IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL PANEL

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-002049
[2021] NZHC 1113

UNDER	Section 284 of the Companies Act 1993, section 66 of the Trustee Act 1956 and Part 19 of the High Court Rules 2016
IN THE MATTER	of HALIFAX NEW ZEALAND LIMITED (IN LIQUIDATION)
AND	an application by MORGAN JOHN KELLY and PHILIP ALEXANDER QUINLAN First Applicants

…/2

Hearing:	30 November, 1, 2, 4, 7, 8, 9 December 2020
Appearances:	A Leopold SC,* E Holmes,* C Trahanas,* M Kersey and S J Jones for Applicants E Hyde* for First Respondent J V Gooley* for Second Respondent V Whittaker SC* and C Mitchel* for Third Respondent R Scruby SC* and K Petch* for Fourth Respondent S D Munro and C M O'Brien for Fifth Respondent E L Smith for Sixth and Seventh Respondents No appearance for Eighth and Ninth Respondents *(appearing remotely from Federal Court)
Judgment:	19 May 2021

JUDGMENT OF VENNING J

This judgment was delivered by me on 19 May 2021 at 11.00 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar / Deputy Registrar

Date…………

an application by HALIFAX NEW ZEALAND LIMITED (IN LIQUIDATION)
Second Applicant

MORGAN JOHN KELLY and PHILIP ALEXANDER QUINLAN
Third Applicants

an application by HALIFAX NEW ZEALAND LIMITED (IN LIQUIDATION)
Second Applicant

MORGAN JOHN KELLY and PHILIP ALEXANDER QUINLAN
Third Applicants

AND

CHOO BOON LOO
First Respondent

ELYSIUM BUSINESS SYSTEMS PTY LTD
Second Respondent

JASON PAUL HINGSTON
Third Respondent

ATLAS ASSET MANAGEMENT PTY LTD (as trustee for the Atlas Asset Management Trust)
Fourth Respondent

FIONA McMULLIN
Fifth Respondent

ANDREW PHILLIP WHITEHEAD and MARLENE WHITEHEAD (as trustees for the Beeline Trust)
Sixth Respondent

ANDREW PHILLIP WHITEHEAD
Seventh Respondent

JEFFREY JOHN WORBOYS
Eighth Respondent

HONG KONG CAPITAL HOLDINGS PTY LIMITED (HKCH)
Ninth Respondent

Introduction

[1] On 27 November 2018, Morgan John Kelly, Philip Alexander Quinlan and Stewart McCallum were appointed administrators of Halifax New Zealand Limited (Halifax NZ). Just under four months later, on 22 March 2019, Halifax NZ was placed into liquidation.[1] Mr Kelly, Mr Quinlan and Mr McCallum were appointed liquidators.[2]

[2] On 18 September 2019, Mr Kelly and Mr Quinlan were appointed trustees of a Regulation 246 Trust by the Financial Markets Authority (FMA).[3]

[3] Seventy per cent of the shares in Halifax NZ are held by Halifax Investment Services Pty Ltd (Halifax AU).

[4] On 23 November 2018, Halifax AU entered voluntary administration. That triggered the administration of Halifax NZ four days later. Then, on 20 March 2019, Halifax AU was placed in liquidation on a creditors' voluntary winding up. Messrs Kelly and Quinlan are the liquidators.

[5] At the time administrators were appointed to Halifax AU, the aggregate value of the assets recorded in client accounts of Halifax AU and Halifax NZ was approximately AUD 211.6 million. However, the total assets held between the two entities was AUD 192.6 million. There was a deficiency of approximately AUD 19 million.

[6] In their capacity as liquidators of Halifax NZ, and as trustees of the Regulation 246 Trust, Mr Kelly and Mr Quinlan apply to the Court for directions in relation to the distribution of funds held by Halifax NZ (together with ancillary and related orders).[4] The applicants had previously made a similar application for directions and advice to the Federal Court of Australia (Federal Court).

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1 Companies Act 1999, s 241(2)(a).
2 On 9 May 2019 Mr McCallum resigned from his position of liquidator.
3 Reg 246(2) of the Financial Markets Conduct Regulations 2014 (FMCR).
4 The applicants were variously referred to during the proceedings as applicants, liquidators and trustees. The same terminology applies throughout this judgment.

Procedural matters

[7] The relief sought in the application for directions and advice before the Federal Court and the originating application before the High Court of New Zealand (HCNZ) is identical in all relevant respects, as are the parties. The Federal Court and the HCNZ agreed to jointly conduct the hearings to determine the applications in both sets of proceedings.[5]

[8] Although the Courts initially contemplated sitting together, with one week in Sydney and one week in New Zealand, ultimately, with the COVID-19 pandemic, the hearings were conducted jointly by VMR link. Counsel were physically present in either Sydney, Australia or Auckland, New Zealand but appeared before both Courts. Witnesses who were required for cross-examination on their affidavits were sworn or affirmed in both proceedings. Both the Federal Court and the HCNZ received the same submissions and heard the same evidence.

[9] All parties agreed that the Federal Court and the HCNZ could discuss issues during deliberations. Markovic J and I have settled and are agreed on the principal issues raised in the two sets of proceedings. But the ultimate decision in each proceeding and the reasons for decision in relation to those issues are each Court's own.

Background

Halifax entities/shareholding and control

[10] Halifax AU was incorporated on 30 May 2001. Halifax NZ was incorporated on 21 May 2008.[6] On 1 November 2013 Halifax AU acquired a controlling 70 per cent interest in Halifax NZ. Andrew Gibbs (a director of Halifax NZ) and the Andrew Gibbs' Family Trust own the remaining 30 per cent of the shares.[7]

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5 *Kelly, in the matter of Halifax Investment Services Pty Ltd (in liq) (No 5)* [2019] FCA 1341, [2019] 139 ACSR 56 [*Kelly No 5*]; and High Court Minute No (4) dated 12 December 2019 [Minute No 4].

6 Until 9 October 2013, Halifax NZ was called Strategic Capital Management Limited.

7 Previously, on 1 July 2013, Halifax AU and Halifax NZ had entered an introducer agreement pursuant to which Halifax NZ (Strategic Capital Management Ltd as it was then known) would introduce clients to Halifax AU.

[11] The eighth respondent, Jeffrey Worboys, holds 40.97 per cent of Halifax AU's shareholding. Mr Worboys is a director of Halifax AU and was also a director of Halifax NZ from 18 November 2014 to 25 November 2018.

[12] Matthew Barnett, the sole director and shareholder of Hong Kong Capital Holdings Pty Ltd (the ninth respondent), which also owns 40.97 per cent of the shares of Halifax AU, was a director of Halifax AU from 22 January 2007 to 28 February 2018 and a director of Halifax NZ from 18 November 2014 to 15 May 2018.

Representative parties and other respondents

[13] The Court appointed the first to fifth respondents to represent various classes of investor. It also approved the joinder of further respondents to enable the Court to deal with all issues raised in the applications.

Choo Boon Loo

[14] Choo Boon Loo was appointed as first respondent to represent all clients of Halifax AU and Halifax NZ whose proportionate entitlement to, or share of funds from, the deficient mixed fund will be higher after the realisation of all extant investments than their entitlement or share was on the date administrators were appointed to Halifax AU and Halifax NZ (Category 1 clients). Subsequently, Mr Loo's brief as representative was extended to represent all clients who seek an in specie distribution.

Elysium Business Systems Pty Ltd

[15] Elysium Business Systems Pty Ltd was appointed as second respondent to represent all clients of Halifax AU and Halifax NZ whose proportionate entitlement to or share of funds from the deficient mixed fund will be lower after the realisation of all extant investments than their share or entitlement was on the date administrators were appointed to Halifax AU and Halifax NZ (Category 2 clients).

Jason Paul Hingston

[16] Mr Hingston was appointed as third respondent to represent all clients of Halifax AU and Halifax NZ who transferred shares into the Halifax AU IB Platform or Halifax NZ IB Platform from another stockbroker and have not traded in those shares (Category 3 clients).

Atlas Asset Management Pty Ltd

[17] Atlas Asset Management Pty Ltd (as trustee for the Atlas Asset Management Trust) was appointed as fourth respondent to represent those clients of Halifax AU and Halifax NZ whose investments are not traceable and who wish to contend that all clients should share in any deficiency regardless of whether the investments are traceable or not (Category 4 clients).

Fiona McMullin

[18] Ms McMullin was appointed as fifth respondent to represent all clients of Halifax AU and Halifax NZ who invested prior to 1 January 2016 in order to propound the argument that investments made before there was a deficient mixed fund are traceable (Category 5 clients).

[19] The reasonable legal expenses of the first to fifth respondents are to be paid out of the funds held by the applicants.

Whitehead Interests

[20] Andrew Phillip Whitehead and Marlene Whitehead (as trustees of the Beeline Trust) and Andrew Phillip Whitehead were joined as the sixth and seventh respondents respectively on their applications to enable them to pursue individual arguments on behalf of the Whitehead interests generally. The issue of costs was reserved.

Jeffrey John Worboys and Hong Kong Capital Holdings Pty Limited,

[21] On 9 October 2020, Jeffrey John Worboys and Hong Kong Capital Holdings Pty Limited, the eighth and ninth respondents, were joined to these proceedings on the

application of the liquidators.[8] The eighth and ninth respondents had previously been joined to the Federal Court proceedings on their application to argue, inter alia, that the assets of Halifax AU which were acquired in connection with the trading of financial products by clients of Halifax AU, were beneficially owned by Halifax AU and were neither acquired by clients of Halifax AU nor held on trust for clients of Halifax AU.

