular client's interest in, or

[11] Under clause 19.2(b) of the Option Trading Terms, BBY undertakes to pay the client's moneys only into a trust account. The precise intent of clause 19.2(b) is somewhat obscure. Clause 19.2(b) is not included in the Minimum Terms in Schedule 5 to the ASXC Rules, and so must be an additional term agreed between BBY as participant and its clients. Accordingly, BBY appears to have undertaken not to exploit all the rights referred to in clause 19.2(a), and thus to have in some way limited the powers it would otherwise have had, but this is obscure and need not be resolved for present purposes.

entitlement to, any portion of the cover provided by a participant. However, the facility for maintaining separate client accounts is provided not for ASX Clear's own purposes, but to enable participants to record their various clients' interests separately. While I accept that attribution to an individual client involves no acknowledgement *by ASX Clear* of an individual client's equitable interest, such attribution does involve an acknowledgement *by BBY* of its client's equitable interest in the corresponding debt due from ASX Clear to BBY – just as a solicitor, by crediting a client's ledger in the solicitor's trust account, acknowledges that client's equitable claim.

78 However, that does not mean that if the attribution does not reflect the true beneficial ownership, it is conclusive. Nor does it exclude the possibility that, if the source is a mixed fund, the true beneficial entitlement may reside otherwise than where it has been attributed on BBY's instructions to ASX Clear. Mazzetti submitted that in Rule 10.3.4, "Clients of the Participant" means those specific clients to whom the cover was credited, and that Rule 10.3.1 meant that any earlier equities were extinguished, so that those entitled were those to whom the cover was attributed in the individual client accounts. However, Rule 10.3.1 is concerned with the position between ASX Clear and BBY, and not with how BBY holds the debt due to it from ASX Clear; and neither the express terms of Rule 10.3.4 nor its context supports the construction advanced by Mazzetti. The confirmation required of the liquidator is that the money will be deposited into the account maintained by the participant for the holding of client money, and either distributed to clients (generically) or applied to discharge liabilities that clients (generically) owe to the participant. There is no such definite term as "those", to indicate that the reference is confined to those clients to whose accounts the cover was credited. This reflects the overall approach in the ASXC Rules of providing a facility that enables a participant to have cover attributed to particular clients, while treating the relationship between participant and client as one for the participant, and not ASX Clear, to manage.

79 Moreover, Rules 14.6.1 and 14.7.1 operate in the context of a regime that permits funds of a client provided in connection with trading in derivatives to be used by the licensee to meet a margin obligation incurred in respect of another client's trading. Thus conformably with *Corporations Act,* s 981D (which, as

already noted, relevantly provides that money paid to a licensee in connection with a dealing in a derivative may be used for the purpose of meeting obligations incurred by the licensee in connection with margining or settling dealings in derivatives by the licensee on behalf of people other than the client), and clause 19.2 of the Option Trading Terms, cover attributed to one client may have been provided from another's moneys. In the light of the real possibility that one client's moneys have been used to fund another's margin obligations, the ultimate beneficial entitlements may not accord with the manner in which cover has been attributed between client accounts.

80 Accordingly, the intent of Rule 10.3.4 is that in the event of insolvency, while certain steps are required to ensure that "client money" is kept segregated from "house money" and preserved for the benefit of clients, the ultimate allocation of those moneys between clients is the responsibility of the participant (or its liquidator). It follows that 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 – any more than clients are necessarily beneficially entitled to the funds in a solicitor's trust account as recorded in the trust ledger, if there has been a mixing.

Source of Returned Collateral

81 However, Mazzetti submitted that in this case the Relevant ETO Clients are the only persons who could conceivably be entitled to the Returned Collateral, because they and only they provided the funds in which the Returned Collateral was sourced, and no-one but they could have an interest in it. The contrary argument – that the Relevant ETO Clients are not exclusively entitled to the Returned Collateral (as also is the argument that it may be subject to pooling) – is founded on the proposition that the Returned Collateral was sourced in the '541 account, a CSA which contained moneys of other BBY Equities and ETO clients, not limited to the Relevant ETO Clients.

82 As has been explained,[12] when BBY was required to make a net payment to ASX Clear, it did so (at least from about March 2015), by first paying the required amount to ASX Clear from its Facilitation Account, an overdraft

[12] See [17]-[19] above.

account with St George; then reimbursing itself from the '541 Account, which contained moneys of all ETO and Equities clients (not just Relevant ETO Clients), before that account had received funds from those ETO clients whose individual cover obligations had increased; and later (the same day or the next business day), replenishing the '541 Account from the CMAs and DEAs of the ETO clients whose obligations had increased, by the amount of their respective increase. The only relevant difference prior to March 2015 was that the Facilitation Account was not used, and payments were made to ASX Clear directly from the '541 Account.

83 Thus, both before and after the change of procedure in March 2015, funds were drawn from the '541 Account – either to reimburse the Facilitation Account (via the General Account), or to be paid directly to ASX Clear - before the corresponding client funds had been received (from the CMAs and the DEAs) into the '541 Account;[13] so that it is at least possible that there was a shortfall in the balance of the '541 Account when compared to the total amount BBY was required to hold on trust for its clients, and that by making a payment from the '541 Account in excess of that already received from the clients to whom the payment was referable, BBY may be regarded as having drawn on moneys deposited by other ETO or Equities clients, although in the ordinary course the balance was restored by the end of the day (or, perhaps, the following day, when the DEA funds were received).[14]

84 There are at least two reasons why this may not mean that the Returned Collateral should be regarded as sourced in, or derived from, the moneys of other clients held in the '541 Account, but exclusively sourced in the moneys of the Relevant ETO Clients. The first is that, at least from March 2015, the immediate source of the payment to ASX Clear was the Facilitation Account – that is to say, moneys borrowed by BBY on overdraft from St George; the '541 Account did not provide the immediate source of funds for the payments to ASX Clear, notwithstanding that it provided a (transient) source of funds for the prompt replenishment of the Facilitation Account. The second, which applies before as well as after March 2015, is that the '541 Account was itself

[13] Mr Vaughan's 23 December 2015 affidavit at [231]-[232].
[14] Mr Vaughan's 23 December 2015 affidavit at [240(a)].

replenished by moneys drawn from the CMAs and DEAs of the ETO clients who were required to contribute cover, so that any deficit in the '541 Account was only transitory. This is significant in two ways: first, because if it is right to regard the '541 Account as relevant because it was used to replenish the Facilitation Account, then it must equally be right to have regard to the replenishment in turn of the '541 Account by the ETO clients; and secondly, because it shows that in substance – despite the interposition of the '541 Account and the Facilitation Account – the ultimate true providers of the cover were the ETO clients. In other words, there was ultimately no depletion of the '541 Account to fund the cover. The position of the '541 Account, and of the '541 Account clients, was no different after the series of reimbursements than at the outset.

