FEDERAL COURT OF AUSTRALIA

Krejci, in the matter of Union Standard International Group Pty Limited (in liq) [2021] FCA 1483

File number(s):	NSD 754 of 2020
Judgment of:	**JAGOT J**
Date of judgment:	26 November 2021
Catchwords:	**CORPORATIONS** — financial services and markets — corporation holding financial services licence insolvent — priority in distribution of proceeds of liquidation as between trading clients and investing clients — whether investing clients provided with financial products or financial services — whether statutory trust over moneys paid by both trading clients and investing clients to the insolvent licensee exists — statutory trust over moneys paid to licensee by trading clients and investing clients held for benefit of both classes of clients — application by liquidators for directions relating to exercise of liquidators powers
Legislation:	*Corporations Act 2001* (Cth) ss 660K, 761A, 761D, 763A(1), 763B, 763C, 763E, 764A, 766A(1)(b), 766A(1)(c), 766C, 766D, 767A(2)(a), 981A(1), 981B, 981D, 981F(a), 981H, Sch 2 – *Insolvency Practice Schedule (Corporations)* s 90-15(1) *Corporations Regulations 2001* (Cth) regs 7.8.01(5), 7.8.02A, 7.8.03(4), 7.8.03(6)(a),7.8.03(6)(c), 7.8.03(6)(d)
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Cases cited:	*ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65; (2014) 224 FCR 1 *Australian Securities and Investments Commission v Secure Investments Pty Ltd (No 2)* [2020] FCA 1463; (2020) 148 ACSR 154 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 *Black v S Freedman & Co* [1910] HCA 58; (1910) 12 CLR

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	Brady v Stapleton [1952] HCA 62; (1952) 88 CLR 322
	Caron and Seidlitz v Jahani and McInerney in their capacity as liquidators of Courtenay House Pty Ltd (in liq) and Courtenay House Capital Trading Group Pty Ltd (in liq) (No 2) [2020] NSWCA 117; (2020) 102 NSWLR 537
	Frith v Cartland (1865) 2 H & M 417; 71 ER 525
	Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) [2012] FCA 75; (2012) 288 ALR 240
	Hospital Products Ltd v United States Surgical Corporation [1985] HCA 64; (1985) 156 CLR 41
	In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) (No 2) [2018] NSWSC 346; (2018) 363 ALR 492
	In the matter of MF Global Australia Ltd (in liq) [2012] NSWSC 994; (2012) 267 FLR 27
	Kelly (Liquidator), in the matter of Halifax Investment Services Pty Ltd (in liquidation) v Loo [2021] FCA 531
	Nadilo v Souris [2019] NSWSC 108
	Nikitins v EncoreFX (Australia) Pty Ltd (in Liq), in the matter of EncoreFX (Australia) Pty Ltd (in liq) (No 2) [2021] FCA 27; (2021) 149 ACSR 533
	Re BBY Ltd (recs and mgrs apptd) (in liq) (No 3) [2018] NSWSC 1718
	Re Global Finance Group Pty Ltd (in liq) [2002] WASC 63; (2002) 26 WAR 385
	Re Hallett's Estate (1880) 13 Ch D 696
	Re Oatway [1903] 2 Ch 356
	Sze Tu v Lowe [2014] NSWCA 462; (2014) 89 NSWLR 317
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	185
Date of hearing:	28 - 29 October 2021
Counsel for the Plaintiffs:	Mr R Scruby SC with Ms C Ernst
Solicitor for the Plaintiffs:	Colin Biggers & Paisley

Counsel for the First Intervener:	Mr S Golledge SC with Ms K Petch
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Solicitor for the Second Intervener:	Watson Mangioni Lawyers

ORDERS

NSD 754 of 2020

IN THE MATTER OF UNION STANDARD INTERNATIONAL GROUP PTY LIMITED (IN LIQUIDATION) (ACN 117 658 349)

BETWEEN:	**PETER PAUL KREJCI AND ANDREW JOHN CUMMINS AS JOINT AND SEVERAL LIQUIDATORS OF UNION STANDARD INTERNATIONAL GROUP PTY LIMITED (IN LIQUIDATION) (ACN 117 658 349)** First Plaintiff
	UNION STANDARD INTERNATIONAL GROUP PTY LIMITED (IN LIQUIDATION) (ACN 117 658 349) Second Plaintiff
AND:	
	ANDREW MCCLOSKEY First Intervener
	SHIH KUEI CHENG Second Intervener

ORDER MADE BY: **JAGOT J**

DATE OF ORDER: **26 NOVEMBER 2021**

THE COURT ORDERS THAT:

1. Within 14 days the parties confer and file agreed or competing orders and directions reflecting these reasons for judgment.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JAGOT J:

1. BACKGROUND

1 The liquidators of Union Standard International Group Pty Ltd (in liq) (**USIG, USG** or the **company**) have applied for various orders and directions in respect of the liquidation.

2 The principal issue in dispute is that of priority in the distribution of the proceeds of the liquidation between the so-called trading clients and the so-called investing (or, as a subset thereof, interest-bearing) clients.

3 It is common ground that the moneys held on behalf of the trading clients should be taken to be held on trust under reg 7.8.03(4) of the *Corporations Regulations 2001* (Cth) ("[f]or each person who is entitled to be paid money from an account of the financial services licensee maintained for s 981B of the [*Corporations Act 2001* (Cth)], the account is taken to be subject to a trust in favour of the person") and that they should take priority ahead of the general pool of unsecured creditors under reg 7.8.03(6)(c). However, the interest-bearing clients contend that they too are within reg 7.8.03(4) and rank equally with the trading clients, so that there should be a proportional distribution of the proceeds of the liquidation under reg 7.8.03(6)(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"). The trading clients do not accept that contention.

4 I consider that the statutory trust under s 981H of the Corporations Act applies equally to moneys deposited by all trading clients and all investing clients, whether or not they are also interest-bearing clients.

2. PRIMARY FACTS

5 The primary facts are not in dispute.

6 USIG held an Australian financial services licence (**AFSL**) and operated a financial services business under the name "USGFX". The AFSL, in substance, authorised USIG to carry on a financial services business to: (a) provide general financial product advice for derivatives and foreign exchange contracts, (b) deal in a financial product by issuing, applying for, acquiring, varying or disposing of derivatives and foreign exchange contracts and applying for, acquiring, varying or disposing of a financial product on behalf of another person in respect of derivatives

and foreign exchange contracts, and (c) make a market for derivatives and foreign exchange contracts to retail and wholesale clients.

7 USIG carried on a business in accordance with the AFSL. It used an online trading platform (called **MT4**) to trade in derivatives and foreign exchange contracts, making the market for these products and providing general financial product advice. The clients of USIG who traded in derivatives and foreign exchange using this platform are called the trading clients. The representative of the trading clients in the proceeding is Andrew McCloskey.

8 However, the investigations of the liquidators disclosed that USIG also took deposits from clients in China and Taiwan and paid interest to those clients. These persons are called the investing clients. The liquidators identified that it was questionable whether USIG's AFSL authorised this activity. This is because, at the relevant time from 2012 onwards, the AFSL did not authorise USIG to take or pay interest on deposits (before 2012 USIG had been so authorised by its AFSL).

9 The interest-bearing clients, a subset of the investing clients, are persons who: (a) deposited funds with USIG, (b) were credited with interest from time to time on the balance of those funds, and (c) claim to have been entitled to trade in derivatives and foreign exchange contracts through the platform provided by USIG. The representative of the interest-bearing clients in the proceeding is Dr Shih Kuei Cheng.

10 By exclusion, the class of investing clients is confined to persons who: (a) deposited funds with USIG, (b) were credited with interest from time to time on the balance of those funds, and (c) do not claim to have been entitled to trade in derivatives and foreign exchange contracts through the platform provided by USIG.

11 The class of investing clients who were not also interest-bearing clients is not represented in the proceeding.

12 The nomenclature of trading clients, investing clients and interest-bearing clients has been created for the purpose of the liquidation. While USIG distinguished between trading clients and investing clients in at least two ways in its systems (by using a different account prefix for each and not recording its liabilities to investing clients in its financial records), it did not use these terms, nor the term interest-bearing client.

13 The liquidators estimate that the proofs of debt lodged by investing clients (between $195 million and $405 million) dwarf those made by trading clients (about $6 million). The

liquidators hold a total of $5,799,796.14 in connection with the liquidation, with an additional $235,067.33 held in two frozen accounts. There will be a substantial shortfall in liquidation proceeds given the claims of the trading clients (to all proceeds), the investing clients, an unsecured creditors.

14 USIG's financial records are unreliable. As noted, while USIG recorded its liabilities to trading clients in its financial records (excluding a sub-class called DMA clients who appear to have traded directly on the derivatives market through a platform provided by USIG), it did not record its liabilities to investing clients.

15 The terms on which trading clients dealt with USIG appear in various documents.

16 The terms on which investing clients dealt with USIG are unclear.

17 USIG extensively mixed funds from all accounts so that it is now impossible to trace individual deposits of clients into the various accounts. On the evidence:

> (a) Both Trading Clients and Investors deposited funds into Trust Accounts and Money Processor Accounts (affidavit of Peter Paul Krejci affirmed on 23 April 2021 (**Krejci 1**) [142], [146(a)], [147], [148], [208(a)]). They did not make deposits into Operating Accounts (Krejci 1 [133(a)]).
>
> (b) There were transfers between (that is, to and from) different Trust Accounts (Krejci 1 [129(c)], [157]).
>
> (c) There were transfers between Trust Accounts and accounts maintained by Money Processors (Krejci 1 [100], [129(b)], [130(b)], [133], [208]).
>
> (d) There were transfers between Trust Accounts and Operating Accounts. On a regular basis, the Company compared the combined balance of the Trust Accounts with the total net equity position for Trading Clients recorded on the MT4 platform. In the event of a discrepancy, funds were swept into or out of the Trust Accounts to or from Operator Accounts or from Money Processor Accounts: Krejci 1 [133].
>
> (e) There were transfers from Money Processors into Operating Accounts (Krejci 1 [208]).
>
> (f) There were transfers from Operating Accounts to external hedging providers. Between 2015 and 30 June 2018 there were also substantial transfers from Trust Accounts to external hedging providers (Krejci 1 [191], [193]).
>
> (g) There were payments from external hedging providers to Operating Accounts and to Trust Accounts (see Exhibit "PPK-8" to Krejci 1) tab 40, [pages] 639-40).
>
> (h) Commissions were paid to agents appointed by the Company to market products to Investors from Operating Accounts (see Krejci 1 [23(e)]).