[22] If that argument had succeeded, it would have reduced the assets available for distribution to clients of Halifax NZ as well as Halifax AU. For that reason, the eighth and ninth defendants were also joined to the Halifax NZ proceeding.

[23] The eighth and ninth defendants were required to post AUD 50,000 as initial security for costs in the Federal Court proceeding. Prior to the hearing the applicant liquidators sought further security. Counsel for the eighth and ninth respondents then sought and were granted leave to withdraw in both the Federal Court and the HCNZ proceedings. The eighth and ninth respondents did not appear and have taken no steps to advance their arguments in either proceeding.

[24] Although the eighth and ninth respondents did not pursue their claim, on the evidence before the Court the arguments could not have succeeded in any event. The ultimate orders of the Court reflect that. I do not need to refer to nor to consider the eighth and ninth respondents' claims any further. I am aware that an application for indemnity costs against the eighth and ninth respondents has been made in the Federal Court. As the eighth and ninth respondents were joined to these proceedings at the instigation of the Court and on the application of the liquidators, I do not propose to make any order for costs against the eighth and ninth respondents in this proceeding. The Federal Court is the appropriate Court for the costs caused by the actions of the eighth and ninth respondents in the litigation to be determined given the initial active steps taken by them in that Court.

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8 Interlocutory Order dated 21 October 2020.

The operations of Halifax AU and Halifax NZ[9]

[25] From 19 February 2003, Halifax AU held an Australian Financial Services Licence. From at least 2009, until it was placed in administration on 23 November 2018, Halifax AU provided financial services. Clients' money was deposited with Halifax AU in connection with financial services and/or financial products (including both stocks and derivative products) being issued, granted or otherwise made available to the client.

[26] Clients of Halifax AU (and clients of Halifax NZ) could access the following online platforms provided by Halifax AU:

(a) the Interactive Brokers LLC (IB) trading platform also known as Trader Workstation (referred to as IB AU);

(b) its MetaTrader 4 (MT4) trading platform licence from MetaQuotes Software Corp (MetaQuotes) and also known as Halifax Pro;

(c) from at least around 2009 to around July/August 2016, the Saxo trading platform (Saxo); and

(d) from around 8 August 2016, its MetaTrader (MT5) trading platform also licensed from MetaQuotes and known as Halifax Plus.

[27] Clients having accounts with Halifax AU could access the above trading platforms and place trades at their own discretion or could instruct Halifax to place trades on their behalf. Halifax AU was also an authorised body under Halifax NZ's derivatives licence but was not a market participant on any exchange.

[28] Halifax NZ acted as a broker in respect of exchange traded products. It was a licensed derivatives issuer and held a market service licence (MSL) granted by the FMA. Halifax NZ's MSL allowed the company, and Halifax AU, as an authorised body, to issue derivatives in New Zealand. Halifax NZ was also an introducing broker

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9 The summary at [25] to [37] is taken from the Agreed Statement of Facts dated 3 November 2020 and admitted pursuant to s 9, Evidence Act 2006.

to Halifax AU. On 1 July 2013, four months before Halifax AU acquired the controlling share in Halifax NZ, the parties entered an introducing broker/referral agreement pursuant to which Halifax NZ agreed to introduce clients to Halifax AU and refer them to Halifax AU's financial services business. As such, Halifax NZ introduced prospective clients to Halifax AU for the purpose of financial products trading.

[29] Halifax NZ conducted business by:

(a) providing access for its clients and for clients of Halifax AU to the IB trading platform (which was referred to as IB NZ);

(b) facilitating access for its clients to Halifax AU's IB AU platform;

(c) facilitating access for its clients to Halifax AU's MT4 platform; and

(d) facilitating access for its clients to Halifax AU's MT5 platform.

[30] The financial products in which clients of Halifax AU and Halifax NZ could trade were either:

(a) exchange traded financial products, namely investments traded on a regulated exchange, such as the Australian Stock Exchange, New York Stock Exchange, or London Stock Exchange (including shares, warrants, futures and options); or

(b) over the counter (OTC) financial products comprising derivatives which were not listed on a regulated stock exchange but which were traded via private contracts between the client and either Halifax AU or Halifax NZ, the value of which contracts were based on the price of assets such as shares, precious metals and commodities.

The trading platforms

[31] The exchange traded financial products, including shares, could be traded through the IB AU, IB NZ, and MT5 platforms.

[32] OTC products could be traded through the MT4, MT5 and IB NZ platforms.

[33] The MT4, MT5, IB AU and IB NZ platforms were operated in Australia by Halifax AU.

[34] The Halifax AU IB platform enabled clients to trade in shares, warrants, equity and index options, futures and options on futures.

[35] The Halifax NZ IB Platform enabled clients to trade in shares, warrants, foreign exchange, equity and index options, futures, options on futures, mutual funds and CFDs on shares. Clients of Halifax AU and Halifax NZ could also transfer stocks onto the IB AU and IB NZ Platforms from other sharebrokers.

[36] The MT4 platform enabled clients to trade in foreign exchange and CFDs on shares, indices, metals and commodities. The MT5 platform enabled clients to trade in shares, foreign exchange and CFDs on shares, indices, metals and commodities.

[37] The Saxo platform enabled clients to trade in stocks, futures, foreign exchange derivatives and CFDs. On 30 June 2016, Saxo terminated its agreement with Halifax AU to provide access to the Saxo platform. Following that termination, the majority of clients on the Saxo platform were migrated to the MT5 platform.

Closing out – operation of investments

[38] Since 23 November 2018 the administrators (and subsequently the liquidators) have permitted clients to close out open positions or to sell or realise investments in financial products but clients have not been able to enter any new transactions or trades.

The relationships: Halifax NZ and its clients

[39] Halifax NZ and its clients generally entered Client Service Agreements (CSAs).[10] The standard CSA contained the following relevant clauses:

> **2. Appointment**
>
> a. The Client appoints Halifax NZ as its agent to:
>
> i. enter into the Transactions on behalf of the Client;
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> ii. do all things reasonably necessary to perform the Transactions; and
>
> iii. do all things reasonably incidental to the performance of the Transactions.

[40] Transaction is defined as:

> … means trading in the Financial Products described in the Client Details Form and such other Financial Products as may be agreed … from time to time.
>
> …
>
> **6 Trusts and Segregated Accounts**
>
> …
>
> a. All money and property deposited by the Client with Halifax NZ, or received by Halifax NZ on behalf of the Client, will, if required by law, be deposited in a trust account or client segregated account by Halifax NZ and held in accordance with applicable legal requirements.
>
> b. any deposit into a client segregated account does not fully protect the Client's money and property from the risk of Loss due to a default not caused by the Client.
>
> c. If the Client's money and property is placed in a client segregated account, it may be co-mingled with the money and property of other Halifax NZ clients or also with the money and property of other clients of Halifax NZ's counterparties and agents.
>
> …

[10] There are at least two editions of the CSA, one dated 1 May 2015 and the other 8 July 2018. The above clauses are taken from the CSA entered by the Whitehead Interests on 11 April 2016. The later version (8 July 2018) is similarly worded in relevant respects.

[41] Clients of both Halifax AU and Halifax NZ were able to trade on all of the platforms regardless of whether they had executed a Client Service Agreement (CSA) although it was necessary for the client to first have an account set up and funded in connection with the relevant platform to be able to trade.

[42] Halifax NZ also issued Product Disclosure Statements (PDS) and accompanying schedules from time to time through the Halifax NZ website in relation to derivative products. PDS were issued by Halifax NZ on 26 May 2015 for CFDs, Exchange Traded Option Contracts, Future Contracts and Futures Option Contracts, and for Margin Foreign Exchange, and Foreign Exchange Options.[11]

[43] The PDS included the following terms:

> **1.1 What is this?**
>
> This is a product disclosure statement (**PDS**) for Contracts for Difference (**CFD**) provided by Halifax New Zealand Limited (**Halifax, we, our, us**). CFDs are derivatives, which are contracts between you and Halifax that may require you (**client**) or Halifax to make payment or deliver on the CFDs underlying index, equity, commodity, financial product, or other asset (as the case may be). The value of the contract will depend on the price or value of the underlying index, equity, commodity, financial product, or other asset. The contract specifies the terms on which those payments and deliveries are to be made.
>
> …
>
> **2.1 What is a CFD?**
>
> A CFD is an agreement between you and Halifax to pay the other the difference arising from movements in the value of an Underlying Product, without either party having to actually own the Underlying Product.
>
> A CFD is an OTC derivative product. This means that CFDs are created and traded off-market between you and Halifax rather than being traded on an exchange, such as a stock exchange or futures exchange.
>
> …
>
> **5. How Halifax treats funds and property received from you**
>
> **5.1 How we treat your money**
>
> Amounts you pay to us are deposited into the Client Trust Accounts that we maintain. The Client Trust Accounts are held with ANZ Bank New Zealand.

[11] Other versions of the PDS for CFDs and Margin Foreign Exchange and Foreign Exchange Options were issued on 30 June 2016.

> This means that client funds (and property) transferred to us through the Trading Platforms are held on trust. Funds we receive are not available to pay any liability of ours, including general creditors in the event of our receivership or liquidation.
>
> Any funds of yours required to meet Margin Requirements, including any fees and charges you incur, will be deducted from the Client Trust Account and paid directly to us.
>
> For money deposited in the Client Trust Account, you should be aware that:
>
> a. individual client accounts are not separated from each other;
>
> b. all clients' funds are co-mingled into the one account; and
>
> c. the client money provisions may not protect any funds of yours if the Trust
>
> Halifax is entitled to retain all interest earned on the money held in the Client Trust Accounts.