85 In *MF Global*, Black J rejected a submission that the only persons entitled to post-appointment recoveries from clearing houses and agents in respect of futures contracts were the particular futures clients whose positions were cleared, holding that for the purpose of s 981H(1) the recoveries were received "on behalf of" all those persons who had contributed to the mixed fund from which margin payments had been made, in circumstances where that margin was calculated on a net basis and may have been paid from client segregated accounts holding other clients' funds.[15] His Honour said:[16]

> [196] The terms of Pt 7.8 Div 2 Subdiv A also indicate that the concept of "on behalf of" extends beyond agency, since s 981D refers to dealings "on behalf of" people other than the client, although that section deals with derivative transactions which are generally, if not invariably, undertaken between parties trading as principal rather than on an agency basis. The reference to "on behalf of" there cannot be limited to an agency relationship since otherwise it would have no or very limited application in the very kind of transaction to which the section is directed.
>
> [197] MFGA relied on the authority conferred under the client agreements to pay the margins on the relevant transactions to Futures Agents from the mixed Futures CSAs. In my view, MFGA therefore acted on the instructions of, or as auxiliary to and for the benefit of, Futures clients collectively in paying those margins from the mixed Futures CSAs and, by extension, in receiving the Futures Recoveries from Futures Agents. It can therefore properly be said that MFGA received Futures Recoveries from Futures Agents "on behalf of" Futures clients collectively, within that wider meaning of that term. For that reason, the Futures Recoveries would properly be deposited to the mixed

[15] MF Global at [184]-[198].
[16] MF Global at [196]-[198].

> Futures CSAs from which the margins had been paid, and they would then be subject to the trust imposed under s 981H and reg 7.8.03(4) and would be distributed in accordance with reg 7.8.03(6) following the appointment of administrators to MFGA.
>
> [198] In my view, the terms of reg 7.8.03(6) in turn require a proportionate distribution of the Futures Recoveries, without weighing the strength of different forms of entitlement to those recoveries. Even if I were wrong in that view, and regard is to be had to the relative strengths of claims to those proceeds in determining the entitlement to the Futures Recoveries for the purposes of reg 7.8.03(6), I consider that all Futures clients have equal claims to all Futures Recoveries where the payments of margin to Futures Agents from which they were derived were funded from the mixed Futures CSAs to which all Futures clients had contributed. The fact that a particular position was opened as agent for a particular client with a particular Futures Agent does not, in my view, change that result.

86 The Opposing Defendants submit that what happened in the present case is not relevantly distinguishable – that the source of the Returned Collateral was a mixed fund, namely the '541 Account, and thus that it should be seen as having been returned for the benefit of derivatives clients who contributed to that account, not only the Relevant ETO Clients.[17]

87 As it seems to me, the crux of the decision in *MF Global* was that the margin was funded from a mixed fund, and the amount of margin recorded in an individual client's Futures ledger account that may have actually been remitted from a CSA to the Futures Agent was unknown. Funds initially paid by clients to MFGA were mixed by product line in CSAs; payments by MFGA to counterparties were made from this mixed fund; and so moneys repaid by counterparties to MFGA were also to be regarded as of a mixed character and not attributable to a particular Futures client.

88 If it were established that in the present case, any relevant "mixing" was transitory, with any drawing on the '541 Account to fund Cover being followed, within 24 hours, by replenishment of the '541 Account from the relevant clients' CMAs and DEAs, so as to return the '541 Account to the *status quo ante,* then it could not be said that, in reality, the '541 Account was used to fund the margin payment, because it was not ultimately depleted to fund the collateral.

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[17] In Sonray, Gordon J referred to 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: Sonray at [83]. The extent to which equitable tracing principles should be applied in this context may be limited, given the relevant statutory context: See In the matter of All Class Insurance Brokers Pty Ltd (in liq) [2014] NSWSC 475 at [46] (White J).

MF Global does not in my opinion dictate that if it can be seen that in reality individual clients have funded the returned Cover, 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. In that event, each payment to ASX Clear would not have been made on behalf of all clients collectively, but of an amount which represented the net amount due on account of the sum of individual clients. Despite the interposition of the '541 Account, the exercise ultimately was not a collective enterprise, but one on a myriad of individual accounts, netted off, with each payment to and from ASX reflecting the net amount due after offsetting the various countervailing obligations, in respect of each of which there was prompt replenishment or reimbursement from or to each relevant client's CMA or DEA. If the Relevant ETO Clients fully met their obligations to provide cover, so that there was ultimately no depletion of the funds of clients other than the Relevant ETO Clients for that purpose, then there has been no ultimate use of other '541 Account money, and it would be inappropriate to treat the cover to ASX as having been provided by anyone other than them. In that event, in substance, it would not have been '541 Account money, but the Relevant ETO Clients' money from their CMAs and DEAs, that was being used to pay or top up margin.

89 However, a critical integer of this argument is that any depletion of the funds in the '541 Account was promptly remedied, as soon as the Relevant ETO Clients' funds arrived from their CMAs. If a Relevant ETO Client failed to make its contribution – for example, if there were insufficient funds in its CMA to do so – then the funds of other clients in the '541 Account continued to provide part of the cover attributable to the Relevant ETO Clients. Mazzetti submitted (1) that there is no evidence of any occasion where a Relevant ETO Client failed to make good that reimbursement; and (2) that it is highly improbable that that could have occurred, since any defaulting ETO client would have had its position closed out and any cover recovered from ASX Clear.