18 Further, while "Deposits into and withdrawals from Term Deposits were made only to or from Operating Accounts (Krejci 1 [139]) … there was substantial mixing as between Operating Accounts and other funds".

19 The sole shareholder of USIG has not co-operated with the liquidators.

3. KEY PROVISIONS

3.1 The application

20 By s 600K of the Corporations Act, Sch 2 has effect.

21 Schedule 2 is the *Insolvency Practice Schedule (Corporations).*

22 Under s 90-15(1) of this Schedule, the Court may make such orders as it thinks fit in relation to the external administration of a company.

3.2 Status of moneys

23 Section 981A(1)(a) of the Corporations Act provides that Subdiv A of Div 2 of Pt 7.8 applies to "money paid to a financial services licensee (the ***licensee***) in the following circumstances: (a) the money is paid in connection with: (i) a financial service that has been provided, or that will or may be provided, to a person (the ***client***); (ii) a financial product held by a person (the ***client***); and (b) the money is paid by: (i) the client; (ii) by a person acting on behalf of the client; or (iii) to the licensee in the licensee's capacity as a person acting on behalf of the client".

24 Accordingly: (a) s 981A(1) does not require that the money be paid to a licensee in accordance with or as authorised by the licensee's AFSL, and (b) s 981A(1) extends to a financial service that has been provided, or that will or may be provided, to a person.

25 Further, in *Nikitins v EncoreFX (Australia) Pty Ltd (in Liq), in the matter of EncoreFX (Australia) Pty Ltd (in liq) (No 2)* [2021] FCA 27; (2021) 149 ACSR 533 Colvin J said:

> [87] …Although the terminology 'in connection with' must take its meaning from the particular context, it is a phrase that is of considerable generality the contextual meaning of which will be indicated by the purpose for which the ambulatory language is used: *Hoy v Coffs Harbour City Council* [2016] NSWCA 257 at [60] (Bathurst CJ, Simpson and Payne JJA agreeing); *R v Khazaal* [2012] HCA 26; (2012) 246 CLR 601 at [31] (French CJ); *Horsell International Pty Ltd v Divetwo Pty Ltd* [2013] NSWCA 368 at [170]-[174] (McColl JA, Beazley P agreeing); and *Minister for Immigration and Multicultural Affairs v Singh* [2000] FCA 845; (2000) 98 FCR 469 at [28]-[29] (Black CJ, Sundberg, Katz and Hely JJ).

> [88] In the present context, the words manifest a requirement that there be a meaningful connection between the payment of the money and the financial product measured by reference to the subject matter being addressed. In this case, the provision forms part of detailed provisions that regulate the behaviour of the holders of a financial services license. Those provisions are to be construed by reference to the main object described in s 760A … That object seeks to promote confident decision making by consumers of financial products and services as well as 'fairness, honesty and professionalism by those who provide financial services'.

26 Section 981B of the Corporations Act provides that a licensee "must ensure that money to which this Subdivision applies is paid into an account that satisfies" certain requirements. The requirements include in s 981B(1)(b)(i) that the only money paid into the account is "money to which this Subdivision applies (which may be money paid by, on behalf of, or for the benefit of, several different clients)".

27 Section 981F(a) of the Corporations Act provides that regulations may be made dealing with how money in an account maintained for the purposes of s 981B is to be dealt with if the licensee becomes insolvent.

28 By s 981H(1) of the Corporations Act "money to which this Subdivision applies that is paid to the licensee … is taken to be held in trust by the licensee for the benefit of the client".

29 Regulation 7.8.01(5) of the Corporations Regulations provides that the account under s 981B is to be designated as a trust account and the licensee must "hold all moneys paid into the account … on trust for the benefit of the person who is entitled to the moneys".

30 As noted, reg 7.8.03(4) provides that if a person is entitled to be paid money from an account of a financial services licensee maintained for s 981B of the Act, the account is taken to be subject to a trust in favour of the person.

3.3 Financial product

31 By s 763A(1) of the Corporations Act, a financial product is a facility through which, or through the acquisition of which, a person makes a financial investment, manages financial risk, or makes non-cash payments.

32 Section 763B of the Corporations Act provides that a person makes a financial investment if: (a) the investor gives money or money's worth (the ***contribution***) to another person and, relevantly in (ii), the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact

generated), and (b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

33 Section 763C of the Corporations Act provides that a person manages a financial risk if they: (a) manage the financial consequences to them of particular circumstances happening, or (b) avoid or limit the financial consequences of fluctuations in, or in the value of, receipts or costs (including prices and interest rates).

34 Section 763E of the Corporations Act provides that an "incidental product" is not a financial product. An "incidental product" is something that, but for s 763E, would be a financial product because of Subdiv A of Div 2 of Pt 7.8, that is either "an incidental component of a facility that also has other components" or "a facility that is incidental to one or more other facilities" and it is reasonable to assume that the main purpose of the facility or facilities is not a "financial product purpose". A "financial product purpose" means a purpose of making a financial investment, managing financial risk, or making non-cash payments.

35 Under s 764A(1) of the Corporations Act a "financial product" includes a "security", a "derivative", and foreign exchange contracts.

36 Under s 761A a security includes a "debenture".

37 Under s 9 a "debenture" is a chose in action that includes an undertaking by the body to repay as a debt money deposited with or lent to the body, but does not include an undertaking to repay money deposited with or lent to the body by a person if the person deposits or lends the money in the ordinary course of a business carried on by the person and he body receives the money in the ordinary course of carrying on a business that neither comprises nor forms part of a business of borrowing money and providing finance.

38 A "derivative" is defined in s 761D.

3.4 Financial service

39 By s 766A(1)(b) and (c) of the Corporations Act a person provides a financial service if they, relevantly, deal in a financial product or make a market for a financial product.

40 Section 766C of the Corporations Act describes conduct constituting dealing in a financial product.

41 Section 766D(1) of the Corporations Act describes conduct constituting the making of a market for a financial product. A person makes a market for a financial product if: (a) either through a facility, at a place or otherwise, the person regularly states the prices at which they propose to acquire or dispose of financial products on their own behalf; and (b) other persons have a reasonable expectation that they will be able to regularly effect transactions at the stated prices; and (c) the actions of the person do not, or would not if they happened through a facility or at a place, constitute operating a financial market because of the effect of s 767A(2)(a).

4. KEY PRINCIPLES

42 A "mixed fund" is "one which contains funds from more than one source": *Re Global Finance Group Pty Ltd (in liq)* [2002] WASC 63; (2002) 26 WAR 385 at [97].

43 The equitable rule is that "if a man mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his own": *Frith v Cartland* (1865) 2 H & M 417; 71 ER 525 at 526. The rule was approved in *Brady v Stapleton* [1952] HCA 62; (1952) 88 CLR 322 at 336 and *Hospital Products Ltd v United States Surgical Corporation* [1985] HCA 64; (1985) 156 CLR 41 at 109-110: *Sze Tu v Lowe* [2014] NSWCA 462; (2014) 89 NSWLR 317 at [457].

44 The concept of a person being "entitled to be paid money" from an account required to be maintained under s 981B referred to in reg 7.8.03(4) "import[s] the principles applicable to trusts and, in particular, to deficient mixed trust accounts": *Georges v Seaborn International (Trustee), in the matter of* ***Sonray*** *Capital Markets Pty Ltd (in liq)* [2012] FCA 75; (2012) 288 ALR 240 at [82].

45 These principles provide that "all contributors to a deficient mixed fund hold an equitable charge over the entire fund and its traceable proceeds to the value of their contributions, subject to any dealings and costs … or are equitable tenants in common of the mixed fund as a whole, including its traceable proceeds, and subject to such deductions": *Sonray* at [83].

46 All a court can do in circumstances where it is not "possible to work out precisely who is entitled to what moneys in particular segregated accounts" is to "permit the moneys … to be pooled with a view to their proportionate distribution": *Sonray* at [84].

47 "Such a course of action is consistent with the purpose of the statutory regime, namely the achievement of a fair outcome between clients by a pragmatic and even-handed distribution among them: see, by way of example, s 983E of the Corporations Act which provides that

where the money received is insufficient to pay all proved claims, the court may 'despite any rule of law or equity to the contrary, apportion the money among the claimants in proportion to their proved claims and show in the scheme how the money is so apportioned' and the second reading speeches in relation to the *Financial Services Reform Bill 2001* (Cth) which indicate that the legislation was designed to produce a harmonised regulatory regime for market integrity and consumer protection across the financial services industry": *Sonray* at [85].

48 However, there is "no reason to read reg 7.8.03(6) in a manner which would require pooling where more than one account had been maintained as permitted by s 981B(2), but those accounts had in fact been maintained separately so that there was no mixing of funds between them": *In the matter of* ***MF Global*** *Australia Ltd (in liq)* [2012] NSWSC 994; (2012) 267 FLR 27 at [48]. This is because "where there are relatively clear property interests in particular property, this cannot 'be altered by reference to some notion of common misfortune': *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227; [2003] 2 All ER 478 at [44]; *Australian Securities Commission v Buckley* (1996) 7 BPR 15,024; *Re Magarey Farlam Lawyers Trust Accounts (No 3)* [2007] SASC 9; (2007) 96 SASR 337 at [123], [145]; S B Thomas, 'Clayton's Case and the "Common Pool" Exception (2004) 15 JBFLP 177 at 183'": *MF Global* at [78].

49 Accordingly, the "'cases in which pooling has been sanctioned typically involve the mixing of funds across accounts': *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* [2001] QSC 082; *Australian Securities and Investments Commission v Letten (No 7)* [2010] FCA 1231; (2010) 190 FCR 59; (2010) 80 ACSR 401": *MF Global* at [79].

50 "[Q]uestions of degree are involved (so that a small number of small transfers may not have warranted pooling), and that one of the objects is to avoid a situation in which one trust benefits at the expense of another": *In the matter of BBY Limited (Receivers and Managers appointed) (in liquidation) (No 2)* [2018] NSWSC 346; (2018) 363 ALR 492 (***BBY (No 2)***) at [52]. Brereton J thereafter in *BBY (No 2)* summarised the relevant principles at [83] as follows:

> 1 While a liquidator must distribute funds under his or her control through the company being trustee of trusts in accordance with the legal entitlements to those funds, findings about what legal entitlements exist depend upon the evidence, and where a liquidator knows no more than that the fund is held on trust and that there are a number of potential claimants, it may be appropriate for the Court to direct distribution of the fund amongst the claimants proportionately to their claims. That is because it is the best that can reasonably be done on the available evidence.
>
> 2 Regulation 7.8.03(6) applies individually to each s 981B account maintained

by an insolvent licensee, and does not authorise the pooling of accounts for the purposes of distribution. To have a right to payment under reg 7.8.03(6)(c) out of a particular[client segregated account], a claimant must demonstrate an "entitlement" to money in that account. In this respect, general principles of trust law relevant to determining entitlement apply, insofar as they are not displaced or modified by the statutory regime.