The relationships: Halifax NZ and IB

[44] The relevant agreements between Halifax NZ and IB included:

(a) IB Institutional Services Customer Agreement dated 18 November 2014;

(b) IB Consolidated Account Clearing Agreement dated 25 November 2014;

(c) IB Fully Disclosed Clearing Agreement dated 15 February 2015.

[45] Similar agreements were concluded between Halifax AU and IB on 18 June 2007 and 29 July 2010.[12]

[46] There was also an agreement dated 19 January 2017 between Halifax NZ and Interactive Brokers (UK) Limited which governed certain products offered on the IB NZ platform.

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[12] In relation to both the Consolidated Account Clearing Agreement and Fully Disclosed Clearing Agreement.

[47] The IB Institutional Services Customer Agreement licensed the customer (Halifax NZ) to use IB software.

[48] The IB Consolidated Account Clearing Agreement dated on 25 November 2014 included the following clauses:

(a) "WHEREAS, [Halifax NZ] "desires to maintain … consolidated accounts … with [IB] through which it will effect transactions in specified investment products on behalf of [Halifax NZ] Customers …";

(b) the Consolidated Account would be "carried in the name of [Halifax NZ] and [Halifax NZ] shall effect all transactions to be executed and cleared by [IB] for [Halifax NZ] through the Consolidated Account. [Halifax NZ] shall be solely responsible for all aspects of the acceptance and handling of the individual accounts of the Customers of [Halifax NZ] whose transactions are effected through the Consolidated Account …, the acceptance and handling of all orders submitted by [Halifax NZ's] Customers …"; [13]

(c) Halifax NZ "may accept orders of its Customers and submit such orders to [IB], or [Halifax NZ] may provide its Customers with a mechanism to submit such orders themselves electronically directly to [IB];

(d) IB "shall receive and execute orders" and clear executed transactions for [Halifax NZ] through the Consolidated Account;

(e) [Halifax NZ] "shall be solely responsible for maintaining required books and records in connection with all [Halifax NZ] Customer Accounts and transactions contemplated by this Agreement or involving [Halifax NZ] Customers …";

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[13] This was known as the "White Label" agreement.

(f) Halifax NZ acknowledged that a "separate account[s] that may be used to hold any proprietary funds and positions of [Halifax NZ] will not be treated as customer accounts" for certain regulatory purposes; (referred to by witnesses as the IB NZ Prop Account);

(g) IB would "establish Sub-Accounts of the [Halifax NZ] Consolidated Account" (with each Sub-Account to be used for trading of the [Halifax NZ] Customer Account and the single Master Sub-Account to be used to hold any proprietary funds and positions of [Halifax NZ];

(h) IB granted to Halifax NZ a non-exclusive and non-transferrable licence to use IB's proprietary software to communicate with the Interactive system;

(i) when a customer order was entered into the Interactive system and transmitted for execution (e.g. to an exchanges electronic system) the identity of IB's customer was anonymous.

[49] The IB Consolidated Account Clearing Agreement also provided for the payment of commissions and fees payable to IB.

[50] IB separately contracted with BNP Parabas Securities Services (BNP) for the provision to IB of, amongst other things, custodial services.[14]

The relationships: Halifax AU and Halifax NZ

[51] On 1 July 2013, Halifax AU and Halifax NZ entered a Clearing and Settlement Program Agreement. Pursuant to that Agreement Halifax NZ agreed to act as a referral source for the purpose of introducing and referring prospective clients to Halifax AU for the purpose of financial products trading. Halifax NZ agreed to ensure that all introduced clients received Halifax AU's Financial Services Guide and Halifax AU's PDS prior to executing the account application.[15] In return Halifax AU agreed to pay

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14 Local Document Australia and New Zealand dated 8 August 2016 between BNP and IB Australia Pty Ltd and IB Australia Nominees Pty Ltd.

15 Clause 3A(g).

Halifax NZ a fee in respect of the introduced clients in accordance with an agreed schedule.

[52] Following Halifax AU's purchase of a controlling interest in Halifax NZ, the treasury and finance operations of Halifax NZ were carried out by Halifax AU. In particular, the treasury functions carried out included:

(a) conducting a daily review of the bank accounts of Halifax AU and Halifax NZ for the purpose of identifying and allocating deposits made by clients;

(b) causing deposited funds to be transferred to the appropriate bank account relating to the specific trading platform used by the client;

(c) causing a client's account on a relevant trading platform to be credited with an amount reflecting the funds deposited by the client so that the client could commence trading;

(d) actioning redemption requests from clients of Halifax AU or Halifax NZ, meaning requests to transfer funds from accounts held with Halifax NZ or Halifax AU to external accounts nominated by clients;

(e) attending to transfers of funds as requested by Jeff Worboys and Matthew Barnett, the former directors of Halifax AU; and

(f) attending to periodic internal and external reporting requirements.

[53] Halifax AU's support of Halifax NZ was reflected in their respective staff numbers. Immediately prior to administration, Halifax AU had 16 employees while Halifax NZ had only four, all of whom were predominantly sales focussed.

The Trust relationship

[54] All parties accept that the investments and cash in bank accounts are held on trust by the applicants.[16] However, they differ as to the precise nature and extent of the obligations under the trusts. The trusts arise variously by imposition by statute or regulation, under the terms of the contractual arrangements or by the practical dealing between the parties.

[55] Separate statutory and regulatory provisions apply in both jurisdictions. As noted, Halifax NZ was a broker. Section 77P of the Financial Advisers Act 2008 (FAA) provides that:

> (1) A broker who receives client money or client property, in his, her or its capacity as a broker for a client, –
>
> (a) must hold the client money or client property, or ensure the client money or property is held, on trust for the client; …..

[56] Client money and client property are defined in s 77B(2) of the FAA. Client money means money received from, or on account of, a client in connection with acquiring, holding or disposing of a financial product, or otherwise in connection with a financial product. Client property means a financial product, a beneficial interest in a financial product or received in connection with a financial product received from, or on account of, a client. Financial product is defined in s 5 of the FAA and, via the definition of financial product in the Financial Markets Conduct Act 2013 (FMCA), includes equity securities. In short, all moneys paid into Halifax NZ in respect of share trading and all shares acquired by Halifax NZ on behalf of clients fell within the s 77P FAA Trust.

[57] However, as noted, in addition to facilitating the purchase of shares Halifax NZ also enabled its clients to purchase derivatives by facilitating investment in derivative products through Halifax AU. While the definition of financial product in s 7 of the FMCA Act includes derivatives, s 77C(1)(d) of the FAA excludes from the definition of a broking service under that Act a person providing a relevant service in

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[16] Some of the funds held include commission and fees payable to Halifax AU and Halifax NZ and interest earned on funds in client deposit accounts. The client investors' claims to such money falls outside the directions sought by the applicants in these proceedings.

the course of acting as a derivatives issuer under a licence pursuant to Part 6 of the FMCA. So, money paid to Halifax NZ in its capacity as a derivatives issuer fell outside the scope of the s 77P FAA Trust. Nevertheless, regs 240 to 243 of the FMCR, read with the definition of derivatives investor money in reg 239, have the effect that all money paid to Halifax NZ in the nature of margin payments, all proceeds of the closing out of any such positions and all money deposited but not yet invested were required to be held by Halifax NZ on trust pursuant to reg 240 and were to be paid into a trust account: reg 241. The only exclusions were charges, fees, and other amounts payable as the price for making the investments, together with interest payments.

[58] The appointment of administrators to Halifax NZ on 27 November 2018 constituted an insolvency event for the purposes of reg 246 of the FMCR. As a result, the following was subject to a single trust in favour of all clients on behalf of whom the money was held:

(a) derivatives investor money, and derivatives investor property (as defined in the FMCR);

(b) money or property held by a hedging counterparty on behalf of the derivatives issuer as a result of the use of derivatives, investor money, or derivatives, investor property in authorising hedging activities; and

(c) any obligations owed by a hedging counterparty to the derivatives issuer that have arisen from the use of derivatives investor money or derivatives investor property.

[59] As noted, on 18 September 2019 the FMA appointed Mr Kelly and Mr Quinlan as trustees of the single trust created by reg 246.

[60] As Halifax NZ facilitated investment by its clients on the MT4 and MT5 platforms through Halifax AU, it also met the definition of a derivatives issuer within s 6 of the FMCA. As such, Halifax AU was required to hold the money (and property) in relation to such derivative investments on trust and, following the liquidation, reg

246 would apply to it also. Accordingly, some of the assets held by Halifax AU would also be held pursuant to the trusts under the provisions of the FMCR.

[61] In any event, if the money were not held on such a trust by Halifax AU, it would be held pursuant to the statutory trusts under s 981H of the Corporations Act 2001 (Cth).

[62] As noted, apart from those statutory and regulatory trusts, the contractual relationship recorded in the CSAs and the PDSs and the dealings between Halifax NZ and its clients established Halifax NZ as trustee of moneys and other property on behalf of clients.

[63] In conclusion, on one or more of the above bases, all money or property paid to or held by Halifax NZ (apart from charges, fees and interest due to Halifax by contract) was held by Halifax NZ on trust for its clients.