90 The problems with that submission include (1) the absence of evidence of any failure to replenish is not equivalent to proof that there was never any such failure; (2) the fact that BBY had provided cover to ASX Clear that (with the exception of two identified client accounts in respect of which there were

shortfalls of $3,090 and $1,676 respectively) fully covered the open positions does not mean that BBY had been fully reimbursed by its clients; (3) one possible explanation for the circumstance that the Erroneous Withdrawals cannot completely be reconciled with ETO margin payable on 19 May 2015 is that some of the relevant BBY clients may have had an insufficient balance in their CMA to permit withdrawal of the entire ETO margin amount;[18] and (4) "regardless" matter (g) requires that the possibility that a client might also be a debtor to BBY be left open, so that the circumstance that it might be highly improbable is not enough.

91 This conclusion is reinforced by the implications of *Corporations Act*, s 981D, and the terms of the Client Agreements, referred to above, which mean that the amount of cover a client provided to BBY did not necessarily correspond to the value of the cover that BBY had put up in relation to that client's derivative contracts; that cover provided by BBY in respect of a client's contracts could have included funds paid to BBY by other clients; and whatever cover a client did provide to BBY could be used by BBY to meet margin requirements arising out of the open positions of other clients. It is at least possible that BBY may have, as permitted by s 981D, used the funds of other derivatives clients held in the '541 Account to meet margin obligations of Relevant ETO Clients.

92 While it is clear that a participant such as BBY may permissibly use moneys paid by one derivatives client to meet a call for cover relating to other derivatives clients, it is less clear what legal consequences flow from such a use of one client's moneys to meet obligations of another. *Corporations Act,* s 981D (and clause 19.2 of the Option Trading Terms) must mean at least that no breach of trust is involved in doing so. But s 981D 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 one to *use*, for limited purposes, not to appropriate.

93 On the other hand, it would be a curious result 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. As there is no direct

[18] Mr Vaughan's 23 December 2015 affidavit at [250].

relationship between the two clients, the preferable analysis is that where a participant permissibly uses the funds of one client to meet the margin or security obligations of another, that participant becomes a borrower from the first and a lender to the second client. In other words, the participant (permissibly) borrows from the trust account, and lends to another client; but the first client does not have a right to trace the moneys into the hands of the second.

94 A consequence of this is that, conceivably, some Relevant ETO Clients may be debtors to BBY, while other clients may be creditors of BBY. 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. For that reason also, the outcome of "regardless" matter (g) – whether any clients are also debtors of BBY and, in this regard, any issues relating to set-off – could well affect whether BBY is entitled to apply at least some of the Returned Collateral to satisfy obligations of Relevant ETO Clients to it.

95 Thus having regard to the basis on which the separate question must be considered, it is 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, cannot at this stage 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 may be debtors to BBY. This means that it is not possible to conclude, at this stage, that the Returned Collateral is sourced solely in funds provided by the Relevant ETO Clients, or that whether any clients are also debtors would make no difference.

Conclusion as to Returned Collateral

96 It follows that, in respect of the Returned Collateral, the separate question must be resolved in the negative. As it is not possible to conclude that the Returned Collateral is held exclusively on behalf of the Relevant ETO Clients, it is unnecessary to resolve the further submission of the Opposing Defendants that, even if it were, it would 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.

ERRONEOUS WITHDRAWALS

97 The "Erroneous Withdrawals" comprise 197 payments, totalling $2,396,157.41, received into the '541 account on 19 May 2015, after BBY's ASX market participation was suspended by ASX Clear at about 10.50am on 18 May 2015 (after settlement of BBY's ETO margin obligation for that day with ASX Clear), which were referable to ETO margin payments that BBY would have been required to settle (after netting off any cover to be returned) with ASX Clear at about 10.30am on 19 May 2015, in circumstances where BBY did not in fact settle its ETO margin obligation with ASX Clear on 19 May 2015 (or at any time thereafter). Mazzetti claims to be entitled to the Erroneous Withdrawals on two bases:

(1) Primarily, that they were amounts paid into the '541 Account "in error", for the purpose of reg 7.8.03(6)(a); and

(2) Alternatively, that the funds are impressed with a trust, on the basis that they have been received by a volunteer, for a purpose which has failed – namely funding or reimbursing payments by BBY to ASX Clear to meet margin calls in respect of the relevant clients.

98 All the Opposing Defendants contend that, in respect of the Erroneous Collateral, the separate question should be answered in the negative, without prejudice to Mazzetti's right at the final hearing to seek to establish an entitlement to the return of those funds in priority to any other claims upon them.

Can the Erroneous Withdrawals be separately identified?

99 A preliminary question is whether the Erroneous Withdrawal funds are identifiable.

100 Immediately prior to the deposit of the Erroneous Withdrawals, there was $7,207,698.01 in the '541 Account. The Erroneous Withdrawals were added to

those funds. As at 31 August 2015 and 15 September 2015, the Erroneous Withdrawals remained in the '541 Account. As at 4 December 2015, the balance of the '541 Account was $10,722,948.33. There have been no post-administration withdrawals from any of the CSAs, including the '541 Account.

101 It follows that the Erroneous Withdrawals remain in the '541 Account and, because there has been no subsequent withdrawal from that account, there should be no difficulty in identifying – and, if appropriate, extracting – deposits made since the administration date. I proceed on the basis that the funds representing the Erroneous Withdrawals can, if necessary and appropriate, be identified and segregated from the '541 Account.

Payment in error

102 The first basis on which Mazzetti contends for an affirmative answer to the separate question in respect of the Erroneous Withdrawals is that they were paid into the '541 Account "in error" for the purposes of (CTH) *Corporations Regulation*, reg 7.8.03(6)(a), which relevantly provides that, in the case of insolvency, the first payment out of money in the account of the financial services licensee maintained for s 981B is of "money that has been paid into the account in error". In order to obtain an affirmative answer to the question in respect of the Erroneous Withdrawals, Mazzetti must establish that, irrespective of the "regardless" matters, the payment of those funds from the CMAs of the Relevant ETO clients into the '541 Account was "in error". The relevant "regardless" matters include whether or not:

> (i) the withdrawal of the Erroneous Withdrawals from client CMAs occurred as a result of an automatic process that BBY failed to disable or as a result of positive actions taken by employees of BBY and/or the Receivers;
>
> (j) BBY was authorised to withdraw the Erroneous Withdrawals from client CMAs; and
>
> (l) as at 19 May 2015, the Erroneous Withdrawals or any part of them might have been required to satisfy the ultimate cost to close out any open ETO position.