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

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

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

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

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

51 As Brereton J also said in *BBY (No 2)* at [40]:

> Although not concerned with the pooling of multiple accounts, *Re French Caledonia Travel Service Pty Ltd* [[2003] NSWSC 1008 at [186]; (2003) 59 NSWLR 361] is an

> important starting point, because it demonstrates that in a liquidator's application for directions, courts often have to do "rough justice" by reason of the limitations of the available evidence, in the light of what is reasonably practical and economical, and judgments may be made on evidence much inferior to that which would be required to sustain a beneficiary's claim in adversarial proceedings. Campbell J (as he then was) explained that while a liquidator must distribute the company's funds – or funds under its control as a trustee – in accordance with the legal entitlements of people to those funds, findings as to what those legal entitlements are depend upon the evidence and inferences properly drawn from it, and where a liquidator seeking to administer a fund knows no more than that the fund is held on trust and that there are a number of potential claimants whose merits he cannot on any rational basis distinguish between, a liquidator may be justified in distributing the fund amongst the claimants proportionately to their claims, and it may be appropriate to direct the liquidator accordingly

52 "In Australia and a number of other common law jurisdictions, application of the rule in *Devaynes v Noble* (1816) 1 Mer 529; (1816) 35 ER 767 (*Clayton's Case*) by which the earliest deposit into the bank account is presumed to have been the first withdrawn (that is, 'first in, first out') has been rejected as an appropriate solution to the conundrum which involves dealing with the interests inter se of investors or clients who invariably have been either defrauded or left short of funds by incompetent management": *Caron and Seidlitz v Jahani and McInerney in their capacity as liquidators of* ***Courtenay House*** *Pty Ltd (in liq) and Courtenay House Capital Trading Group Pty Ltd (in liq) (No 2)* [2020] NSWCA 117; (2020) 102 NSWLR 537 at [10]. Other approaches are a pari passu or proportional distribution, or the application of the "lowest intermediate balance" approach (which treats any given depositor's share as rateably reduced whenever there is any withdrawal from the fund): *Courtenay House* at [12]-[16].

5. TRADING CLIENTS' CONTENTIONS

53 The position of the trading clients is that all of the moneys held in all of the accounts of USIG ought to be pooled or grouped together for the purposes of meeting, on a pari passu basis, claims of any person who is a beneficiary under the statutory trusts created by s 981H of the Corporations Act and r 7.8.03(4) of the Corporations Regulations. The persons so entitled are the trading clients. The investor clients, including the interest-bearing clients, are not so entitled.

54 According to the trading clients they have an entitlement to the moneys in all accounts and to a tax refund of overpaid tax from the Australian Taxation Office because:

(1) the evidence confirms that the trading clients entered into either or both of margin foreign exchange trading contracts (**Margin FX Contracts**) or contracts for difference (**CFDs**) with USIG. Further:

(a) both Margin FX Contracts and CFDs are a "financial product" within s 764A(1). Specifically, Margin FX Contracts are foreign exchange contracts and CFDs are derivatives;

(b) Margin FX Contracts and CFDs were within the scope of USIG's AFSL; and

(c) dealings between USIG and trading clients were in accordance with (at least) a USIG product disclosure statement (**PDS**), the USIG financial services guide (**FSG**), and online terms and conditions;

(2) it follows that these moneys were paid within the scope of s 981A(1) and were held on trust by USIG for the trading clients under s 981H;

(3) on any view, there is a deficiency in the statutory trust by reason of USIG's conduct and ensuing liquidation;

(4) the evidence discloses that USIG commingled all funds, making tracing impossible;

(5) on the evidence it is reasonable likely that the moneys of the trading clients paid into the trust account were paid into or through all other accounts meaning that all of those accounts are impressed with a trust in favour of the trading clients;

(6) that reasonable likelihood is supported by the principle that. in the case of breach of trust, it is presumed that the trustee used its own money first and the beneficiary is entitled to trace into the remaining moneys in the fund: *Re Hallett's Estate* (1880) 13 Ch D 696 and *Re Oatway* [1903] 2 Ch 356, as discussed in *Nadilo v Souris* [2019] NSWSC 108 at [94]-[96]; and

(7) as to the refund of overpaid tax (overpaid, because tax was paid on the basis of the accounts which did not record liabilities owed to investing clients), if tax was paid out of the operating accounts, it is reasonably likely that these liabilities were paid with client money and the refund ought to be repaid into the account from which it was paid, which would be subject to the trust.

55 According to the trading clients, the investing clients (including the interest-bearing clients) do not have an entitlement to any of the moneys because:

(1) the relevant time for determining the purpose of a payment to a licensee, specifically whether the payment is within the terms of s 981A(1), is the time at which the payment is made. What occurs thereafter is irrelevant unless it can cast light on the purpose of the payment at the time it is made;

(2) even if the investing clients may have been given access to the MT4 platform, either on purpose or inadvertently, in connection with their business as depositors, that does not of itself entitle them to protection under the statutory regime;

(3) the investing clients did not deposit money with USIG with the intention required by ss 763B or 763C;

(4) the deposits of the investing clients do not constitute a "debenture". In *Australian Securities and Investments Commission v Secure Investments Pty Ltd (No 2)* [2020] FCA 1463; (2020) 148 ACSR 154 at [52] Derrington J said:

> A mere loan agreement between a borrower and lender by which money is lent in return for its repayment together with interest is unlikely to satisfy the requirement that it was intended that the contribution would be used by the Borrower to generate a financial return for the lender. In the ordinary course, a borrower uses borrowed funds for their own purposes to generate a benefit for themselves and the interest rate is the price paid for the use of the funds.

(5) further, as discussed in *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65; (2014) 224 FCR 1 at [675]-[700], not every document of a company creating or acknowledging a debt is a debenture. Specifically, "when the words of the chapeau to the definition in s 9, 'to repay as a debt money deposited with or lent to' the company, are read in light of the regulatory provisions of Ch 2L and Ch 6D, it is evident that those words import the notion of an undertaking to repay a debt comprising a loan made to the company as part of its working capital";

(6) the investing clients deposited money with USIG in a capacity where USIG was unregulated as a deposit holder which "takes them outside the statutory protections and the consequence of that fact is that they are mere unsecured creditors";

(7) the investing clients did not deposit money with USIG for the purposes of purchasing Margin FX Contracts or CFDs, or accessing the trading platforms, as it was with the trading clients, and thus the money was not paid in connection with a financial service that has been, or will, or may be, provided to the person;

(8) the representative of the interest-bearing clients, Dr Cheng, had no intention of trading when he paid his money over because he thought it was too risky. The fact he later changed his mind is irrelevant;

(9) at best, for those interest-bearing clients who had to do a minimum of three trades to benefit from an increased rate of interest, it might be that a "financial product purpose"

was incidental to the purpose of the investing clients making a deposit with USIG, engaging s 763E;

(10) on the evidence:

(a) the investment product was only offered to persons in China and Taiwan;

(b) the investment product is distinct from the trading product. The investing clients were told about the investment threshold amount, the interest rate, the way in which interest is calculated, flexible deposits and withdrawals from investment accounts, and that that there was no lock-in period. They were told that the investment product operated similarly to a bank deposit. In contrast, returns from the trading product depended entirely on the trading client's trading activities;

(c) for the investing (interest-bearing) clients to receive a bonus interest rate (of 12% per annum) they had to complete a minimum of three trades, which discloses the incidental nature of the trading activity;

(d) the fact that somebody downloads or is provided with the PDS does not establish that an investment was made pursuant to it;

(e) the PDS does not refer to the investment product and is directed solely at trading clients;

(f) the MT4 platform appears to have been the means by which USIG managed its interaction with all clients, regardless of what they were undertaking;

(g) the fact that that Dr Cheng and Mr McCloskey went to the same web page and entered their credentials through the same fields is immaterial, as the issue is the client's purpose at the time the payment is made;

(h) it is apparent that USIG distinguished between trading clients and investing clients (as they were identified with different prefixes on the MT4 platform and USIG's records, and treated differently in USIG's records, in that the liabilities to trading clients were recorded but the liabilities to investing clients were not);

(i) the MT4 platform has a window or link designated "special account" for the investing clients;

(j) investing clients were also told that USIG would use their deposits to provide leverage in foreign exchange transactions of USIG, which puts an end to the

proposition that those moneys were impressed with any form of non-statutory trust;

(k) there is no reliable evidence that any interest-bearing client in fact traded Margin FX Contracts or CFDs (for example, Dr Cheng said he conducted zero trades as he could not obtain access to the MT4 platform to do so, but USIG's records show that he conducted five trades. Further, Dr Cheng made withdrawals totalling $22,000 but USIG records show him withdrawing $22,000 twice);

(11) accordingly, it should be found that all of the investing clients (including the interest-bearing clients) paid money to USIG for the purpose of receiving a guaranteed rate of return by way of interest. The investment product did not involve a debenture or any other kind of financial product as referred to in ss 763B or 763C. As such, the money was not paid in connection with a financial service being or to be provided by USIG, or the acquisition of a financial product from USIG. Those moneys, it follows, are not impressed with a statutory trust;

(12) those moneys are also not impressed with a general law trust as the investing clients were told that the money would be used by USIG to leverage its foreign exchange contracts. Further, none of the material provided by USIG referred to the investment product as opposed to the trading product.

6. CONSIDERATION

6.1 Statutory trust

56 I agree with the trading clients that under s 981A(1) the principal issue in this case is whether, at the time of payment of the money, it can be said that the payment was in connection with a financial service that has been provided, or that will or may be provided, to a person.

57 I agree with the trading clients that it must be accepted that their payments to USIG satisfy s 981A(1) on the basis of, at least, the operation of ss 763A(1) and 763C (a financial product is a facility through which a person manages financial risk).

58 As explained below, I agree with the trading clients that, on the evidence, the statutory trust arising applies to: (a) all of USIG's accounts, and (b) the taxation refund.