A single deficient mixed fund

[64] As noted, the total value of assets held for the clients of Halifax AU and Halifax NZ when the applicants were appointed administrators was approximately AUD 192.6 million. There was a deficiency of approximately AUD 19 million between the aggregate value of the assets recorded as being held in the client accounts of Halifax AU and Halifax NZ and the value of assets actually held. However, that sum was partly offset by an amount of money held in the corporate bank accounts and term deposits in the name of Halifax AU. The client moneys' shortage was approximately AUD 15.471 million.[17]

[65] Although the assets held (shares, options and warranties) have increased since the date of administration so that the aggregate balance of investor accounts was, as at 31 July 2020, just under AUD 265 million, the costs of the administration, the liquidation, and the litigation have also increased so that there was a shortfall in client funds as at 31 July 2020 of just over AUD 53 million.

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[17] Outline of liquidators'/trustees' submissions at 44.

[66] With the exception of the Whitehead Interests (and while in some cases arguing for an in specie distribution, or in the case of the Category 3 and Category 5 clients, that their investments were not purchased from the deficient mixed fund), the remaining respondents accept that the funds of Halifax NZ were mixed with the funds of Halifax AU. Their position is that there is effectively a single deficient mixed fund comprising shares and other investments as well as money in bank accounts held between the two entities.

[67] The Whitehead Interests do not accept the characterisation of the investments and funds held by Halifax NZ and Halifax AU as being a single deficient mixed fund.

[68] The Whitehead Interests accept that Halifax AU and Halifax NZ were trustees and/or custodians of money and investments held for the various clients. However, they argue that where the shareholdings are identified in the segregated client accounts on the IB platforms, they should not be considered as part of a single deficient mixed fund.

[69] The Whitehead Interests make the point they did not trade on the MT4 or MT5 platforms. They argue that their holdings, as recorded in the segregated IB client accounts, were acquired as a result of purchases arranged or directed by Mr Whitehead and in respect of which the Whitehead Interests had provided valuable consideration by depositing money to the Halifax NZ client trust account prior to or at the time of acquisition. They argue their holdings are separately identifiable and traceable.

[70] Given the arguments raised by the Whitehead Interests, it is necessary to determine whether the funds (shares and other property, including money) held by Halifax AU and Halifax NZ constitute a single deficient mixed fund.

[71] At the outset, it is important to acknowledge the factual complexities in this case caused by the numerous bank accounts and the various trading platforms used by Halifax AU and Halifax NZ. This is not the case of a trustee operating a single bank account. As at 23 November 2018 Halifax AU had funds in 27 bank accounts (including IB and MT4 and MT5 accounts), funds with two hedging providers and

with five merchant providers and at least six accounts with IB. Halifax NZ had funds in eight bank accounts and held a further six IB accounts.

[72] Clients in Halifax NZ deposited money into a variety of bank accounts, including the ANZ Halifax NZ dollar account, the IB suspense account with Bankwest in AUD and NAB foreign currency accounts or the Halifax Pro-Suspense account also with Bankwest and in AUD.

[73] The applicant's evidence establishes that, where a Halifax NZ client deposited funds into one of the Halifax NZ dollar accounts, the Halifax IB suspense account in Australia or one of the foreign currency sub-accounts then, once the funds had been identified and cleared, on the instructions of Halifax treasury, the client's account or sub-account on the IB Platform would be credited and a corresponding debit would be made in the Halifax master account on the platform.

[74] The principal evidence regarding the flow of funds between the various accounts is contained in Mr Kelly's affidavits of 26 June 2019 and 22 June 2020 as corrected and clarified in his subsequent affidavit of 20 October 2020.[18]

[75] Mr Kelly's evidence confirms the following processes applied:

(a) Clients who invested on the IB NZ Platform deposited money into the ANZ Halifax NZ account (which was expressly designated as a trust account) or into a range of ANZ foreign currency accounts (in the name of Halifax NZ – again expressly designated as trust accounts). The deposits into the ANZ Halifax NZ account were in NZD and the deposits with the latter accounts were made in a range of foreign currencies. The ANZ foreign currency accounts were not commonly used. Where IB NZ clients wished to make deposits in foreign currencies, they were encouraged to make their deposits into one of the NAB foreign currency accounts operated by Halifax AU.

[18] A flow chart showing the flows of money in general terms is attached marked 'A'.

(b) IB NZ clients were also able to deposit funds into the IB Suspense Account, the Merchant Account, the Halifax Pro-Suspense Account and were encouraged to use the NAB foreign currency accounts.

(c) MT4 and MT5 clients who signed a CSA with Halifax NZ deposited funds into either the Halifax Pro-Suspense Account, the Merchant Account, or into a NAB foreign currency account. In some instances, clients on the MT4 or MT5 Platforms also deposited money into the IB Suspense Account or directly into the ANZ Halifax NZ account.

(d) In order for the client account to be credited there needed to be sufficient funds deposited by Halifax NZ in one of the IB named bank accounts and recorded in the IB NZ master account. To achieve this Halifax NZ, like Halifax AU, maintained a surplus "buffer" of funds with IB. This enabled Halifax NZ to credit client accounts on the IB Platform immediately on receipt of the deposit rather than waiting 24 to 48 hours for a transfer from Halifax NZ to IB to appear in the relevant account as cleared funds. To achieve this, funds were regularly transferred from the ANZ Halifax NZ account to IB as required to maintain the buffer.

(e) An examination of the Halifax NZ business records (which Mr Kelly has reviewed and approved) also discloses that some payments were made for the benefit of Halifax NZ rather than for the benefit of its clients. In the case of Halifax NZ, for instance, legal fees were paid from the ANZ Halifax NZ account. However, most such unauthorised payments made in that way were for the benefit of Halifax AU.

(f) Some payments were made to clients at their request.

(g) There were also some transfers to Invast and Gain for the purpose of hedging foreign currency and other derivative transactions entered into between the clients and Halifax NZ on the MT4 and MT5 platforms. This occurred automatically by way of a bridge.

(h) There were also transfers to HSBC foreign currency accounts in the name of IB to ensure foreign currency held by IB in the name of Halifax NZ was maintained at a level required by IB. From time to time, Halifax treasury would notify IB they wanted to make a deposit and IB would provide an account number for the deposit.

(i) There was a regular flow of funds from the ANZ Halifax NZ account to the NAB New Zealand dollar account.

[76] Importantly, clients of Halifax AU or Halifax NZ did not deposit funds directly with IB. The provision of funds by a client to a Halifax bank account did not give rise to a corresponding deposit to an IB account. Deposits from Halifax AU or Halifax NZ bank accounts were only made to IB on an as needed basis when the balance of funds with IB had fallen below a level (the buffer) that Halifax treasury considered necessary to fund potential future transactions.

[77] From time to time and as required, Halifax AU and Halifax NZ made the buffer payments by transferring funds from bank accounts held by those companies to the IB bank account to ensure Halifax AU and Halifax NZ had sufficient funds deposited with IB so their clients could trade through the credit recorded in their accounts with IB.

[78] Further, when clients realised open positions on the IB AU or IB NZ platforms, their account with IB recorded a credit. The moneys from such realisations generally remained in the relevant IB AU or IB NZ bank account and were effectively available as retained proceeds to enable further trading, not only by the clients who had realised their investments but also by other clients. The retention of the moneys effectively meant either a lesser buffer payment would be required, or more time could pass before a further buffer payment would be necessary.

[79] Mr Kelly confirmed that a review, as at the date of the administration, of 30,000 plus transactions and accounts operated by the Halifax Group had determined there was no pattern behind the transfer of funds. There was no direct link between investments and individual client deposits. Clients were able to trade using the

commingled pool of funds deposited by other clients before their own funds were cleared.

[80] Mr Kelly confirmed that the MT4 and MT5 Platforms operated in the same way. Funds were deposited to ensure there was sufficient credit to allow the transactions to occur. Again, if a client deposited funds for the purposes of investing through the MT4 or MT5 platform the funds could have gone into any account. If in New Zealand dollars it would have been deposited to the Halifax ANZ New Zealand dollar account or possibly to one of the foreign currency accounts operated by Halifax in Australia.

[81] The other assets held by Halifax NZ for clients were contractual rights and derivative products such as options, warrants and the rights resulting from trades placed by Halifax NZ with Invast or Gain to hedge the exposure of the Halifax NZ to clients under a range of foreign exchange contracts or index CFDs entered into by clients (known as A book clients).

[82] The IB AU Prop account was a sub-account of the master account. It recorded share transactions on the MT5 Platform and it was also where commissions and other moneys payable to Halifax AU were aggregated.

[83] Shares held in the IB NZ Prop account were held for the purpose of hedging against trades on the MT5 Trading Platform. The assets were held on behalf of Halifax NZ rather than the individual client. The shares were purchased to hedge exposure to CFDs. Halifax NZ acquired the shares out of trust funds. The shares were accordingly subject to an equitable charge in favour of the relevant clients. The legal interest was held on behalf of Halifax NZ (which was purporting to transact on its own behalf) but the beneficial interest was subject to the equitable charge.

[84] Mr Kelly's evidence focused primarily on the period from January 2016 to 23 November 2018 as the records predating January 2016 were incomplete. In that period

(January 2016 to 23 November 2018) the following amounts were paid into the IB AU master account:[19]

(a) net payments of AUD 28.3 million flowed from the IB allocated account;

(b) payments totalling approximately AUD 900,000 were transferred from the Halifax Pro Allocated account (funds deposited by MT4 clients and MT5 clients);

(c) net payments of approximately AUD 3.2 million flowed from the ANZ HNZ dollar account (funds deposited by Halifax NZ clients); and

(d) funds of approximately AUD 5.4 million were transferred from various foreign currency accounts.