When is a payment "in error"?

103 In *MF Global,* where the liquidators had sought a direction that all amounts paid into client accounts after the appointment date should be returned on the basis that they were paid in error, Black J held that error was established,

regardless of the subjective intention of those making the payments, because they were made on an assumption which had been falsified:[19]

> In my view, error is established in respect of payments into the CSAs after the Administrators' appointment irrespective of the subjective intention of those making the relevant payments, because those payments were plainly made on the assumption that MFGA was undertaking an ongoing financial services business, in connection with which those payments were made. That assumption was falsified from the Appointment Date, because from that date MFGA was practically unable to conduct such a business, and in any event the Administrators properly ceased to conduct such a business.

104 However, in *In the matter of All Class Insurance Brokers Pty Ltd (in liq),* White J expressed the view that relevant error for the purpose of reg 7.8.03(6)(a) would be the error of the person making or directing payment, and would not be established where the payment was made as intended by the payer, notwithstanding that the intention was procured by fraud:[20]

> No creditor submitted that it is entitled to first payment out of the account because it was in error in paying money to the company, having been induced to do so by fraud. In my view, the relevant error for the purpose of reg 7.8.03(6)(a) would be the error of the person making or directing payment to the account. Even if a creditor made the payment directly to the trust account, as distinct from merely paying the company, and was induced to do so by fraud, I do not consider that it would have acted merely in error. The moneys would have been paid into the intended account albeit that the payment was induced by fraud.

105 Whether a payment is made *into an account* "in error" will depend, at least usually, on the purpose of the payer. If the payment is so made that the payer's purpose is not achieved, because of some mistake, it will have been made in error. Thus if the payer's purpose is to pay Party A, and by mistake (whether of the payer in drawing the cheque or making an online transfer, or of the receiving bank) the payment is made into an account of Party B, it is paid into Party B's account in error. If the payer's purpose is to pay a solicitor's bill, and the payment is made to the trust account rather than the general account, it will have been paid into the trust account in error; on the other hand, if the purpose is to put the solicitor in funds to complete a purchase for the client, and the payment is deposited into the general account, it will have been paid into the general account in error. Accordingly, it is the purpose of the payer, rather than who makes the error, that is important. A payment is made *into an account* "in

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[19] MF Global at [165].
[20] [2014] NSWSC 475 at [39].

error" if having regard to the purpose of the payer it ought not have been paid into that account.

106 That is a different concept from a payment which would not have been made but for a misrepresentation, or a false assumption. "Error" connotes mistake, rather than misrepresentation. Like a payment procured by a misrepresentation, a payment deliberately made, albeit upon a false assumption, is made intentionally, not mistakenly. A payment made in accordance with the payer's intention is not made in error – notwithstanding that the intention might have changed had other facts been known.

Was there "error" in this case, "regardless…"?

107 As has been observed, the ASXC Rules in respect of ETOs provide for ASX Clear to calculate a participant's margin obligations (Rule 14.5.1) and to notify the participant of those obligations (Rule 14.5.2), and that the participant must provide cover for those obligations (Rule 14.6.1), and call cash or other collateral from its clients sufficient to ensure that the participant is able to satisfy its obligations to ASX Clear (Rule 14.7.1).

108 Upon the suspension of BBY on 18 May 2015, following the commencement of the voluntary administration and the appointment of the Receivers, its clients were informed that ASX Clear would consider whether their derivatives positions might be transferred to another clearing participant, but only if the new clearing participant provided written notice to ASX Clear by 1.30pm on 18 May 2015 of the clients whose positions were sought to be transferred to it, and confirmed in that written notice that it had client instructions to transfer those positions and could complete that transfer by 5pm on 20 May 2015. Where a client's position was not transferred in accordance with that procedure, it was earmarked for closing out. ASX Clear began the process of closing out those ETO positions on 19 May 2015, and completed it on or about 21 May 2015. There was thus a period – from 19 May 2015 until 21 May 2015 – when the positions of those ETO clients who had open positions as at 18 May 2015 remained open, while ASX Clear undertook the close out process.

109 Under Rule 19.5.1, mere suspension does not terminate the "admission" of a participant; thus, suspension does not have the consequence that the

participant ceases to be a “participant”, that is to say a person admitted under Rule 3.1. Nor is a suspended participant in any way relieved of its obligations under Rules 14.6.1 and 14.7.1 to provide cover to meet margin requirements determined by ASX Clear, and to call for cash or other collateral from its clients in amounts sufficient to ensure that it is able to satisfy such margin requirements. This is readily understandable, because despite the suspension of a participant, the open positions of its clients remain exposed to adverse movements, in respect of which ASX Clear would still wish to be protected.

110 Thus the suspension by ASX Clear of BBY's participation with effect from 18 May 2015 did not preclude ASX Clear from making margin calls after that date, nor relieve BBY of its obligations, during the period of suspension, to provide cash or other collateral to meet margin requirements determined by ASX Clear, and to call for cash or other collateral from its clients in amounts sufficient to ensure that it was able to satisfy such requirements. Clients had a corresponding ongoing obligation to contribute cover to meet margin calls, after, as well as before, BBY was suspended from participation.

111 That BBY had margin obligations to ASX Clear on 19 May is uncontroversial. Mazzetti accepts that BBY had ETO margin obligations with ASX Clear for 19 May 2015, amounting to $2,914,469.12. The Relevant ETO Clients had corresponding obligations to contribute cash or collateral to enable BBY to meet its obligation to ASX Clear.