59 In their oral submissions, the trading clients clarified that they did not contend that money paid outside of the scope of the AFSL could not be the subject of the statutory trust. This

acknowledgement is correct. The statutory trust under Subdiv A of Div 2 of Pt 7.8 of the Corporations Act arises if money is paid as provided for in s 981A(1). Section 981A(1) does not require that the payment be money that the licensee is authorised to accept under its AFSL. As the interest-bearing clients also submitted, to conclude otherwise would be surprising as it would mean that "persons receiving unauthorised financial services or products would not be afforded the same protections as those receiving authorised financial services or products".

60 I do not agree with the trading clients that the moneys paid to USIG by the investing clients, be they interest-bearing clients or not, are incapable of satisfying s 981A(1) of the Corporations Act, having regard to the facts that: (a) the provision operates by reference to money paid in connection with a financial service that, relevantly, "may be provided" to the client, (b) by s 766D a financial service includes the making of a market for a financial product, (c) by ss 763A(1) and 763C a financial product includes a facility through which, or through the acquisition of which a person manages financial risk, and (d) Margin FX Contracts and CFDs are each "financial products" as they are facilities through which, or through the acquisition of which, a person manages financial risk.

61 On this basis, any investing client who paid the money to USIG on the basis that, if they wished to at any time in the future, they could use their deposited money to trade Margin FX Contracts and CFDs is a person who paid money in connection with a financial service that may be provided within the meaning of s 981A(1).

62 Section 763E must also be considered in this regard. As noted, this is the incidental product provision. It operates if the financial product is an incidental component of the facility and it is reasonable to assume that the main purpose of the facility is not a financial product purpose (meaning the purpose of making a financial investment, managing a financial risk, or making non-cash payments). Deciding whether s 763E is engaged or not requires close consideration of the facts.

6.1.1 Dr Cheng's evidence

63 Dr Cheng is a citizen of Taiwan. He is a dentist. He does not regularly trade stocks and regards himself as a conservative investor. In 2016 he met a representative of USIG, a financial advisor known as Eddy. He met Eddy again in 2017. Eddy told him about an investment opportunity with no risk involving the deposit of money into a Commonwealth Bank of Australia trust account which would earn interest. This was a USIG savings account which would earn 6% interest. Eddy described USIG as a world leading online trading platform for "Forex, currency

trading sort of thing using software called MT4". Eddy said "USG is an Aussie based company and the money sits in a Commonwealth Bank trust account so you can be assured it will always be safe and secure". Dr Cheng said "I know nothing about currency trading". Eddy said "You do not need to be concerned with the trading aspect, treat it as a savings account. If you are interested, we can arrange another time for me to tell you about it". Dr Cheng agreed to think about it, but said he was not very interested in currency trading because he had heard that it was risky.

64 Dr Cheng met Eddy again, who gave a presentation about USIG. Eddy said that USIG made money by charging a "brokerage fee whenever people trade online". Dr Cheng repeated that he did not want to trade currency as it was too risky. Eddy said:

> You do not need to actively participate in any kind of trading. Currently, USG is promoting a special trading account which gives 6% annual return for the first year and an extra 2.4% the second year. It works like a savings account. You need to open an account with USG and deposit money into their client trust account which is segregated and designated for trading purposes only. The interest-like payment is called a Bonus, it will be paid directly into your MT4 account every month. The whole thing is secure and safe.
>
> …
>
> USG makes tons of money by charging broker fees and overnight interest, so offering 6% interest is really nothing to them. They need your money so that they can offer trading up to 1:500 leverage in the forex market. It is common practice in the industry to charge broker fees.

65 Eddy told Dr Cheng he did not need to trade but only needed to deposit money into the trading account of USIG to earn the 6% interest per annum. Later Eddy gave Dr Cheng a copy of the 2017 USIG PowerPoint presentation, another PowerPoint presentation relating to ASIC, photographs of USIG events, and a notarised letter from the Commonwealth Bank. That letter identifies four accounts of USIG in different currencies as "Client Trust Account" saying that the bank "confirm[s] the above accounts … [which] are noted as trust accounts". The 2017 USIG PowerPoint presentation identified that by having a trading account the client could both trade and receive income on a monthly basis, the income being interest accrued on the amount in the account not used for trading. The presentation identified various regulations specifying that the client money is held on trust for the client and, in the event of insolvency of the licensee, the client money account is taken to be subject to a trust in favour of each person entitled to be paid money from the account.

66 Dr Cheng understood that USIG was authorised to accept funds on deposit into a trust account and that he would have the ability to trade if he chose to do so. In September 2017 Dr Cheng

visited the official USIG website and registered a trading account. In doing so he said to Eddy that he had to select a leverage for trading and Eddy told him to select 1:100 as this was the lowest risk choice. Dr Cheng did so as he wanted the most risk-free option. Dr Cheng received a confirmation email from USIG about his opening of the account, bearing a note saying that Margin FX Contracts and CFDs carry a high level of risk, and that USIG's PDS and FSG were available on its website. The email said:

> Use the MT4/MT5 account credential received in your email to login to USGFX trading platform and start trading today!

67 The PDS said USIG was authorised to give financial product advice and to deal in derivatives and foreign exchange contracts, as well as to "make a market" for foreign exchange and derivatives contracts, which allowed USIG to "quote market prices to you, including buy and sell prices". To trade, clients had to set up a trading account and deposit an initial margin. Trading facilities were provided through USIG's online trading platform, USIG being the counterparty for all trades. USIG was able to limit its risk by hedging. Deposited funds were said to be held in a designated account separate from USIG's money. The client relinquished any right to interest in designated client accounts, also known as trust accounts. In the designated client accounts, clients' moneys were pooled and held on trust until withdrawn or used to make a trade.

68 The PDS attached a pro-forma agreement that said it prevailed over the PDS to the extent of any inconsistency. The agreement provides that USIG "may aggregate money paid into the Client's Account (the Monies) with funds received from other Clients into a single designated account" (cl 11.1), "the Client authorises and directs [USIG] to withdraw, apply or otherwise utilise the Monies" in order to meet, amongst other things, "obligations … incurred by USG in connection with Contracts" (cl 11.3(a)), to enforce other rights that USG has under this agreement or in the PDS (cl 11.3(b)), and "for any other reason allowed by Law" (cl 11.1(c)) and, when so used by USIG, those moneys "do not belong to the client and do not constitute a loan or constructive trust in favour of the client (cl 11.4). In this regard while "Contract" is defined in the agreement as "a transaction in which the Client agrees to purchase or sell a currency, CFD or other derivative from or to USG or enter into any other transaction with USG for the provision of USG's services under the applicable Trade Contract Terms", cl 11.3(a) continues in these terms:

> Obligations may include an obligation to make payments to a Related Entity or a wholesale liquidity provider in connection with liabilities USG incurs when the Client

> and other clients place Contracts with USG. Liabilities in this sub-clause include but are not limited to minimum floating margin requirements imposed by a Related Entity or wholesale liquidity provider, or other hedging requirements

69 The FSG said at cl 5 that USIG "places client moneys into our Segregated Funds Account which is a client trust account".

70 Dr Cheng briefly read the PDS and arranged to make his first deposit of USD50,030 using the MT4 platform, after which he received confirmation of the deposit from USIG and could see the deposit in his client account on the MT4 platform. He used the same method to make all deposits. Eddy provided Dr Cheng with another PowerPoint presentation in 2018. This presentation said that deposits made were held on trust with the Commonwealth Bank.

71 Dr Cheng understood at all times that he could trade on the account if he wanted to. Eddy told him in 2018 that trading was risky and clients who had clicked the trading option had lost money. Dr Cheng knew of other clients of USIG who were trading and had made money. As a result of his discussion with Eddy, Dr Cheng decided not to trade in 2018. He changed his mind in December 2019. He tried to trade currency using the MT4 platform but got an error message saying his access to trade had been limited. He called Eddy saying he wanted to trade currencies but kept getting this error message. Eddy said that USIG had "temporarily closed the option of trading because lots of clients were suffering huge losses" and USIG did "not want inexperienced traders to accidentally trade and suffer large losses". Dr Cheng accepted this and did not try to trade again.

72 Dr Cheng withdrew USD17,000 from his account on 4 December 2019. He later withdrew USD5,000.

73 Dr Cheng was happy with his USIG account as he received the bonus payments on time and did not have any issues with it.

74 On 22 April 2020 Eddy called him to say that due to the COVID-19 crisis USIG had become insolvent and had temporarily ceased all client withdrawals, but that the money was in a trust account so it was safe even if USIG went insolvent. Eddy offered Dr Cheng an opportunity to move his money to another USIG facility if the money remained with USIG. Later Eddy informed him that USIG had gone into voluntary administration. Throughout this period Dr Cheng's account through USIG's website and the MT4 platform and could see his money in the Commonwealth trust account and believed it remained safe.

6.1.2 Mr McCloskey's evidence

75 Mr McCloskey explained in his evidence that he was told about trading currencies online with USIG by a friend. He saw a video about USIG. Amongst other things, the video said that USIG offered currency and other trading. The video also said: (a) all client deposits belonged to the client and not to the Company. Under the Corporations Act client money is a segregated account meaning that it is separate from Company funds, (b) a client account was protected even if the Company ceased to operate including in circumstances of liquidation, and (c) the Company was not allowed to use client funds under any circumstances. The money was to only be used when a client opened a position or made a withdrawal by lodging to the Company's website. Authorisation to use the funds could only be given by another person in the event that the client signed a Power of Attorney. He also read a PDS on USIG's website.

76 Mr McCloskey used USIG's website to open a trading account in May 2020. He transferred GBP50,000 to the Commonwealth Bank, Union Standard International Group Pty Ltd – Client Trust Account for the purpose of using those funds to trade on USIG's trading platform. In so doing he understood the money would be held on trust by USIG and would not be used for USIG's purposes. Mr McCloskey received a confirmation email from USIG giving him access to his client account and the MT4 platform. Mr McCloskey arranged with USIG to have two accounts. Each month he received a trading statement from USIG. The statement showed his open and closed transactions and the profit or loss he had made on each trade using the MT4 platform in that month. He also received daily trading statements, which showed the change in value in each trading account from day to day.