[85] During the same period, the following amount were paid into the IB NZ master account:

(a) net payments of AUD 17.5 million flowed from the IB allocated account;

(b) payments totalling approximately AUD 1.5 million were transferred from the Halifax Pro Allocated account (funds deposited by MT4 clients and MT5 clients);

(c) net payments of approximately AUD 19.8 million flowed from the ANZ HNZ account; and

(d) funds of approximately AUD 22.1 million were transferred from the foreign currency accounts.

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[19] A flowchart showing the typical application of credits to clients' sub-accounts on the IB Platform and client accounts on the MT4 and MT5 is attached marked 'B'.

[86] While the primary focus was on the period after January 2016, Mr Kelly confirmed the bank accounts of Halifax AU were commingled with each other from the latest by December 2011. From 29 June 2015 the accounts were also commingled with the ANZ Halifax NZ account.[20]

[87] Further, on Mr Kelly's evidence there had also been significant transfers of funds between Halifax AU accounts and Halifax NZ accounts between 29 June 2015 and 23 November 2015. The following transactions took place during that time:

(a) NZD 8,139,247 was transferred from the ANZ HNZ account to the NAB company account;

(b) NZD 350,000 was transferred from the ANZ HNZ account to various foreign currency accounts; and

(c) NZD 2,114,724 was transferred from Halifax's AU NAB NZD account to the ANZ HNZ account.

[88] Mr Kelly's evidence confirms the extent of the admixture of clients' funds with other clients' money and also between Halifax NZ and Halifax AU. Further, the funds flow memorandum prepared for and overseen by Ian Sutherland, a director of KPMG, also confirms the extent of the admixture. As a specific example, $300,000 was transferred in May 2018 from the ANZ Halifax NZ account to the IB account.

[89] Apart from the funds flow memorandum, Mr Sutherland also carried out a "tracing" exercise in relation to a sample of twenty clients of Halifax AU and Halifax NZ and analysed the transactions undertaken by those clients. With the exception of three cases (where stock was transferred through another broker and does not appear to have gone through the IB master account or to have involved any other Halifax group controlled commingled bank account), the funds of the other 17 clients had all been commingled and tracing was not otherwise feasible.

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[20] A flowchart showing an example of how the funds were co-mingled is attached marked 'C'.

[90] The evidence satisfies the Court that there was a commingling of client funds through various bank accounts operated by Halifax NZ itself and also a commingling of funds (both of its clients and its own) between various bank accounts of Halifax NZ and Halifax AU.

[91] Those commingled funds were then used to purchase the shares and other investments held for Halifax NZ's clients. As the shares, other investments and bank accounts are insufficient to meet all clients' entitlements, there is a single deficient mixed fund.

The Whitehead Interests' case

[92] The Whitehead Interests seek directions that their holdings are held by Halifax NZ for their sole benefit. In the alternative, they support an in specie distribution as argued for by the first respondent.

[93] The Whitehead Interests argue that Halifax NZ only had authority to invest its clients' funds subject to the instructions of those clients. The investments on the IB Platforms were held by IB (or its nominee) as custodian of the holdings recorded in the segregated client accounts. The deposits by the Whitehead Interests were not allocated to any other client's segregated client account on the IB or other platforms. They say their holdings are identifiable, distinct, and traceable. The relevant transactions are transactionally and causally linked to the deposits authorised by Mr Whitehead. They are ultimately held by Halifax NZ for the benefit of the Whitehead Interests as distinct from the claims of other clients on the IB platform and the clients who invested through the MT4 and MT5 platforms.

[94] The Whitehead Interests make the following points to support their argument:

(a) first, they argue that Mr Whitehead deposited money solely to the Halifax NZ trust account. They say that money was applied to purchase the Whitehead Interests' holdings;

(b) next, they note the separate legal entities of Halifax NZ and Halifax AU; and

(c) they argue that, at the date of administration, Halifax NZ was not insolvent so was in a position to satisfy its trust obligations to the Whitehead Interests. The Whitehead Interests held a personal bundle of rights in a solvent company.

[95] Ms Smith submitted that the Whitehead Interest's holdings were traceable from the records held by Halifax NZ and the IB segregated account. She referred to the following passage from *Sonray* in support:[21]

> [86] Of course, rateable distribution is subject to an important qualification — it does not apply if the claimants do not have equal claims: *French Caledonia* at [176] and [185]. Put another way, it is necessary to determine whether there should be differential treatment of claimants. That question is determined on available evidence. Thus, if a claimant can establish a remedy founded on tracing, the court will grant relief founded on that evidence because it permits it to reach a different conclusion in respect of that claimant: *French Caledonia* at [178], [187] and [189].

[96] Ms Smith submitted there was no reason why the breach by Halifax AU of its obligations as trustee should itself favour pooling, if pooling was not otherwise required.[22] She argued there was a principled basis to treat the Whitehead Interests differently.

[97] The fundamental difficulty with the Whitehead Interests' submission is that it is based on the premise that if the individual investments can be tracked through the account records, and there is a balance or holding recorded to their credit, they are entitled to trace that holding or money. That proposition however fails to acknowledge the evidence that the bank account into which the Whitehead Interests initially paid their moneys and which funds were transferred to the IB accounts from time to time was tainted as part of the deficient mixed fund. The submissions for the Whitehead Interests fail to adequately take account of the difference between the various accounting records (such as the IB Prop account for example) and the various bank accounts.

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21 *Georges (in his capacity as joint and several liquidator of Sonray Capital Markets Pty Ltd (in liq) v Seaborn International (as trustee for the Seaborn Family Trust)* [2012] FCA 75, 288 ALR 240 [*Sonray*].

22 *Re BBY Ltd (recs and mgrs apptd) (in liq) (No 2)* [2018] NSWSC 346, (2018) 363 ALR 492 [*BBY (No 2)*] at [51].

[98] The Whitehead Interests' case is that their money was used to purchase their share investments through the IBNZ or IBAU platforms as confirmed by the entry in their segregated client accounts under those platforms. But Mr Kelly's evidence confirms that the Whitehead Interests shares (just like other clients' shares) were purchased from admixed funds.

[99] On this point the case cannot be distinguished from *Sonray.* In *Sonray*, the funds and assets were spread over a number of segregated accounts denominated in various currencies with numerous shareholdings and open trading positions held by or with third party institutions. The trust funds and assets had been mixed. The liquidators sought a direction they were entitled to pool the balance of the accounts into a single account for distribution. Gordon J noted:[23]

> [91] As discussed at [48] above, there were at least 1049 defalcations which directly or indirectly affected the funds held in the ANZ AUD segregated account. Due to the nature, number and frequency of the defalcations and the number and frequency of legitimate deposits, withdrawals, transfers, dealings and trading by Sonray clients, officers and providers, that account cannot practically or economically be the subject of a cash tracing exercise.
>
> [92] When Sonray client money from the ANZ AUD segregated account was transferred into other segregated accounts, or was used for trading by Sonray clients who had deposited money into another segregated account for that purpose (the tainted transactions), those segregated accounts became "tainted" with both the deficiency in the ANZ AUD segregated account and the equitable joint charge over, or the equitable tenancy in common in, the money transferred or the money deposited but not used in the trading: see [83] above. Those accounts share with the ANZ AUD segregated account the character of being irreversibly deficient and mixed and too can no longer practically or economically be the subject of a cash tracing exercise.

and then, importantly for present purposes:[24]

> [214] The liquidators accepted that a Sonray client is beneficially entitled to shares on a their sub-account on a trading platform provided that the shares were not purchased with money that passed through a tainted segregated account or the proceeds of shares purchased with such money and were not otherwise "connected with" a tainted transaction.

[100] In *BBY (No 2)*, Brereton J approved the above reasoning and noted:[25]

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23 *Sonray*, above n 21.
24 *Sonray*, above n 21.
25 *BBY (No 2)*, above n 22, citing *Sonray*, above n 21.

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

[101] While mixing can provide a proper basis for pooling, where mixing is established it does not necessarily mean pooling must follow.[26] In the present case the ANZ Halifax NZ account which the Whitehead Interests paid their monies into was co-mingled with the NAB NZD account which was itself a source of the deficiency. Further, on 9 June 2015, money was transferred from the Saxo account (which was itself intermingled with the IB Allocated and Halifax Pro Allocated accounts) to the ANZ Halifax NZ account. The evidence confirms that all the Whitehead deposits passed through the commingled ANZ Halifax NZ account after that date. As Mr Whitehead confirmed, the Whitehead Interests entered a client/broker relationship with Halifax NZ in April 2016. The evidence confirms that the Whitehead Interests' shares were purchased from admixed funds.

[102] While Ms Smith is correct that the terms of the contracts Halifax AU and Halifax NZ had with their respective clients are the legal foundation of the relationship between Halifax AU and Halifax NZ, they are not of themselves determinative of this issue. Both Halifax AU and Halifax NZ breached the terms of those contracts. Halifax NZ was entitled to mix clients' funds. What it was not entitled to do, and what it did, was to mix clients' funds with its own and also with the funds of clients of Halifax AU.

[103] The Whitehead Interests' argument does rather beg the question whether their purchases through the IB platforms were made from a deficient mixed fund. The IB

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[26] *BBY (No 2)*, above n 22, at [46]; and *Re MF Global Australia Ltd (in liq)* [2012] NSWSC 994, (2012) 267 FLR 27 [*MF Global*] at [47]–[49].