112 The Erroneous Withdrawals were characterised by the Receivers as “invalid margin calls”, because no payment was made in respect of them by BBY to ASX Clear. However, the fact that the Receivers did not pay BBY’s margin obligations on or after 19 May 2015 does not mean that BBY had no obligation to do so, or to call for cash or other collateral from its clients to enable it to do so. Neither the appointment of administrators and Receivers, nor, as has been seen, the suspension of BBY as a participant, terminated BBY’s legal obligation to pay any call made on it, or its right to make a call on its clients, or its clients’ obligation to meet any such call. The liability of clients to meet margin calls made by BBY on them is not affected by the fact that BBY may not have met calls made by ASX Clear on it.

113 “Regardless” matter (i) concerns the mechanism by which the Erroneous Withdrawals were made, and in particular whether they occurred as a result of an automated process that BBY failed to disable or as a result of positive actions taken by employees of BBY and/or the Receivers. In the way in which BBY’s systems appear to have operated, it was a margin call from ASX Clear that would trigger the generation of the reports that would ultimately “sweep” the requisite contributions from clients’ CMAs and DEAs. The overwhelming probability is that the Erroneous Withdrawals were made in response to margin calls made and notified by ASX Clear to BBY between 18 and 20 May 2015. Three possibilities have been postulated. The first (and most likely) is that the withdrawals were automatically generated, pursuant to a report that identified the amount payable to ASX and recoverable from clients. An alternative possibility is that the payments were made as a result of a conscious decision by or on behalf of BBY or the Receivers to make the call on clients. A third – intermediate – possibility is that the process which had been in place before the administration date was not entirely automated, but was not overridden. However, all three scenarios involve the use – intentional or unintentional – of the clients’ standing authority to draw funds from their CMAs (or DEAs) to fund their margin obligations, in circumstances where the Receivers had determined not to pay BBY’s margin obligation to ASX Clear. The essential variable is whether or not the Receivers would have stopped the process, had they adverted to it. (Although it was said that the Receivers could not have turned their mind to the question, “regardless” (i) means that the possibility that they did must, at this stage, remain open).

114 Insofar as it might be suggested that relevant “error” is to be found in failure on the part of BBY – by the Receivers – to cancel the daily “sweep” to reimburse BBY on account of margin payments, when it had not made and did not intend to make those payments, that would not establish that the Erroneous Withdrawals ought not have been made. As already explained, BBY remained obliged to meet margin calls by ASX Clear, and to make calls on its clients, and clients remained obliged to meet calls made by BBY on them. BBY's failure to meet its margin obligations to ASX Clear does not relieve it of its obligation to do so, nor affect its right to margin call its clients to enable it to do so. No

obligation to “cancel” the sweep arose, and so even if “error” by the Receivers be relevant, there was no relevant “error” in failing to cancel the sweep.

115 Mazzetti contended that there was error because the payments were made only because the clients had not countermanded or revoked their authorities, wrongly assuming that BBY was still an active participant in the market. In this respect, Mazzetti relied on the approach adopted by Black J in *MF Global,*[21] set out above. Although it was correctly pointed out that *MF Global* did not involve an automatic “sweep” of clients’ accounts, I accept that in principle it is indistinguishable. However, as explained above, I do not accept that a payment made in accordance with the payer’s intent to achieve the payer’s purpose can be said to be “in error” just because it would not have been made but for a false assumption.

116 In this case, the payments were made in accordance with a system which had been established for the purpose of BBY and its clients meeting their margin obligations. The Erroneous Withdrawals were payments made by clients pursuant to their existing liability in respect of extant open positions. As ASXC Rules 14.6.1 and 14.7.1 continued to bind BBY, the collection of funds from the CMAs and DEAs of ETO clients on 19 May 2015 took place in accordance with that system, and in accordance with extant authorities, notwithstanding the Receivers’ decision not to settle ETO's margin obligations with ASX Clear for that day. *Prima facie*, they were made in accordance with the clients’ authority and intent, and the system that was in place. Even if – as seems probable – the withdrawals were the product of an automated or routine process that was inadvertently permitted to continue to operate, that merely demonstrates the continuing operation of a process by which BBY sought to discharge its obligations under Rule 14.7.1 of the ASXC Rules. Given that there was a legal obligation on the part of the clients to make the payments, the circumstance that, had they been informed of the suspension of BBY, they might have preferred not to do so, does not mean that the payments ought not have been made. It is not self-evident that in those circumstances the affected clients would have countermanded the payment, let alone that they were entitled to do so.

[21] MF Global at [165].

117 It might be that “error” in the relevant sense could be established if BBY had ceased to be authorised to make such withdrawals. However, given “regardless” matter (j) – which is whether BBY was authorised to withdraw the Erroneous Withdrawals from client CMAs – the separate question can be answered in favour of Mazzetti at this stage of the proceedings only if the presence or absence of client authority makes no difference. At least unless BBY’s authority had ceased – a matter which must remain open, under “regardless” matter (j) – it cannot be said that the payments ought not have been made.

118 It follows that, in this sense, the Erroneous Withdrawals were not payments made “in error”. However, there remains an argument, which is more conveniently addressed below, that they were “paid *into the ‘541 account* in error”.

Alternative basis – trust

119 Mazzetti also invokes a trust law basis for the return of the Erroneous Withdrawals, namely that if, on 19 May 2015, BBY and the Relevant ETO Clients were obliged to provide cover to meet margin calls by ASX Clear, but the Erroneous Withdrawals were not used for that purpose, they are held on trust to return them to those who provided them.

120 It is clear that the Erroneous Withdrawals were not in fact used for the purpose of covering clients’ positions, but remain in the ‘541 Account. Mazzetti submits that the funds so paid into the '541 Account after the administration date should be regarded as being held on a separate trust, and ought to be returned to the beneficiaries of that trust – or that a resulting trust has arisen over the Erroneous Withdrawals in favour of those beneficiaries – being the Relevant ETO Clients. The Opposing Defendants submit that, as the Erroneous Withdrawals were paid into the '541 Account, each of those clients would, for that reason, answer the description of a person who is entitled to be paid money from an account of the financial services licensee maintained for *Corporations Act*, s 981B, and that by reg 7.8.03(6) the Relevant ETO Clients could only be entitled to the return of the Erroneous Withdrawals in priority to

any other claims upon the ‘541 account if they can establish that they were paid into the ‘541 Account “in error”.