6.1.3 USIG's agent's evidence

77 There is also an affidavit in evidence from an agent of USIG, Yao-Ming Huang, who sued USIG for unpaid commissions. This agent appears to have performed the same role as Eddy performed. This agent resided in Taiwan. He worked for USIG from 2013. He was told by USIG that client money went into a trust account with the Commonwealth Bank and was provided with a letter from the Commonwealth Bank identifying the USIG client trust accounts. According to this evidence:

(1) clients who made deposits were initially part of a "6% bonus program". This program operated similarly to a bank account. The client could deposit money and earn a fixed annual rate of return of 6% which they could withdraw at any time. This program was not available to Australians or Americans;

(2) USIG "uses the money deposited by clients in these products to give to liquidity providers such as banks to support the leverage on foreign exchange transactions. While the client's money is used for the transaction, it is not in theory risked in the transaction because, as set out above, the position will be sold if it is losing money before any of the client's money is lost";

(3) USIG had little marketing material and no document setting out all the terms and conditions of the 6% bonus program. Mr Huang wrote PowerPoint presentations for agents selling the program. The 2014 presentation explained that: (a) interest is returned at a rate 6% per annum, (b) a minimum deposit of USD10,000 was required to open an account, (c) "clients can request to withdraw at any time", and (d) the "program is ASIC regulated and money is deposited into trust accounts";

(4) USIG changed this product to vary the interest rate each month as Taiwan was "cracking down" on fraudulent products. Later in 2016 USIG also introduced a loyalty bonus of 0.2% per month introduced for client funds that had remained in an account for more than 12 months;

(5) in 2018 USIG moved clients of the 6% bonus program to the "monthly bonus program". Mr Huang updated the PowerPoint presentation to reflect the new program involving a variable interest rate;

(6) in 2014 USIG created a product for residents of China, the "12% bonus program". Mr Huang wrote a PowerPoint presentation for this program. The features of this program were the same as the 6% bonus program and monthly bonus program. Features were that:

   (a) the program is available only to mainland Chinese investors;

   (b) interest is returned at a rate 12% per annum;

   (c) "clients can request to withdraw at any time, but must have completed at least 3 foreign exchange transactions";

   (d) there is a minimum deposit of USD10,000 to open an account; and

   (e) the "program is ASIC regulated and money is deposited into trust accounts";

(7) in 2017 the 12% bonus program was changed so that new clients had to make at least 3 foreign exchange transactions of USD100,000 each (including leverage) per month and the opening deposit had to be USD50,000. Mr Huang amended the PowerPoint

presentation for this program. Mr Huang noted that the new requirements were not strictly enforced; and

(8) later in 2017 the 12% bonus program was changed to a 9.6% bonus program, but other terms remained the same. Mr Huang prepared a PowerPoint presentation for this program;

6.1.4 Further documentary evidence

78 Documents which appear to be connected with the products available in China include statements such as the following:

> - All of the funds of our company's clients are kept in independent "client trust accounts" opened with Commonwealth Bank. All of the clients' funds are legally segregated from the company's own funds. The owner of the trust account funds is the customer himself. The trust account can protect against legal account freeze and attachment.
> - The investor deposits money into a legal trust fund account opened with Commonwealth Bank through USGFX. Based on the designated purposes in the contract, USGFX leverages the funds with a view to increase the transaction volume of transaction clients so that handling fee earnings may be enhanced. The company shares the handling fee earnings that it collects with the clients. This is the basis for the profits of the custodian account.
> - This is the certificate of the trust account issued by Commonwealth Bank. All of the funds of our company's clients are kept in the client trust accounts described by the certificate. The company cannot embezzle the client's funds.
> - Profit Model Investors are tradable margins for USG foreign exchange traders, so as to obtain a proportional share of transaction fees.
>
> Expected Income Distribution 0.8% monthly, 9.6% annual.
> - Better Century - Trading Bonus Program 12% bonus per year Trade more to get more advantage, get 1% trading bonus each month.
> - Complete the minimum required trading volumes each month, each orders cannot be closed within 3 minutes.
> - Once the trading requirement is completed, trading bonus of 1% of your deposit amount will be granted on the 10th day of the next month.
> - Trading profit can be withdrawn at any time, but bonus does not accrue on the trading profit.

79 USIG also appears to have partnered with other providers in China. One example is the U-PLUS project with Shenzhen Hefu Asset Management Company. There is an example agreement styled Agreement of 2T U-PLUS Trust Account between an individual and Shenzhen Hefu Asset Management Company as exclusive agent for USIG's "U-PLUS trust account within the border of the People's Republic of China".

(1) under the agreement the individual entrusted Shenzhen Hefu Asset Management Company with managing funds in the "entrusted account" the individual opened with USIG (Pt 1 term 6);

(2) the agreement says the individual entrusts Shenzhen Hefu Asset Management Company "to manage and add value to his capital of financial management" and agrees that Shenzhen Hefu Asset Management Company "shall choose the investment products and fully manage the capital (Pt 1 term 8.1);

(3) further, the "entrusted capital from [the individual] is based on the method of financial bonus from the third party [presumably, USIG]" (Pt 1 term 8.2);

(4) Part 2 term 1 says "Bonus rate is 0.9% monthly during the period of financial management. Lock-in period for capital is 2 years and the capital shall all be claimable after expiration";

(5) Part 2 term 3 says Shenzhen Hefu Asset Management Company "is responsible to ensure that the invested capital and uncollectible money from [the individual] is all returned when the agreement is expired and [the individual] apply for withdrawal";

(6) Part 2 term 3 says the "minimum amount of initial capital for U-PLUS is 50 thousand USD or in other currencies. The bonus is calculated to thousands"; and

(7) Part 4 term 1 says Shenzhen Hefu Asset Management Company "has the right to manage and use the capital entrusted by [the individual] according to this agreement".

80 The entrusted account was accessed via USIG's MT4 trading platform.

81 An announcement from Shenzhen Hefu Asset Management Company associated with USIG's termination of the U-PLUS project says Shenzhen Hefu Asset Management Company "has set records for transaction volume in the past few years, started to earn a reputation in the foreign exchange industry".

82 It is apparent that USIG and Shenzhen Hefu Asset Management Company offered a variety of products associated with the U-PLUS terminology under which the depositor was paid interest and bonuses for making their money in USIG available for management and use (I infer by Margin FX Contracts) by Shenzhen Hefu Asset Management Company for a fixed term.

83 Documents relating to another project are also in evidence. The project is described as the USIG Youshiji Project. People were invited to open an account on the basis that USIG "will reward you 0.8% bonus monthly, or 9.6% bonus annually based on the total amount of capital

(must reach more than 50 thousand USD) in your account. The more capital, the more bonuses". The rules included "[o]ne 3-lot transaction must be completed for each month. People fulfilling the criterion will receive 0.8% bonus and an extra bonus of 100USD on the 10th day of next month".

84 Other evidence discloses that USIG licensed the MT4 trading platform from MetaQuotes Software Corp. The platform's intended use was web trading.

6.1.5 Liquidator's evidence

85 Peter Krecji, one of the liquidators, gave evidence about his investigations. This evidence included the following matters not identified above from the primary evidence.

86 Some of the trading clients were also offered platform access to facilitate direct market access (**DMA**), which wa usually confined to sophisticated trading clients given that the DMA service was a high risk product. The DMA service was a type of online trading facilitated by a platform which allows trading clients to directly access the live, underlying market exchange through which trade orders are sent directly to the underlying exchange without trade desk intervention.

87 USIG used numerous offshore money processing entities to receive and transmit moneys from clients.

88 Another investing client, Hsin Chien Wang, who resides in Taiwan, provided Mr Krecji with documents relating to his investment in an interest earning product he opened via a "special account". Before doing so Mr Wang was provided with a PDS and terms of business, an FSG, and online terms and conditions. The "special account" portal was displayed on USIG's website in Chinese only and Mr Wang described it as accessible "for joining the interest earning project". Other displayed account types on Mr Wang's portal included a standard account and a VIP account. The website included a requirement to choose a leverage rate between 1:100 and 1:500, as well as a trading server and currency. Clients were also required to answer questions about their financial position and trading experience. Clients had to acknowledge that they had read and understood the PDS and terms of business, FSG and online terms and conditions. The documents which Mr Wang accessed on USIG's website are in the same or similar terms to those Dr Cheng accessed.

89 The liquidators have not located any evidence to date that suggests that there was any material difference between how investing clients who deposited funds via money processors with

USIG and how trading clients who deposited funds via money processors deposited money with USIG.

90 USIG appears to have distinguished between trading clients and investing clients in its electronic records by designating the prefix of the accounts of investing clients as "P-test" (or similar) and trading clients with prefixes such as "ZM", "ZMO" or "ZM_".

91 According to the liquidators' investigations there are 3,007 unique investing client account names of which a total of 2,751 also held trading accounts in the same name. That is, it appears from the (unreliable) records of USIG that approximately 92% of investing clients whose names were included in the MT4 data had access to, or opened, a trading account. It is not practicable for the liquidators to determine which of those 92% of investing clients actually traded. In any event, there is evidence that the trading records are unreliable as the records record Dr Cheng as having undertaken five trades when his evidence is that he tried to trade but could not do so. Dr Cheng's account was allocated a "P-test" prefix.

92 In USIG's records Dr Cheng in fact has two accounts with two different logins. The deposits went into one account. The purported five trades are recorded against the other account.

6.1.6 Observations

93 As the submissions for the interest-bearing clients explained, the evidence discloses that:

(1) Dr Cheng and Mr McCloskey were provided with the same or substantially the same PDS, FSG and terms and conditions;

(2) Dr Cheng and Mr McCloskey opened their accounts with USIG in the same way;

(3) the USIG bank account details forms given to Dr Cheng and Mr McCloskey were identical except for the specific account number (Dr Cheng deposited funds to USG's USD account while Mr McCloskey deposited funds to USG's GBP account);

(4) Dr Cheng and Mr McCloskey received what appear to be identical emails confirming the opening of their accounts, the relevant log in details for the MT4 trading platform, and instructions on how they could commence trading;

(5) Dr Cheng and Mr McCloskey could and did both log into the MT4 platform, which included similar information on available trades that could be placed;

(6) Dr Cheng and Mr McCloskey's account statements bear the same formatting, with both including heading levels for "Closed Transactions", "Open Trades" and "Working Orders";

(7) (a) investing clients had bonuses credited on the positive balance of their accounts from time to time, styled as a "monthly bonus reward", with USIG reserving "the right to adjust the rate of bonus", and that there would be a "monthly announcement of bonus rate", whereas (b) trading clients were awarded "bonus" trading credits.

94 Apart from USIG's internal records, there is no evidence indicating that investing clients understood that they had or might have opened two accounts with USIG, one for investing and one for trading. As the submissions for the interest-bearing clients say, the evidence indicates that those clients believed they had established one account with one login. The MT4 platform disclosed a single account to them.