AU master account and IB NZ master account, which they rely on for the record of their holdings, are ledgers rather than bank accounts. As Mr Kelly explained, the cash in the IB bank accounts transferred from the general Halifax NZ accounts enabled the debits and credits in the IB NZ master account (and from time to time the IB AU master account) to the clients' sub-accounts in those ledgers to take place. The buffer or credit that the relevant Halifax entity had in its master account enabled IB to carry out the transaction requested. There was, however, no cash flow directly associated with particular entries in the ledger.

[104] The Whitehead Interests rely on the records which show their holdings and confirm their separate interests. Ms Smith referred to the prima facie validity of such records as recognised in *Re Registered Securities Ltd* and *Finnigan v Yuan Fu Capital Markets Ltd (in liq)*.[27]

[105] While in the present case each client's individual account records their holdings there are not enough such holdings and funds within the bank accounts into which those funds were paid for every client to be paid out the holding or amounts recorded to their credit. If the Whitehead Interests' argument was correct then all parties who invested through the IB platform with Halifax NZ would be entitled to repayment in full but there are insufficient holdings and funds to achieve that. The Whitehead Interests, like other clients, have an equitable charge over the entirety of the admixed fund represented by the holdings and funds in the various bank accounts, but do not have a separately identifiable charge over any particular shares.

[106] Ms Smith submitted that the applicants' appeared to argue for a collective right to trace in answer to the Whitehead Interests claim. While such a right may have been recognised in *Foskett v McKeown*,[28] it was said to be "dubious" by Williams J in *Re International Investment Unit Trust*[29] and was rejected on its facts by Clifford J in *Priest v Ross Asset Management Ltd (in liq)*.[30]

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27 *Re Registered Securities Ltd* [1991] 1 NZLR 545 (HC); and *Finnigan v Yuan Fu Capital Markets Limited (in liq)* [2013] NZHC 2899.

28 *Foskett v McKeown* [2001] 1 AC 102 (HL).

29 *Re International Investment Unit Trust* [2005] 1 NZLR 270 (HC).

30 *Priest v Ross Asset Management Ltd (in liq)* [2016] NZHC 1803, (2016) NZCLC 98-046 at [159], [161]–[163], [166].

[107] Ms Smith mischaracterises the applicants' argument as being for a collective right to trace. The applicants do not argue for a collective right to trace, rather they rely on fact that the Whitehead Interests' holdings (just as the majority of other clients' holdings) were purchased, not from Whitehead funds, but from moneys sourced from the deficient mixed fund (which involved an admixture of not only other clients' money but also Halifax NZ's money). It is not a question of a collective right to trace but rather it is a recognition of the source of the funding for the Whitehead Interests' investments.

[108] The Priests' claim was quite different factually. Mr Priest had a close relationship with Mr Ross and was himself a sharebroker and financial adviser. Much of Mr Priest's trading was through his own firm. He used Ross Asset Management (RAM) and Mr Ross to trade in overseas markets he did not have access to and also to hold the securities for him. Although Mr Ross and RAM were involved in a Ponzi scheme, the Priest holdings actually existed. Importantly, as Clifford J made clear in *Priest*, the suggestion that all clients acquired a proprietary right or claim in the Priest investments could not succeed on the facts as RAM (and its related entities) did not use other clients' money to acquire property for their own benefit, rather, they acquired bare title for the Priests as beneficial owners. As Clifford J recognised, the Priest Holdings were not "part of a mixed fund of the type the courts have recognised, generally consisting of monies in a bank account".[31] In the present case the Whitehead Interests were purchased from such a mixed fund.

[109] While the documentation is quite different, the present case is factually more similar to that of *Re Registered Securities Ltd.*[32] In that case some of the mortgage investments had purportedly been allocated to specific clients but it was not possible to trace the clients' funds into the mortgages allocated to them for a variety of reasons, including that there was a deficiency in the trust accounts and clients' funds were mixed and were used to pay shortfalls in interest payments due to other clients. No client could have a right to property which did not belong to them. The liquidator's evidence was sufficient to displace the "prima facie" validity of the allocations to individual clients. The Court concluded that a division of assets on a contribution

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31 *Priest v Ross Asset Management Ltd (in liq)*, above n 30, at [15].
32 *Re Registered Securities Ltd*, above n 27.

basis was the only rational mode of distribution. Similarly, in the present case, the applicants' evidence is sufficient to displace the "recorded" allocation of holdings in the Whitehead Interests' names. The Whitehead Interests cannot have a separate and individual right to holdings acquired from the admixed fund, rather they have a shared right to an interest in all such holdings.

[110] In further reliance on *Re BBY (No 2)*, Ms Smith referred to the following passage to argue that, to the extent Halifax AU was in breach of trust, the trust fund was restored when the Whitehead Interest funds were cleared:[33]

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

[111] But with respect to that submission, Mr Leopold SC is correct in his response to it that there was no challenge to Mr Kelly's evidence that it was the buffer payments (and the retained realisations of closed out positions) rather than deposits which enabled trading. From before April 2016 (when the Whitehead Interests made their first deposit) the Halifax NZ account was part of the deficient mixed fund. There was no evidence that from any particular point after April 2016 the Halifax NZ account "disgorged' the moneys it received from the admixed funds so that it was entirely cleansed and made whole.

[112] Ms Smith emphasised that these proceedings do not involve the liquidation of a single entity. Halifax AU and Halifax NZ are separate legal entities. She noted the contractual relationship created by the CSA between Halifax NZ and its clients and also that the terms of the Clearing and Settlement Agreement confirmed Halifax NZ was not the agent of Halifax AU. She submitted that there was no conjunctive or joint venture trading.

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33 *BBY (No 2)*, above n 22.

[113] Ms Smith is correct in her submission that Halifax NZ is a separate entity from Halifax AU. However, again, that does not address the fundamental difficulty for the Whitehead Interests of the established admixture of funds between the clients of Halifax AU and Halifax NZ (and an admixture of the Halifax entities' funds with clients' funds) and that the holdings claimed by the Whitehead Interests as their property were purchased from such admixed funds.

[114] Ms Smith next submitted that Halifax NZ was solvent as at the date of administration. Any deficiency lay solely in Halifax AU and apparently arose from its failure to hedge all its derivative trades. She relied on aspects of the administrator's report to creditors of 14 March 2019 to support her submission that Halifax NZ was solvent. In particular, she relied on the following note from the report:

> Our investigations to date indicate that Halifax NZ became insolvent on or around 23 November 2018, being the date from which Halifax AU was unable to continue to provide financial support.

[115] And later:

> Our preliminary investigations have revealed that the company may not have traded while insolvent for a material time (if at all). It is likely the company became insolvent on or after 23 November 2018 being the date administrators were appointed to Halifax AU and the director immediately took steps to appoint administrators to Halifax NZ.

[116] Ms Smith submitted that, but for the actions of Halifax AU, the Halifax NZ Trust held for the benefit only of the Halifax NZ IB platform clients would have been solvent so that the assets held by Halifax NZ would have been refundable to Halifax NZ IB clients in their entirety.

[117] There are two principal difficulties with that submission. First, the statements as to the solvency of Halifax NZ are somewhat equivocal. In cross-examination, Mr Kelly's evidence about Halifax NZ's solvency was:

> Q. So it – by definition of what a solvent or insolvent company is, it was considered solvent, was it not?
>
> A. It's – it's difficult to answer that question. Because Halifax New Zealand was entirely dependent on Halifax Australia for its income flows and for its revenue, the question remains as to whether Halifax New Zealand was actually solvent because of the insolvency of

> Halifax Australia. But the fact remains, as far as the director knew of – as far as – sorry – as far as Mr Gibbs and the other two directors whose names escape me at the moment would have [known] the income flows from Halifax Australia were sufficient to allow the Halifax New Zealand operation to pay its debts as and when they fell due. When those weren't sufficient, the Halifax expenses would have been paid out of client moneys. So it's an open [question] as to Halifax New Zealand was in fact solvent or [insolvent], but the directors certainly considered that it was based on what they knew.
>
> …
>
> Jeff Worboys, the Australian director – he was director of both – would've had a different point of view.

[118] As Mr Gooley pointed out in closing submissions, read as a whole, the report to creditors actually supports the suggestion that Halifax NZ was insolvent as at 23 November principally because the company was obviously dependent on Halifax AU for support and funding to continue to operate. Halifax NZ could not meet the test of solvency as at that date. It was not able to pay its debts as they fell due from money available to it. It was dependent on funding and support from Halifax AU. At all material times Mr Worboys was a director of Halifax NZ. The company is fixed with his knowledge that Halifax NZ was dependent on support from Halifax AU to continue operating.

[119] The other problem with Ms Smith's submission is that it again overlooks the fundamental difficulty that the Whitehead Interests' holdings were purchased using funds from the deficient mixed fund. On their transfer into Halifax NZ the funds from Halifax AU were already subject to other obligations, including to other clients. They were not funds Halifax NZ could lawfully apply for its own purposes or for the sole benefit of any particular Halifax NZ client. The fact there were different platforms is of no moment. The issue remained how the funds flowed through the various bank accounts.

[120] For the above reasons the claim by the Whitehead Interests to be in a special and different position to that of other clients, both in Halifax NZ and Halifax AU must fail.