121 Mazzetti’s submission involves two alternative but not inconsistent propositions: the first is that the Erroneous Withdrawals were paid *into the ‘541 account* in error, in the sense that they ought to have been paid into a different, separate account, to which the relevant clients would be exclusively entitled; and the second is that the Erroneous Withdrawals now held in the ‘541 Account are not subject to the regime provided by reg 7.8.03(6), because they were received into the ‘541 Account after the administration date.

122 The first correctly recognises that reg 7.8.03(6)(a) is concerned not merely with amounts paid in error, but with amounts paid *into the relevant account in error.* As Mazzetti submits, money called for and received after the administration date should not have been mixed into a deficient pre-administration CSA. The purpose of the relevant clients in making the payment was that the funds would be used to cover their open positions. If they were not required for that purpose, the implied intention is that they be returned – not mixed with a potentially deficient pre-administration CSA. The Receivers ought to have kept moneys received after their appointment separately. Accordingly, the Erroneous Withdrawals ought not have been paid into the ‘541 Account, but into a separate account, and they were therefore paid *into the ‘541 Account* in error. As they can be identified and segregated from the ‘541 Account, they can still be treated as a separate (and not a mixed) fund, which is held on resulting trust for the clients from whose CMAs and DEAs they were withdrawn, and should be returned to them.

123 As to the second, the question concerns the time at which reg 7.8.03(6) operates, and in particular whether it applies as at the date of the insolvency event, or some later date such as the distribution date. Several considerations tell in favour of the view that it is directed to the date of the insolvency event. First, the authority for the Regulation, found in s 981F, is to make provision “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 … the licensee becomes insolvent”; the focus is the money in the account (or the investment

thereof) when the licensee becomes insolvent. Secondly, and consistently, the Regulation applies "if a … licensee becomes insolvent" (reg 7.8.03(2)); thus it applies forthwith upon the licensee becoming insolvent. Thirdly, once it applies, it makes the account subject to a trust in favour of each person entitled to be paid money from it (reg 7.8.03(4)), and fixes the rights and priorities of those persons – including, where there is a shortfall, to a pro-rata distribution between those entitled (reg 7.8.03(6)). The purpose of the Regulation is to make provision in respect of the position of clients who suffer shortfall upon insolvency of the licensee, and it would be inconsistent with the concept of a trust affixing under reg 7.8.03(4), if those rights could be altered by deposits into the relevant account of post-appointment receipts. Fourthly, given the usual pattern of schemes for pro-rata distribution upon insolvency, it is unlikely to have been intended that post-insolvency date receipts should alter the application of the Regulation to moneys in an account at the date when the Regulation becomes applicable. Accordingly, the preferable construction of reg 7.8.03(6) is that it deals with the funds in the relevant account at the moment of the insolvency event – here, the appointment of administrators – and not funds received into the account subsequently.

124 For those reasons, Mazzetti's alternative contention in respect of the Erroneous Withdrawals succeeds. As the Erroneous Withdrawals were not in fact used for the purpose for which they were paid (of covering clients' positions), and were paid in error into the '541 Account when they ought to have been paid into a separate post-administration account, and/or having been received post-administration are not subject to the reg 7.8.03(6) regime, they are held on a separate trust, and ought to be returned to the beneficiaries of that trust, being the Relevant ETO Clients represented by Mazzetti.

OTHER MATTERS

125 Two other applications are also before the Court.

Liquidators' Interlocutory Process filed 8 March 2016

126 Although other directions are also sought in the Liquidators' Interlocutory Process of 8 March 2016, the Liquidators ultimately sought at this stage only directions that they would be justified in (1) closing out open derivative

positions held by BBY through Interactive Brokers LLC (IBL) upon termination of the contracts constituted by the "Online Account Terms" with the clients to whom those positions are referable, and (2) treating securities held by BBY through IBL and Saxo Capital Markets (Australia) Pty Ltd as "Transactions" that are not "Open Transactions" within the meaning of the Online Account Terms (where "open derivative positions" means warrants, equity and index options, futures, options on futures and FX products; and "securities" means shares or interests in a managed investment scheme (including, without limitation, units in a unit trust)). No other party opposed the directions sought by the Liquidators in this respect. The balance of the Interlocutory process is to be adjourned to the final hearing.

127 BBY had a relationship with IBL whereby BBY clients could log on to a BBY-branded IBL trading platform to trade securities, options, FX contracts, futures contracts and other financial products on Australian and international markets. BBY and IBL dealt with each other as principals, and IBL considered that its only client was BBY, although there were separate "sub-accounts" for each individual BBY client who used the IBL online platform.

128 There were two BBY "omnibus" accounts with IBL, each of which comprised a "master" account referable to BBY, and various sub-accounts, mostly referable to individual BBY clients. IBL currently holds cash on behalf of BBY in a variety of currencies in the two omnibus accounts, representing cash deposited by BBY clients and transferred by BBY to IBL but not used to trade; proceeds of the close-out of positions and the realisation of securities prior to the administration date, which had not been remitted to BBY before 17 May 2015; and proceeds of the close-out of positions and/or the realisation of securities since the administration date. Although the overall cash balance of the BBY omnibus accounts is negative in respect of some currencies, if all amounts were converted into Australian dollars and netted off, they would amount to about A$8 million.

129 IBL also continues to hold a large number of securities and open derivatives positions on behalf of BBY. IBL cannot calculate the final amount payable to BBY until all the relevant positions and securities have been realised or closed

out, and it will be difficult for IBL to pay any amount to BBY until then. There is currently a significant margin "buffer", so that the automatic close-out of open positions where there is insufficient cover is not triggered.