95 The liquidators identified four main differences between trading clients and investing clients.

96 First, investing clients appear to have been paid interest calculated on the balance in their account. Trading clients were assigned bonus credits. On Dr Cheng's evidence his payments were represented to be a "monthly bonus reward" with USIG reserving "the right to adjust the rate of bonus" and that there would be a "monthly announcement of bonus rate". He received these payments irrespective of undertaking any trading. The evidence shows that trading clients were awarded "bonus" trading credits calculated by reference to their trading volumes.

97 Second, the liquidators consider that USIG's AFSL authorised it to undertake its activities with trading clients but did not authorise it to accept deposits from investing clients.

98 Third, USIG's liabilities to trading clients are recorded in its financial records whereas its liabilities to investing clients are not.

99 Fourth, all investing clients resided in China and Taiwan, whereas trading clients included people residing in other countries.

100 Of these four differences I consider only the first to be potentially material. I am unable to see how the other matters can be relevant to the application of s 981A(1) or s 763E of the Corporations Act.

101 Related to the first difference is the fact that investing clients, or at least some of them (including Dr Cheng), were told that USIG would use their deposits to provide leverage in

foreign exchange transactions of USIG. It was submitted for the trading clients that this prevented the investing clients from arguing that their moneys were subject to any trust.

102 This submission, however, must be confined to a non-statutory trust outside of the scope of s 981A(1). This is because the statutory trust created by s 981H(1) applies to "money to which this Subdivision applies that is paid to the licensee", and under s 981A(1) the Subdivision applies to money paid as specified in that provision. Section 981A(1) does not exclude money paid that may be able to be used by the licensee for the licensee's own purposes. The definitions of "financial services" and "financial product" which are at the heart of s 981A(1) include circumstances in which a client pays money to another person to enable that other person to use the money to generate a financial return to the client: s 763B(a); see also various kinds of financial products in s 764A.

103 Further, as noted, cl 11.3(a) of USIG's terms and conditions (which undisputedly applied to trading clients) provided that trading clients authorised USIG "to withdraw, apply or otherwise utilise the Monies" in order to meet, amongst other things, "obligations … incurred by USG in connection with Contracts" and this right was specified as extending to USIG doing so in connection with any liabilities it incurred on behalf of any clients. In other words, USIG was able to withdraw the money of one trading client to pay liabilities USIG incurred on behalf of another trading client.

104 On this basis, there is no material difference between the positions of trading clients and investing clients merely because USIG was authorised to use the moneys of investing clients to provide it with leverage capacity in Margin FX Contracts. USIG was also authorised to use the moneys of trading clients to meet any of its liabilities incurred in connection with contracts of any trading client (including but not limited to minimum floating margin requirements imposed by a "Related Entity" or "wholesale liquidity provider" (as those terms are used in USIG's terms and conditions), or other hedging requirements).

105 For these reasons the apparent potentially material differences between the trading clients and investing clients are that: (a) the trading clients made money through their own trading activities and the receipt of bonus payments from USIG connected to their trading volume, and (b) the investing clients made money through depositing their money and the receipt of bonus payments from USIG connected to their deposit balance.

106 The matters below indicate that the approach of the trading clients to the position of the investing clients involves an over-simplification.

107 First, the evidence of Dr Cheng is that, although he did not intend to trade in Margin FX Contracts when he made his initial and other deposits with USIG, at all times, he understood that he could trade on his account if he wished. Dr Cheng thus deposited money on the basis that if he wished to trade on his account he could do so through the MT4 platform and in accordance with the PDS, FSG, and terms and conditions provided to him relating to such trading. Accordingly, when he made the payments to USIG, Dr Cheng did so in connection with a financial service that will or may be provided by USIG to Dr Cheng. That financial service was both the capacity to deal in a financial product as provided for in s 766C and the making of a market as provided for in s 766D(1).

108 The words "will or may be provided" in s 981A(1)(a)(i) must be given effect. Those words are used in contradistinction to "has been provided" in the same provision. The various phrases have both a temporal and qualitative meaning. A financial service has been provided if the client has received the financial service. A financial service will be provided if the client has not yet received the financial service but will do so. A financial service may be provided if the client has not yet received the financial service but may do so. In the case of the apparent relationship between Dr Cheng and USIG, USIG would be bound to permit Dr Cheng to trade on USIG's MT4 platform through his USIG account, if and when Dr Cheng chose to do so, because Dr Cheng had opened that account and deposited money into it.

109 On this basis, the fact that Dr Cheng did not intend to trade when he opened his USIG account is not material provided it can be inferred that, at that time, Dr Cheng intended that if he wished to trade in the future he could do so using his USIG account (that is, that USIG was bound to provide that service to him).

110 I would draw this inference given Dr Cheng's evidence that: (a) he always understood that he could use that account to trade if he wished, (b) he subsequently acted in accordance with that understanding by attempting to trade, (c) he was advised by Eddy that he did not have to trade, which is consistent with Dr Cheng's belief he could choose to trade at any time and would be able to do so, (d) the documents with which he was provided focused on the trading service USIG offered, (e) he created an account that gave him access to the MT4 platform, which was USIG's trading platform, and (f) all of USIG's representations to him were to the effect he could trade as and when he chose.

111 The fact that Dr Cheng's subsequent attempts to trade were unsuccessful does not alter the character of his deposits, at the time they were made, as the payment of money in connection with a financial service that, at the least, may be provided to him (or, arguably, will be provided to him by USIG subject only to the contingency of Dr Cheng deciding to do so).

112 Other evidence supports the inference that the agreement between USIG and investing clients (not just interest-bearing clients) included, as part of the transaction, the capacity for the investing clients to trade with USIG as the counter-party as and when they chose to do so. The evidence includes that:

(1) it should be inferred that Eddy, an agent of USIG, dealt with other clients in much the same way as he dealt with Dr Cheng, including providing them with the same kinds of information;

(2) the experience of Mr Wang, another investing client, is consistent with that of Dr Cheng, including having to choose his leverage (relevant only to trading) and the requirement to acknowledge the PDS and terms of business, FSG and online terms and conditions all of which relate to trading;

(3) it is apparent that all such clients had access to the MT4 platform;

(4) it should be inferred that all such clients were subject to the same or similar representations by USIG;

(5) it should be inferred that Mr Huang, another agent of USIG, intended that investing clients should be provided with the PDS, FSG and other terms of trading, which reinforces the importance of the capacity to trade as and when those client chose, USIG being bound to provide that service;

(6) the 12% bonus program operated by reference to a minimum number of trades, reinforcing that the other investment products included a capacity to trade whenever the client wished; and

(7) USIG provided other products (the U-PLUS products) in which the client agreed that another entity (Shenzhen Hefu Asset Management Company) would trade on the clients' account.

113 The fact that Mr Wang used a "special account" portal to access the MT4 platform does not enable an inference to be drawn that this somehow precluded trading. Nor does the fact that Dr Cheng, when he tried to trade, could not do so. When he contacted Eddy about not being

able to use the MT4 platform to trade, Eddy did not suggest that Dr Cheng was not entitled to do so. He said that there was a temporary suspension of trading due to clients having suffered large losses. If the position had been that Dr Cheng was unable to trade because of the type of account he had opened it is difficult to imagine a reason why Eddy would not have told him this from the outset given Dr Cheng's apparent lack of interest in trading at that time.

114 The distinction USIG drew in its systems, between trading clients and investing clients, does not mean that the latter were not entitled to trade. The distinction may have served numerous purposes given that there was a difference between the two groups in that the former received bonuses relating to the volume of trades and the latter received bonuses relating to the balance in their account.

115 The fact that USIG did not record its liabilities to investing clients in its accounts is also explicable other than on the basis that those clients held no entitlement to trade. Recording those liabilities would have affected its profit position adversely and may have exposed it to questions by regulatory authorities and others about its authority under its AFSL to take apparent deposits.

116 The fact that the liquidators' investigations show that 92% of investing clients also held trading accounts does not mean that 8% of investing clients were not entitled to trade. As noted, USIG's financial records are unreliable. The fact that those records show 8% of investing clients did not have a trading account is explicable other than by inferring those clients had no right to trade. The records may be wrong (as they are wrong in numerous other respects). The records may reflect clients who had not made or attempted to trade. In these circumstances, and to the extent the records are reliable to show the activities of trading clients, they must be equally reliable to show that the vast majority of investing clients had trading accounts.

117 There is another reason why it may be inferred that it was important for USIG to ensure that it had agreed with investing clients that, as and when they wished, they could trade through the MT4 platform. It is that USIG's licence, from about 2012, did not authorise USIG to take money on deposit. By agreeing with investing clients that it would be the counter-party for any trading activities they wished to undertake, it became arguable that USIG's dealings with these clients were authorised by its AFSL. It may be inferred that this was important to USIG.

118 Having regard to these matters, the better view is that s 981A(a)(i) of the Corporations Act (money paid in connection with a financial service) applies to the investing clients, just as it applies to the trading clients.

119 For s 981A(1)(a)(i) there is no provision equivalent to s 763E of the Corporations Act (incidental financial products). In any event, I would not accept the submission of the trading clients that s 763E of the Corporations Act applies to the investing clients. A matter which is "incidental" is something "fortuitous" or in "subordinate conjunction with something else" (Macquarie Dictionary Online). I would not consider the entitlement of investing clients to trade as and when they wished to be fortuitous or in subordinate conjunction with their purpose of investing. I infer that for both USIG and the investing clients the capacity to trade, from the inception of each account and deposit, was an important component of the service that USIG provided.

120 Second, and irrespective of the entitlement of investing clients to trade, I consider that s 981A(1)(a)(ii) of the of the Corporations Act (money paid in connection with a financial service) applies to the investing clients, by reason of s 763B(a)(ii) (the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor). An important aspect of the dealings between USIG and investing clients (which, as noted, despite appearances, was similar to the position of trading clients given cl 11 of the trading terms, discussed above) is that investing clients made money either by making their money available to USIG to use to leverage its deals as the counter-party with trading clients (and investing clients who traded) or by trading. Relevantly:

(1) Dr Cheng was expressly told by USIG's agent, Eddy, that USIG would use his money so USIG could use it to leverage USIG's foreign exchange transactions;

(2) Mr Huang, USIG's agent, also understood and, no doubt, would have informed investing clients that USIG would use their money to leverage USIG's foreign exchange transactions and that the client's money was safe because USIG would sell its position if losing money on the transaction before any client money was lost; and

(3) USIG or its agents, specifically Mr Huang, created documents which it should be inferred were to inform agents and prospective clients of the investing products which disclosed that "USGFX leverages the funds with a view to increase the transaction volume of transaction clients so that handling fee earnings may be enhanced. The

company shares the handling fee earnings that it collects with the clients. This is the basis for the profits of the custodian account".