[121] In the alternative, Ms Smith supported Mr Hyde's submission for a form of in specie distribution. She submitted pooling could not be regarded as a principled

response when some clients had chosen to close out, while others had retained open positions. To pool in those circumstances would amount to an unprincipled windfall to some. I deal with the reasons for rejecting that submission in the context of considering Mr Hyde's case for the first respondent.

Category 3 investors

[122] Mr Hingston is the representative of the Category 3 clients, namely all clients of Halifax AU and Halifax NZ who transferred shares into Halifax's trader workstation platform (the IB platform) from another stockbroker and have not traded in those shares.

[123] On 19 March 2018 Mr Hingston transferred [redacted] shares in Altium Limited, which he owned, into an IB client sub-account on the Halifax AU trader workstation. The shares were not derived from any deficient mixed fund nor were any funds from bank accounts held by Halifax AU or Halifax NZ used to acquire the shares. The shares were transferred directly from Computershare to interactive brokers CHESSHIN and from there to a securities account at BNP in the name of IB Nominees Pty Ltd (the BNP account). Through a series of contractual arrangements BNP holds the Altium shares on trust for IB Australia which in turn holds its interest on trust for IBLLC, which acts as agent for Halifax AU in relation to the Altium shares. Halifax AU holds the shares as agent for Mr Hingston under the CSA.

[124] Between 19 March and the administration date, Mr Hingston sold [redacted] Altium shares. During the same period a limited number of other clients also sold Altium shares from the BNP account.

[125] As at the date of administration the BNP account had a total of [redacted] shares including [redacted] recorded as held for Mr Hingston, being the balance of Altium shares that he transferred from Computershare on 19 March 2018 and which had not been traded.

[126] On behalf of Mr Hingston (and other Category 3 shareholders in the same position in relation to other shareholdings transferred in and not traded),[34] Ms Whittaker SC submitted the balance of the shares transferred to the BNP account from Computershare, and which had not been traded, were traceable into an equivalent number of Altium shares now held in the BNP account. Mr Hingston had an equitable charge over the contents of the account to that extent. Shares were available to satisfy that charge, and they should be carved out rather than applied as part of a general pool to meet the indirect claims of other Halifax clients. She resisted the suggestion that Mr Hingston's charge over the contents of the BNP account should be rateably reduced.

[127] The applicants accept that the Category 3 clients' shares never became part of the mixed fund. They also accept that Halifax client records and the former activity statements make it possible to identify those clients who fall into Category 3 and whose rights in the shareholding introduced by them are untainted.

[128] For those reasons, the applicants accept that the holdings of the Category 3 clients should not be pooled, noting Brereton J's comments in *Re BBY (No 2)*:[35]

> [57] … On the other hand, pooling may be inappropriate where the trust ledger records provide a reliable factual foundation on which to mould relief, and mere difficulty in ascertaining entitlements to permit distribution by single account may not suffice to justify "pooling", though that would be influenced by the size of the estate, the number of claimants, and the degree of difficulty.

[129] The applicants accept that in the case of the Category 3 respondents it is practicable to give effect to their rights by appropriating to them a specific identifiable and severable part of the trust property, albeit they propose the Category 3 clients pay the additional cost associated with giving effect to their rights.

[130] A similar approach was taken by Gordon J in *Sonray.*[36] Gordon J accepted, without criticism, the liquidator's concession that a Sonray client was beneficially entitled to shares on the sub account on a trading platform provided the shares had not

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34 Eleven Category 3 investors (including Mr Hingston) have been identified to date.
35 *BBY (No 2)*, above n 22, (footnote omitted).
36 *Sonray*, above n 21.

been purchased with money that had passed through a tainted segregated account, and were not otherwise connected with a tainted transaction.

[131] Mr Scruby SC, representing the interests of the Category 4 clients, argued against the case made for the third respondents. He submitted that there was insufficient evidence to determine, for any particular member of Category 3, whether or to what extent the shares could be identified so as to be able to exclude them from part of the deficient mixed fund. The particular shares held by Mr Hingston could not be differentiated. Further, if the other Altium shares had been purchased with deficient mixed funds then those shares would effectively have "infected" the overall shareholding of the Altium shares.

[132] Mr Scruby submitted that in the absence of a sufficient explanation as to what happened to the overall pool of shares between the time the Category 3 clients transferred shares to Halifax and the appointment date, it was not possible for the Category 3 clients to sufficiently identify their interest in the shares to trace them.

[133] Mr Scruby also relied on the case of *Caron v Jahani (No 2)* (*Courtenay House).*[37] He carefully and thoroughly took the Court through the reasoning of Bell P in that case and submitted that the lowest intermediate balance rule should be applied. Any sales of shares of the same type held by Category 3 clients would have to be treated as having depleted the interest of the Category 3 clients in the same proportion either to their interest in the mixed fungible fund of shares or the interest of the others entitled to the same shares.

[134] While Mr Scruby spent some time analysing the decision of *Courtenay House,* with respect, that decision is not directly applicable to the Category 3 clients in this case. While, as a matter of principle, the Court can accept that the lowest immediate balance rule is not confined in its application to money in a bank account and can

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[37] *Caron v Jahani 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) 382 ALR 158 [*Courtenay House*].

apply to other kinds of fungible funds,[38] that does not address whether the lowest intermediate balance rule is applicable on the facts of a particular case.

[135] *Courtenay House* can be distinguished on its facts from the present case. First, the issue in that case, as identified by Bell P, was:[39]

> [9] … how limited funds in a bank account are to be distributed between investors whose funds were deposited into and co-mingled in that account over a number of years, …

[136] In *Courtenay House* the Court was concerned with a single bank account and cash. Here the Court is concerned with a single mixed fund, which is made up of a number of bank accounts, shares and other types of investments. Further, the *Courtenay House* decision dealt with a Ponzi scheme and, relevantly, the contest was between depositors who had made deposits prior to the date of the freezing orders and those who had made deposits after the orders. The later depositors were also divided into those who had made deposits before the withdrawal of a sum of $60,000 and those who deposited after (whose latter deposits could be identified). Bell P concluded that the lowest intermediate balance rule provided the fairest, most equitable and principled outcome in that case. In the context of a Ponzi scheme the application of the lowest intermediate balance rule may be more appropriate (although it was not applied by Clifford J in *Priest*). But each case must turn on its on facts. As Bathurst CJ noted in *Courtenay House*:[40]

> [3] ….it is by no means clear… that it would be appropriate to apply the lowest intermediate balance method if the losses were incurred in the course of legitimate trading pursuant to the mandate given to Courtenay House ….

And:[41]

> [5] Finally, the determination of distribution in accordance with the lowest intermediate balance method may be of such complexity that a liquidator would be justified and entitled to distribute on a pari passu basis.

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38 *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74 (PC); *Re Global Finance Group Pty Ltd (in liq) (supervisor apptd); Ex Parte Read (as liquidator of Global Mortgage Investments Pty Ltd and Global Finance Group Pty Ltd)* [2002] WASC 63, (2002) 26 WAR 385 [*Global Finance*]*;* and *Brady v Stapleton*, (1952) 88 CLR 322.

39 *Courtenay House*, above n 37, at [9].

40 At [3].

41 At [5].

[137] Ms Whittaker accepted that, when transferred into the fungible mass in the BNP account, the Altium shares became indistinguishable from other shares held in that account but she submitted that, at that time, Mr Hingston became entitled to an interest in the equivalent number of Altium shares from the BNP account. She argued his interest could be traced into an "equitable proprietary" interest in an equivalent number of Altium shares held in the BNP account. His interest was held by way of an equitable charge over the whole of the account valued as the extent of his interest (the remaining shares recorded as held by him) in it.

[138] In *Priest v Ross Asset Management Ltd* Clifford J considered that a trust could be declared over part of a pool of unnumbered, uncertified shares.[42] Clifford J noted:

> [178] Shares in one company are, amongst themselves, fungible. This means that there is no way to distinguish one share in a particular company from other shares in that company. A conceptual difficulty arises.
>
> [179] Assume that, at the date of the acquisition by RAM/Dagger of shares comprising the Priest Holdings-say shares in Company X-RAM or Dagger already owned (for Other Investors) shares in Company X. In that circumstance, a question of the certainty of the subject matter of the trust would arise. That is, for a trust to come into existence the property which is the subject matter of the trust must be able to be identified with certainty. If RAM or Dagger already held shares in Company X for Other Investors, given that shares in a particular company are amongst themselves fungible, it could be argued it would not be possible to identify which of the pool of fungible shares was subject to the trust in favour of the Priests, and which were subject to the trust in favour of the Other Investors. I am not attracted to that argument. Given the ubiquity of decertificated shares, in my view it should be enough for a given number of those shares to be identified as having been earmarked for an investor for the trusts, bare or otherwise, recognised in managed funds to come into existence.

[139] In *Ellison v Sandini Pty Ltd* Jagot J considered Clifford J's reasoning and similarly concluded that a trust can exist over a fungible pool of assets.[43]

[140] In the case of the Category 3 clients there are reliable records which enable the Court to mould appropriate relief.[44] The relief is not necessarily available to all holders of the Altium shares. As Mr Scruby argued, some of those shares held by other Altium investors could have been purchased from tainted monies. But it is not the fact

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42 *Priest v Ross Asset Management Ltd*, above n 30.
43 *Ellison v Sandini Pty Ltd* [2018] FCAFC 44, (2018) 263 FCR 460 at [148].
44 See *Re BBY (No 2)*, above n 22, at [57].

they are Altium shares which sets Mr Hingston's holding apart. It is that his holding itself (it could have been any other shareholding) was not purchased from a tainted fund but rather was transferred into Halifax AU from an untainted source and, importantly, remains untainted.