130 Under the terms applicable to the omnibus accounts, IBL has the discretion but not the obligation, upon an insolvency event in respect of BBY, to liquidate all or any part of any "account position". However, IBL does not propose to exercise those rights to close out or otherwise sell the positions of BBY and its clients unless and until they receive an instruction from the Liquidators to do so. The Liquidators consider it desirable that they instruct IBL to close out the open positions and realise the securities and remit the proceeds to the Liquidators for distribution in accordance with the ultimate direction of the Court to be made following the final hearing of these proceedings. They consider that the best course because (1) it is consistent with the cessation of BBY's business; (2) some of the positions may not expire for a significant period of time, and it would be impractical to keep them open until expiry; (3) it would be difficult to distribute them *in specie*; (4) if it is necessary to distribute them pro-rata, realisation would be essential; and (5) dividend cannot be paid to clients until funds are recovered from IBL.

131 BBL had a broadly similar relationship with Saxo Capital Markets (Australia) Pty Ltd. Saxo has remitted the cash it held in BBY accounts to a segregated trust account operated by the Liquidators. However, Saxo continues to hold a substantial quantity of shares (worth in the order of $4.35 million) on behalf of BBY, which it is unwilling to sell without a direction from the Liquidators. The Liquidators consider it in the best interests of BBY clients that the Saxo shares be sold, as the most practical means of facilitating a dividend to clients.

132 BBY's relationship with its clients in respect of IBL and Saxo was governed by its Online Account Terms, which relevantly provide as follows:

> **22. TERMINATION**
>
> 22.1 Either party may terminate this agreement by giving the other party 3 Business Days' written notice.
>
> 22.2 Upon termination under clause 22.1, BBY will immediately take steps to Close Out any Open Transactions at the then prevailing Prices.
>
> …

133 In clause 24, the following terms are defined:

> **Close Out, Closed Out and Closing Out** in relation to a Transaction mean discharging or satisfying the obligations of the Client and BBY under the Transaction and this includes:
>
> (a) by delivering the amount or value of the Underlying Security (including a dollar multiple of an index) required in accordance with the terms of the Transaction; or
>
> (b) as a result of the matching up of the Transaction with a Transaction of the same kind under which the Client has assumed an offsetting opposite position;
>
> (c) making adjustments for fees and charges.
>
> **Open Transaction** means, at any time, a Transaction which has not been Closed Out or settled prior to the time agreed for settlement.
>
> **Transaction** means any contract:
>
> (a) between either:
>
> (i) the Client and BBY as principal; or
>
> (ii) the Client and a Market Participant (made by BBY as the Client's agent), including under a Market Agreement,
>
> (b) to purchase, or agree to purchase (including a forward purchase) or to pay an amount calculated in respect of, Underlying Security in one currency against the settlement in another currency (or other agreed Underlying Security) and in respect of which transaction (other than in respect of Closing Out and Open Transaction as permitted under this agreement) the Client has, or is taken to have, agreed (whether orally, electronically or in writing) to the Underlying Securities involved, the amount of the currency (or other agreed Underlying Security) to be purchased or sold by the Client, the Price and the settlement date.

134 Subject to receiving the direction sought from the Court, the Liquidators propose to issue notices under clause 22.1 terminating BBY's agreement with the relevant clients, and thereupon to take steps to close out any open derivative positions. However, because they anticipate that some clients may wish to assert an entitlement to the return of Saxo shares or IBL securities *in specie*, they do not at this stage propose to have those shares and securities realised.

135 The Liquidators' reasons for wishing to close out open derivatives position – in particular, that some of the positions may not expire for a significant period of time and it would be impractical to keep them open until expiry; that it would be difficult to distribute them *in specie*; that if it is necessary to distribute them pro-rata, realisation would be necessary; and that dividend cannot be paid to

clients until funds are recovered from IBL – provide a sound rationale for doing so. No interested party suggested otherwise.

136 It appears that to trigger the power to do so, it is first necessary for BBY to terminate the client account agreement (under clause 22.1), upon which it obtains the obligation (and corresponding entitlement) to take steps to close out any "Open Transactions" (clause 22.2). The difficulty perceived by the Liquidators is as to just what is contemplated by an "Open Transaction". In particular, and not least because it is recognised that some clients may wish to assert an entitlement to return of securities *in specie*, they have expressed concern and uncertainty as to whether shares and analogous securities are "Open Transactions" which they would also be obliged to "Close Out" on termination, or have already been "settled" and thus are no longer "Open", in which case they would not fall within clause 22.2. Thus they sought directions which would clarify whether they could proceed on the basis that shares (and analogous securities such as units in unit trusts) were excluded from "open derivative positions" in clause 22.2.

137 Although there are some peculiarities in the drafting – perhaps because of the wide range of transactions to which the terms could potentially apply – in the definition of "Open Transaction", the words "the time agreed for settlement" appear to refer to the time which may be allowed, from time to time, for settlement or expiry of the transaction; if that time has not yet arrived, and the transaction has not yet been closed out, settled or expired, it is "open". Purchases of shares (and analogous securities) are settled on a D+3 basis. As they have necessarily been settled, they are not, at any time now relevant, "a Transaction which has not been … settled".

138 Accordingly, the Liquidators would be justified in proceeding on the basis that share trades are not "Open Transactions", and would not have to be "closed out" on termination of the client account, while derivatives (as distinct from shares) which have not been closed out, settled or expired, are "Open Transactions" which can and must be closed out on termination under clause 22.2.

Liquidators' Interlocutory Process dated 16 March 2016

139 Pursuant to an Interlocutory Process leave to file which was granted at the hearing on 23 March 2016, the Liquidators ultimately sought a direction that they would be justified in treating payments made into BBY's client segregated accounts on or after 18 May 2015 by clients *"with no obligation to BBY to make payment on the date of payment"* as "*paid into the account in error*" within the meaning of reg 7.8.03(6)(a). The issue is whether payments made into the '541 account on or after the administration date, by clients who were under no obligation to make the payment, should be returned to the clients who made the payments in priority to any other claimant on the account, on the basis that those payments were "paid into the account in error" within the meaning of the Regulation.