121 Accordingly, in making their money available to USIG to use to leverage its deals as the counter-party with trading clients (and investing clients who traded), it may be inferred that the investing clients knew and intended that USIG would use their money to generate a financial return for them in the form of the bonus monthly payments which, in fact, were a share of the transaction fees USIG earned from clients who traded through its MT4 platform.

122 The investing clients also had no day-to-day control over the uses which USIG made of their money to generate the return as required by s 763B(b).

123 Given that the way in which USIG could offer these bonus payments to investing clients was by using the clients' money to leverage its transactions as the counter-party, it is not apparent why the trading clients submit that the evidence does not permit the conclusion of a relevant connection between the making of the deposit and its use by USIG to generate a return. That connection is consistently disclosed in all of the available evidence about the terms on which USIG dealt with investing clients.

124 The nature of the deal between the investing clients and USIG also tends to explain why it was important that the investing clients be provided with the PDS, FSG, and terms and conditions under which trading occurred. As noted, I infer that all clients were given the same or substantially the same basic information which related to trading. Provision of information of that kind to a client not intending to trade at the time of opening the account would raise the obvious question of how USIG would pay the bonus amounts per month. Eddy and Mr Huang knew that USIG used the money to leverage its position in Margin FX Contracts as the counter-party, and that part of the transaction fees charged to clients who traded was the source of the bonus payments to the investing clients. Eddy did not hesitate to inform Dr Cheng that this was how the bonus payments were generated by USIG. Mr Huang, it may be inferred, also had a spiel ready for prospective clients advising that their money was safe because USIG could sell the position before it lost any client money. Mr Huang also prepared documents disclosing this to be the source of the bonus payments generated by USIG and to be paid to investing clients. The obvious inference is that he intended agents to use those documents to explain to prospective clients how they would get their return and why their money was safe.

125 In these circumstances, for the trading clients to describe the investing products as a cash deposit with a fixed rate of return and to stress that the PDS, FSG, and terms and conditions, while given to the investing clients, had nothing to do with the investing products, misses the point. The investing clients were investing in USIG's making of a market for its Margin FX Contracts. They made money by sharing part of USIG's transaction fees for clients (including investing clients who wished to do so) trading Margin FX Contracts. For such clients, it was important to be given the PDS, FSG, and terms and conditions relating to trading, because they were participating in USIG's market.

126 On this basis, it should be inferred that USIG's agents had two basic ways of enticing prospective clients: (a) offering them the capacity to trade themselves, and (b) if they did not wish to trade when opening their account, offering them a way to benefit from USIG's trading market by depositing money to leverage USIG's trades and sharing in USIG's trading transaction fees, as well as a capacity to trade at any time they wished.

127 Given all of the available information I do not accept the trading clients' characterisation of the dealings between USIG and the investing clients as a form of term deposit offering monthly interest, where the investing clients neither knew nor cared how USIG generated its funds. If this were so, there was no reason for investing clients to be provided with the information relating to USIG's trading arrangements. USIG's agents would not have been so willing to explain to clients how the investing products worked. The fact that the agents also described the investing products as like a savings account (as money was deposited and monthly bonus payments received) raised the obvious question which Dr Cheng asked as to how USIG made the money to pay the monthly bonuses. As noted, both the fact of Eddy's answer and the preparation of material giving that answer by Mr Huang indicate that it was an important part of USIG's marketing via agents to investing clients that they could share in USIG's profits from its derivatives market by making money available to USIG for leveraging. That the money would also provide a return to USIG does not change the fact that, from the investing clients' perspective, their purpose in making the deposit was for USIG to use the money to generate a return for the client.

128 In these circumstances, s 763E is also inapplicable. The financial product was not incidental to the facility. Nor was the inferred financial product purpose of the investing clients.

129 Otherwise, I consider that it cannot be the case that the statutory trust under s 981H is defeated merely because the licensee does not in fact pay the money into an account that satisfies s 981B.

The operation of s 981H does not depend on compliance by the licensee with any of its obligations. This makes sense, as a licensee should not be in any better position in respect of a client merely because the licensee has breached any of its statutory obligations.

130 Although use of funds from trust accounts for hedging was unlawful from 4 April 2018 (as a result of the introduction of s 981D(2) and reg 7.8.02A), there is no reason to infer that USIG complied with this requirement. In any event, the commingling of funds continued and thus it should be inferred that moneys with hedging counter-parties are also impressed with the statutory trust.

131 These conclusions are consistent with the conclusions of Black J in *MF Global*, despite that case being decided before the introduction of s 981D(2) and reg 7.8.02A. Further, and contrary to the liquidators' submissions, I do not see why the reasoning in *MF Global* at [242] might be distinguishable in respect of moneys received back from hedging counter-parties. In particular, given the arrangements between USIG and its clients, I consider that such payments would be to the licensee in its capacity as a person acting on behalf of the client as referred to in s 981A(1)(b)(iii). Although the liquidators noted that "[o]f the $1,978,807 recovered since the date of appointment, $1,115,615.37 was recovered from a hedge provider with whom no transactions occurred other than through Operating Accounts", which is different from *MF Global*, the operating accounts themselves are impressed with the statutory trust.

132 Further, the fact that USIG, on a regular basis, compared client net equity as indicated on the MT4 platform with the balances of trust accounts and swept any excess or deficiency from or to those trust accounts from operating accounts (see Krejci 1 [133(b)]) is not determinative. The circumstances of commingling in the present case necessitate a more broad-brush approach than might otherwise be the case. This conclusion also applies to the fact that USIG treated moneys paid by hedging counter-parties as company assets, not client funds.

133 It will be apparent that in the above analysis I have drawn no distinction between investing clients and interest-bearing clients. I do not consider the distinction to be justified on the material for a number of reasons:

(1) there is no evidence supporting the inference that any investing client was not also an actual or potential trading client. The evidence that might point to the contrary, discussed above, is equally explicable by other circumstances;

(2) there is no evidence indicating that USIG distinguished between investing clients and interest-bearing clients. That is a distinction introduced by the legal representatives of Dr Cheng on the (proper) basis that there might be a group of investing clients who, unlike Dr Cheng, had no entitlement to trade;

(3) on the evidence, there is a group of investing clients (the U-PLUS clients) who did not trade on their accounts themselves, but agreed that another entity could trade on their accounts for them. There cannot be any serious doubt on the evidence that these clients knew that they were agreeing that the other entity could use their money to trade to make a profit for the client and themselves;

(4) there is no reason to infer that there is a class of investing clients who were not entitled to trade if they wished to do so. Inferring the existence of such a class raises the question of why such a class would exist. Nothing in the evidence explains why USIG would wish to prevent investing clients from trading if they so wished. If they traded and lost money, USIG earned transaction fees from their trading and the account balance would reduce thereby reducing the bonus payments USIG had to make. If they traded and made money, USIG would have to pay more in bonuses, but it also earned the transaction fees on their trading activities and had more money available to leverage its transactions; and

(5) given this and the other evidence referred to above, I infer that all investing clients were also actual or potential trading clients.

134 On this basis, in terms of the application of s 981A(1) of the Corporations Act, there is no proper foundation to distinguish between the trading clients and investing clients. They both have the benefit of the statutory trust provided by s 981H. The extent of the trust in favour of each such client is co-extensive.

135 While the liquidators submitted that, for example, any refund from the ATO would not be subject to the trust, I am unable to agree. It is necessary on the evidence to infer that tax liabilities were paid from commingled statutory trust and other funds. On that basis, any refund from the ATO should be treated as a refund of moneys into the commingled account from which the payment of the liability was made.

136 For the reasons given I have reached an equivalent conclusion in respect of payments by hedge counter-parties.

137 Further, and similarly, while there was no mixing as between term deposits and any account other than the operating accounts, the mixing that affected the operating accounts is sufficient to ensure the statutory trust also extends to the term deposits.

138 The money recovered from offshore money processors, on the evidence, must be client money. As the liquidators submitted, it would be odd if a licensee could escape the statutory trusts imposed by the Corporations Act by ensuring that clients paid moneys into foreign accounts that were not authorised. As the moneys that were repaid by money processors are not clearly referable to particular client deposits, the same pragmatic approach is necessary and appropriate in the circumstances. Mr Krejci's evidence is that these repayments far exceeded the amounts disclosed in USIG's records as owing from the money processors, apparently because they constituted a "rolling reserve", the source of which is unclear (see Krejci 1 [201], [202]).

139 The same conclusion applies to all potential sources of funds which the liquidators have identified.

140 I recognise that these conclusions will adversely affect unsecured creditors but that is a consequence of the circumstances and the operation of r .8.03(6)(c) of the Corporations Regulations.

6.2 Express trust

141 Given the conclusions above, it is not necessary to resolve the interest-bearing clients' contentions that the moneys available and recovered, or to be recovered, are subject to an express trust in their favour, co-extensive with the statutory trust in favour of the trading clients.

142 In this regard, I note only that everything the investing clients were told indicated to them that their funds were held and used by USIG as a trustee. I infer that they were told this directly by USIG's agents. They were told this throughout the documentation. The fact that the documentation related to trading activities, given the inter-relationship between the trading and investing activities, would not have suggested to investing clients that their money was not to be held in a Commonwealth bank designated trust account.

143 The fact that investing clients authorised USIG to use their money to provide leveraging to enable USIG to trade as counter-party, providing a return to both USIG and the investing client in terms of transaction fees, is not necessarily irreconcilable with the repeated assurances provided by USIG and its agents that the funds were those of the client, and that USIG held the

funds on trust for the clients. Dr Cheng did not perceive any inconsistency. While it must be inferred that he was content for USIG to retain part of the transaction fees generated from trading, he clearly understood that his principal was held in trust and that he was authorising USIG to use that money to generate revenue on his behalf.

144 While it is not possible to conclude that USIG defrauded investing clients, so that no trust of the kind described in *Black v S Freedman & Co* [1910] HCA 58; (1910) 12 CLR 105 arises, the circumstances described above would satisfy the requirements for an express trust as discussed in *Courtenay House* at [18]-[27].

145 Alternatively, as discussed in *Courtenay House* at [28]-[29] a *Quistclose* trust (*Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567) arises as moneys were paid by investing clients to USIG not to become part of USIG's general assets but to be used for the purpose of USIG using the moneys to generate leverage in trading transactions on behalf of the investing clients. To the extent that purpose could not be effectuated, a *Quistclose* trust would arise in favour of the investing clients.

6.3 Debenture

146 For the same reasons, it is not necessary to consider the debenture contentions on behalf of the interest-bearing clients. The debenture argument of the interest-bearing clients always depended on the rejection of their other arguments discussed above. If those arguments are rejected, then it would seem to follow that the moneys deposited by the investing clients would be generally available to USIG as part of its working capital. If that were so (and I do not agree that it is) it is difficult to see why the investing products do not constitute a debenture unless the exclusion in (a)(i) applied – that the investing client deposited the money in the ordinary course of the client's business.

6.4 Other matters

147 The liquidators seek a direction as to the appropriate date for determining the entitlements of clients.

148 The relevant facts are: (a) the limited data available to the liquidators is such that they can only calculate the entitlements of all clients as at the date of their appointment as administrators (8 July 2020), (b) the liquidators gave notice on 10 July 2020 that clients were entitled to close out existing positions prior to 7 August 2020 (at a time when they unaware of the extent of the deficiencies in USIG's records and of the fact that the conduct of the shareholder would result

in their inability to access accurate data about clients' positions as at the date they were closed out), and (c) while the liquidators have managed to obtain a significant amount of data in relation to client positions as at 5 August 2020, that data is incomplete because a subset of trading clients were "transferred away" from USIG by the shareholder and do not appear on these records.

149 Courts favour the date on which a company went into external administration as the date for the calculation of entitlements of clients to moneys under Pt 7.8 of the Corporations Act: *MF Global* at [114], *Re BBY Ltd (recs and mgrs apptd) (in liq) (No 3)* [2018] NSWSC 1718 at [4] (***BBY (No 3)***), and *Kelly (Liquidator), in the matter of* ***Halifax*** *Investment Services Pty Ltd (in liquidation) v Loo* [2021] FCA 531; (2021) 390 ALR 669 at [337].

150 As the information available for 5 August 2020 is incomplete and it is possible to use the data of 5 August 2020 to calculate the value of the investing client account balances as at 8 July 2020 (affidavit of Peter Paul Krejci affirmed on 18 October 2021 [28]), save in respect of any such clients who were transferred to a related entity in the period between 8 July and 5 August 2020, it is appropriate to make the direction the liquidators seek – namely that the relevant date by which to calculate the entitlements of the clients is the date on which USIG entered administration, 8 July 2020.

151 The liquidators seek a direction that they would be justified in returning to clients deposits made into the designated trust accounts after USIG's entry into administration. The value of those deposits totals $565,905: Krejci 1 [210]. The liquidators propose to take that course on the premise that the deposits made after that date were made in error, the liquidators having notified clients that no new deposits would be taken: Krejci 1 [209] and PPK-8, pp 235-237. Regulation 7.8.03(6)(a) provides that, in distributing moneys held in a trust account designated for the purposes of s 981B, priority is to be given to "money that has been paid into the account in error". In *MF Global* at [165]-[166] Black J said that:

> …error is established in respect of payments into the [client segregated accounts] 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 [MF Global Australia Limited (in liquidation) (**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.

152 The same reasoning applies in the present case and such a direction should be made.

153 The liquidators seek a direction that they be permitted to treat clients whose accounts hold balances of AU$50 or less as having no entitlement to participate in trust accounts, hedge recoveries or money processor recoveries in respect of those accounts. They seek that direction owing to the disproportion between the value of those balances and the costs of administering the return to creditors who have an interest in the balance of those accounts. In *BBY (No 2)* at [396] Brereton J said that such a direction "gives pragmatic effect to the reality that the costs to the administration (and thus creditors generally) associated with administering a claim for the amount specified are disproportionate to the benefit to the claimant". I agree and would apply the same principle to any entitlements to other sources of recovered moneys.

154 The liquidators seek a direction that, where a client holds accounts with both positive and negative balances, the liquidators be permitted to set off the positive and negative net balances, noting that: (a) there are approximately $24,000 worth of negative balances capable of being offset against positive balances, (b) cl 6.11 of the terms of business permitted set-offs in broad terms.

155 In *MF Global* at [157], Black J explained that s 981E(2)(b) (excluding set-offs) is directed to protecting clients' interests against third parties and "does not prevent an agreement between a client and a financial services licensee to set off positive and negative balances on different accounts in determining the client's nett position".

156 In *Halifax* at [407] Markovic J accepted the submission of liquidators at [406] that:

> …even where the CSAs do not include an express provision permitting set-off, a direction should be made or judicial advice given that they would be justified in setting off negative account balances otherwise there will be unnecessary expense incurred to the detriment of all beneficiaries. This is because, absent such a direction or judicial advice, the Liquidators will be bound to distribute the relevant portion of positive account balances to clients and then to have to make demands and potentially bring proceedings to recover negative account balances. The Liquidators contend that, in any event, any claim by a client against the Liquidators in relation to set-off of negative account balances, in the absence of a contractual entitlement, would fail for circuity of action because the amount sought to be recovered would correspond with a liability on the part of the client to the relevant Halifax entity which could immediately be claimed back.

157 I consider her Honour was justified in taking this approach and thus accept the liquidators' submissions to the same effect in the present case if, contrary to my view, cl 6.11 does not permit such a set-off.

158 As to the conversion of foreign currencies into AUD, subject to the liquidators considering the terms of an undertaking they have given to the Court in respect of the frozen accounts and

ASIC having an opportunity to make its position known in this regard, I agree with the liquidators that they would be justified in converting funds in the frozen accounts and recovered from offshore money processors into AUD. Otherwise, for so long as the assets are held in foreign currencies, it will be difficult to determine the value of the total pool of assets and each client's proportionate entitlement to that pool, owing to currency fluctuations. Again, Markovic J gave such a direction in *Halifax* at [408]-[409] for the same reasons which I consider to be appropriate.

159 The liquidators seek a direction as to the appropriate source of payment and/or recoupment of their remuneration and expenses. Having regard to the fact that all identified funds are the subject of the statutory trust, I can see no reason why the liquidators' submission that "where proceedings are properly brought by trustees in pursuit of judicial direction, the costs of the proceedings, including representative parties, are usually treated as having been incurred for the benefit of the trust estate and payable out of the trust assets", citing in support *BBY (No 3)* at [41]-[42], should not be accepted. If necessary, the parties can make further submissions about this issue having regard to these reasons for judgment.

6.5 Conclusions/answers to agreed issues

160 In terms of the statutory trust under s 981H of the Corporations Act, the trading clients and investing clients should be treated as being in the same position.

161 The statutory trust extends to all accounts and sources of income identified by the liquidators as discussed above. At the least, given the nature of the proceeding, it can safely be concluded that the liquidators are justified in treating all funds as being subject to the statutory trust in favour of both trading clients and all investing clients.

162 On this basis, the issues agreed between the parties should be varied and answered as follows.

163 Issue 1: whether moneys paid to USIG by trading clients are moneys to which Pt 7.8, Div 2, Subdiv A applies.

Answer: yes.

164 Issue 2: whether moneys paid to USIG by interest-bearing clients are moneys to which Pt 7.8, Div 2, Subdiv A applies.

165 Answer: yes.

166 Issue 2(a): whether moneys can only be moneys to which Pt 7.8, Div 2, Subdiv A applies if they were paid in connection with dealings falling within the scope of USIG's AFSL.

Answer: no.

167 Issue 2(b): whether moneys paid to USIG by interest-bearing clients were paid in connection with dealings falling within the scope of s 981A(1)(a).

Answer: yes.

168 Issue 2(c): whether moneys paid to USIG by interest-bearing clients were paid in connection with the making of "financial investments" within the meaning of s 763B.

Answer: yes.

169 Issue 2(d): whether moneys paid to USIG by interest-bearing clients were paid in connection with the acquisition of "debentures".

Answer: no.

170 Issue 2(e): whether moneys paid by any client of USIG needed to have been paid into an account maintained conformably with the requirements of s 981B in order for those moneys to be held on trust for them by USIG.

Answer: no.

171 Issue 3: whether moneys paid by interest-bearing clients were paid on terms such that they were held on express trust and/or *Quistclose* Trust and/or a *Black v Freedman* trust.

Answer: express trust – yes; *Quistclose* trust – yes; *Black v Freedman* trust – no.

172 Issue 4: whether there is any difference between the positions of interest-bearing clients as described above and other investing clients.

Answer: no.

173 Issue 5: whether a direction or advice should be given that the liquidators would be justified in treating the trust accounts as beneficially held by trading clients, interest-bearing clients and other investing clients on a pari passu basis.

Answer: yes.

174 Issue 6: whether a direction should be given that the liquidators would be justified in treating the money processor recoveries as beneficially held by trading clients, interest-bearing clients and other investing clients on a pari passu basis.

Answer: yes.

175 Issue 7: whether a direction should be given that the liquidators would be justified in treating the hedge recoveries as if held for the sole benefit of trading clients, interest-bearing clients and other investing clients on a pari passu basis.

Answer: yes.

176 Issue 8: whether a direction should be given that the liquidators would be justified in treating the tax recoveries as if held for the sole benefit of trading clients, interest-bearing clients and other investing clients on a pari passu basis.

Answer: yes.

177 Issue 9: whether the liquidators should be given directions or advice that the operating accounts and term deposits should be treated as if held for the sole benefit of trading clients, interest-bearing clients and other investing clients on a pari passu basis.

Answer: yes.

178 Issue 10: whether the date by which the entitlements of trading clients and investing clients are to be calculated is the date of entry into administration (i.e. 8 July 2020).

Answer: yes.

179 Issue 11: whether the liquidators would be justified in setting off positive net account balances against negative net account balances in all accounts owned by the same trading client and/or investing client.

Answer: yes.

180 Issue 12: whether the liquidators would be justified in treating trading clients and investing clients, in respect of each account with a balance of AU$50 or less, as having no entitlement to participate in recoveries.

Answer: yes.

181 Issue 13: whether the liquidators would be justified in returning deposits made by trading clients and investing clients into the designated trust accounts after the appointment date of 8 July 2020.

Answer: yes.

182 Issue 14: whether the liquidators would be justified in converting into AUD any funds recovered from money processors and the funds held in the frozen accounts, should the liquidators be released from their undertaking not to deal with the moneys held in those accounts.

Answer: yes.

183 Issue 15: from which fund or funds should the unpaid approved remuneration and expenses be paid?

Answer: further submissions may be made.

184 Issue 16: from which fund or funds should the applicants' and respondents' costs of these proceedings be paid?

Answer: further submissions may be made.

185 The parties will be given an opportunity to confer and to file agreed or competing orders and directions reflecting these reasons for judgment.

I certify that the preceding one hundred and eighty-five (185) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jagot.

Associate:

Dated: 26 November 2021