Relevant background

140 The relevant factual circumstances are illustrated by the case of Ms Beatriz Martini who, between 5 and 8 May 2015, engaged in correspondence with representatives of BBY in relation to a capital raising by Medlab Clinical Limited, and the process that would be required for her to open a BBY account and acquire shares in Medlab. On 16 May 2015 (a Saturday), Ms Martini requested her bank to transfer $200,000 to the '541 account. The administrators were appointed on 17 May, a Sunday. Ms Martini's bank would presumably have received her request on Monday 18 May, and apparently processed it the same day, as on 18 May 2015, BBY received the sum of $200,000 into its '541 account. On 21 May 2015, a BBY representative wrote to Ms Martini: "Below is a summary of your account which shows no current stock holdings and $200,000 on ledger as your client's funds". The Receiver's reconciliation of payments into the '541 account from 18 May 2015 identified the $200,000 receipt as attributable to Ms Martini. The Liquidators have identified some other transactions which may fall into the same category, but have not yet formed a concluded view about them.

141 The notion of moneys "paid into an account in error" has been discussed above.

142 Ms Martini did not countermand her request before it was actioned, and it is not clear whether the payment was received before or after ASX Clear suspended BBY's market participation. It was actioned in accordance with her intent and purpose. For reasons already explained, I do not accept that it can be said that, even if she would have countermanded the payment had she known of the appointment of administrators – which is not established – that would constitute error in the relevant sense.

143 It was suggested that a fundamental difference between Ms Martini and Mazzetti was that Ms Martini's money was not taken pursuant to a legal obligation to pay it; but in my view, it was paid deliberately, in accordance with her instructions, in furtherance of her purpose. If it was on an assumption that was later falsified, it is in no different a position than the Erroneous Withdrawals, and in that respect was not paid in error.

144 The fact however remains that, like the Erroneous Withdrawals, it was paid for a purpose which failed. Being received after the administration date, it ought not have been paid into a pre-administration potentially deficient CSA, but into a post-administration account. For the reasons given for upholding Mazzetti's alternative argument in respect of the Erroneous Withdrawals, this sum was paid *into the '541 account* in error; alternatively, it is not subject to reg 7.8.03(6). However, the touchstone for this conclusion is not the absence of legal obligation (as the proposed direction suggests), but the fact of receipt after the administration date for a purpose which failed.

145 Accordingly, it seems to me that the Liquidators would 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. However, I will afford the parties the opportunity to make submissions as to the form of an appropriate direction if they wish.

CONCLUSION AND ORDERS

146 My conclusions may be summarised as follows:

147 In respect of the Returned Collateral:

(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;

(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 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. Thus, "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.

148 As to the Erroneous Withdrawals:

(1) despite its suspension, BBY had ongoing obligations to ASX Clear in respect of margin, including making calls on its clients, who had a corresponding obligation to meet those calls. In particular, BBY owed ASX Clear an obligation in respect of margin on 19 May 2015, and the Erroneous Withdrawals were made for the purpose of funding that obligation. That the Receivers did not cancel the "sweep" on that occasion, even if they would have done so had they adverted to it, does not mean that the Erroneous Withdrawals ought not have been made. Nor does the circumstance that, informed of BBY's suspension, clients might have countermanded their authority to BBY. It would only be if, as at 19 May, BBY had ceased to be authorised to make withdrawals that it could be said that the Erroneous Withdrawals ought not have been made, and it follows that it cannot be said that, regardless of whether "(j)

BBY was authorised to withdraw the Erroneous Withdrawals from client CMA's", the Erroneous Withdrawals were made in error in that sense;

(2) however, as the Erroneous Withdrawals were not in fact used for the purpose for which they were paid (of covering clients' positions), and were paid in error into the '541 Account when they ought to have been paid into a separate post-administration account, and/or having been received post-administration are not subject to the reg 7.8.03(6) regime, they are held on a separate trust, and ought to be returned to the beneficiaries of that trust, being the Relevant ETO Clients.

149 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. It will be necessary for the parties to address what consequential orders should now flow from those answers.

150 The Liquidators would be justified in proceeding on the basis that share trades through IBL and Saxo are not "Open Transactions", and would not have to be "closed out" on termination of the client account, while derivatives (as distinct from shares) which have not been closed out, settled or expired, are "Open Transactions" which must be closed out on termination under clause 22.2.

151 The Martini payment was made deliberately, in accordance with her instructions and in furtherance of her purpose, and if it was on an assumption that was later falsified it is in no different a position than the Erroneous Withdrawals, and in that respect was not "in error". However, like the Erroneous Withdrawals, it was received after the administration date, and it was paid *into the '541 account* in error; alternatively, it is not subject to reg 7.8.03(6). However, the touchstone for this conclusion is not the absence of legal obligation (as the proposed direction suggests), but the fact of receipt after the administration date for a purpose which failed. It seems to me that the Liquidators would 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. However, I will afford the parties the opportunity to make submissions as to the form of an appropriate direction if they wish.

Orders

152 On the separate question, the Court orders that:

(1) The separate question be answered in the negative in respect of the Returned Collateral and in the affirmative in respect of the Erroneous Withdrawals;

(2) The First Defendants bring in short minutes of consequential orders on a date to be fixed.

153 On the First Plaintiffs' Interlocutory Process filed 8 March 2016, the Court orders that:

(3) The First Plaintiffs would be justified in closing out open derivative positions held by the Second Plaintiff through Interactive Brokers LLC (IBL) upon termination of the contracts constituted by the "Online Account Terms" with the clients to whom those positions are referable.

(4) The First Plaintiffs would be justified in treating securities held by the Second Plaintiff through IBL and Saxo Capital Markets (Australia) Pty Ltd as "Transactions" that are not "Open Transactions" within the meaning of the Online Account Terms.

(5) In these orders:

(a) "open derivative positions" means warrants, equity and index options, futures, options on futures and FX products; and

(b) "securities" means shares or interests in a managed investment scheme (including, without limitation, units in a unit trust).

(6) The balance (being prayers 2, 3 and 4) of the Interlocutory Process be adjourned to the final hearing of the proceedings.

154 In respect of the First Plaintiffs' Interlocutory Process dated 16 March 2016 and filed in Court on 23 March 2016, the Court orders that:

(7) The First Plaintiffs bring in short minutes of a direction in conformity with this judgment on a date to be fixed.

155 Generally, the Court orders that:

(8) There be liberty to apply on three days' notice.

156 The Court appoints 12 October 2016 at 9.45am before me for short minutes pursuant to orders 2 and 7 above.

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