[141] Mr Scruby's submissions overlook the evidence of Mr Kelly that it is possible to identify the Category 3 clients' interest in the shares. In his affidavit of 22 June 2020, Mr Kelly accepted that shares transferred from an external broker which had not been traded could be traceable because the funds used to acquire them had not passed through a commingled account. Clients whose holdings fell within Category 3 were identifiable from the transfers, open positions, and trade sections of statements produced in respect of the IB client sub accounts. The transfers section of the client account statements showed whether shares had been transferred into the account, the date of any transfer, the quantity and relevantly the method by which shares were transferred into an IB AU or IB NZ account.

[142] Importantly, the Category 3 shares were transferred to the IB AU Platform but were not recorded in the IB AU Prop account and so were unaffected by any discrepancy in that account. They were recorded in the relevant IB AU client subaccount with BNP.[45] Mr Hingston can trace his interest in the Altium shares transferred to Halifax AU by him and has a direct proprietary right in those shares or the balance remaining after his sales.

[143] The feature of the Category 3 clients which distinguishes them is that their shares were not acquired using funds from the deficient mixed fund. Their shares were transferred into Halifax AU or Halifax NZ from other brokers. In Mr Hingston's case, importantly, while he has sold some and thus reduced his holding, the original shares transferred in remain untainted. The issue is not, as it was in *Courtenay House*, the timing of the transactions, which was central to the Court's reasoning. Rather, the issue is the source of the payment for Mr Hingston's Altium shares. The fund in issue in *Courtenay House* was the bank account into which the deposits were made. It was deficient. The Altium shares were not purchased from and never passed through the

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[45] Mr Kelly's affidavit, dated 24 November 2020, at 22.

deficient mixed bank accounts in the present case. They were untainted and were held from the outset by IB AU as custodian.

[144] Finally, a further answer to Mr Scruby's submission that, if the remaining Altium shares had been purchased using funds from the deficient mixed fund the fungible mass would be "infected", is that there is no trustee default involving Mr Hingston's shares. While he may have sold some of his "untainted" shares, there are still sufficient Altium shares available to meet his proportionate remaining interest. The Altium shareholding was never a deficient fund.

[145] There is no principled reason to alter Mr Hingston's "relatively clear property interests … [by] some notion of common misfortune".[46] Mr Hingston (and other Category 3 clients) are not in the same position as other clients whose holdings were purchased using funds from the deficient mixed fund.

[146] For the above reasons I accept the Category 3 shareholders are in a separate category and their shareholdings do not form part of the deficient mixed fund.

[147] In the circumstances, I have not found it necessary to consider Ms Whittaker's alternative argument that if the third respondent's Altium shares in the BNP account were to be pooled, a rateable, in specie, distribution of the Altium shares equivalent to his interest would still be appropriate particularly given the tax considerations. Ms Whittaker's submissions in relation to the tax consequences were supported by an expert report from Craig Stephens of BDO.[47]

[148] I consider it to be beyond the ambit of the applications before the Court to seek to address the issue of the possible consequences of the imposition of a capital gains tax (CGT).

[149] In any event, for the reasons advanced by Mr Leopold for the applicants, there is a good argument that an in specie distribution would not avoid liability for CGT.

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46 *BBY (No 2)*, above n 22, at [83].

47 On this issue, Mr O'Hara, the nominated respondent also addressed the Court on the possible consequences of the imposition of a CGT.

The transfer of shares (in specie) would coincide with the extinguishment of an equitable right, which would be the disposal of a CGT asset.

Category 5 investors

[150] During the course of his closing submissions, Mr Munro sought to expand the class of the Category 5 clients. Mr Munro suggested the other relevant categories of clients whose interests could be similar to those of the Category 5 clients were:

(a) clients of Halifax AU or Halifax NZ who transferred shares from another broker to the Saxo Platform and never traded in those shares, which shares were transferred from the Saxo Platform to the IB AU Platform or the IB NZ Platform and were recorded in a client account on the MT5, the IB AU Platform or the IB NZ Platform;

(b) clients of Halifax NZ who purchased shares through the IB NZ Platform prior to the date on which Halifax AU purchased a controlling interest in Halifax NZ and never traded in those shares;

(c) clients of Halifax AU and Halifax NZ who purchased shares through the IB AU Platform, the IB NZ Platform or the MT5 Platform prior to the date of deficiency (as determined by the Courts) which shares were never traded.

[151] None of the other parties opposed the expansion of the Category 5 class of clients in the way Mr Munro proposed. While Ms Holmes confirmed the applicants did not oppose the amendment, she noted that, without evidence but on instruction, the applicants considered it was unlikely there would be very many clients who would fall within the proposed additional categories. I grant leave to extend the classes of Category 5 clients as sought.

[152] Mr Munro argued that the Category 5 clients were in special position. They could not be said to be subject to a common misfortune and so their holdings should

be excluded from any pari passu distribution. He noted that in *Re BBY Ltd (No 2)* Brereton J had cited with approval the comments of Black J in *MF Global* that:[48]

> [47] … "the case law has recognised that, where there are relatively clear property interests in particular property, this cannot 'be altered by reference to some notion of common misfortune'" and that "accounts should only be pooled ... if mixing or another proper basis for pooling is established".

[153] Ms Holmes confirmed the applicants accepted that in principle the reasoning applicable to the Category 3 clients would also be applicable to the expanded Category 5 clients noted in paras (a) and (b) above. The relevant point is that the shares of such clients were, like the Category 3 clients, not purchased using moneys from the admixed funds in the bank accounts of Halifax AU and/or Halifax NZ but were either transferred into Halifax AU and Halifax NZ whole or were purchased before the funds of clients of Halifax NZ became mixed with the deficient funds of Halifax AU.

[154] As Mr Scruby pointed out, there may well be practical problems in identifying such clients. Mr Lunn, a technical support officer employed by Halifax AU who worked in the online trading support team, gave evidence that on termination of the SAXO platform there were some issues in uploading the accounts onto the MT5 platform by Think Liquidity. For example, if an MT5 client account did not record a cash balance Think Liquidity could not record shares in that account. Sometimes not all financial products recorded in the clients SAXO account were taken across and recorded in the client's MT5 account. Mr Kelly had also noted a further practical issue. He confirmed that the liquidators had ascertained there were discrepancies in the share record recorded in the IB AU prop account when reconciled against the record in the individual client accounts of the shares held by clients and the share CFDs held by them.

[155] Those are practical problems which, if necessary, the applicants can seek further directions on. For present purposes, the important point is that, in principle, if there are clients whose transactions can be ascertained to fall into the above expanded categories then it seems reasonable that they should be treated the same as the Category 3 clients. If it is impractical or not economically feasible for the applicants

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[48] *BBY (No 2)*, above n 22, citing *MF Global*, above n 26, at [78].

to be able to confirm that individual clients come within that category then, as noted, the applicants can seek further directions.

[156] There are two issues surrounding dates in relation to the expanded categories of the Category 5 clients. The first is whether the relevant date for those in the extended Category 5(b) should be when Halifax AU purchased a controlling interest in Halifax NZ on 1 November 2013 or the earlier date when Halifax NZ and Halifax AU entered the introducing broker agreement on 1 July 2013.

[157] There is a lack of evidence about Halifax NZ's financial position prior to 1 July 2013. Mr Kelly confirmed in cross-examination that the liquidators had not investigated anything prior to the merger date with respect to the New Zealand entity. He also accepted that there was no evidence of either a client money shortage or a trust deficiency in Halifax NZ prior to 1 July 2013.

[158] The second and principal issue in relation to the Category 5(c) clients is the date of deficiency.

[159] There are two possible measures of the date of deficiency, either the date of the first client money shortfall or the date of the first trust deficiency. The difference is that, in calculating the client money shortfall, funds held by Halifax AU and Halifax NZ in their own right are taken into account in calculating the shortfall in accordance with the principle from *Re Hallett's* case, whereas the trust deficiency arises as soon as any money required to be held on trust was used contrary to the trust.[49] A trust deficiency will generally arise at an earlier date before the client money shortfall.

[160] Mr Munro argued that the first date of a client money shortfall was the appropriate measure to apply. Not surprisingly, Mr Scruby argued that the date of the first trust deficiency was the appropriate date.

[161] In support of his argument that the client money shortfall date was the appropriate date, Mr Munro referred to the cases of *Finnigan v Yuan Fu Capital*

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[49] *Re Hallett's Estate* (1879) 13 ChD 696 (CA).

Markets Ltd (in liq), and *Eaton v LDC Finance Ltd (in rec)*.[50] Those cases confirmed the application of the *Re Hallett's Estate* principle, namely that where trust money was mixed with the trustee's personal money, the beneficiaries of the Trust are entitled to a charge on the property purchased. Applying the principle to the present case, it would be assumed that Halifax AU and Halifax NZ depleted their own monies first before accessing clients' funds.

[162] Mr Munro submitted the "rough justice" referred to in the cases could be tempered by relying on the best evidence. On that basis, the best evidence was that a client money shortage could not be said to have occurred prior to January 2016.

[163] Mr Munro submitted that prior to 1 January 2016, after taking into account all the funds available to Halifax AU and Halifax NZ, all clients could have been made whole.

[164] Mr Munro noted that while Mr Sutherland considered a client moneys' shortage of AUD 2,030,880 would have existed as at June 2015 if a series of Term Deposits and Trident Funds were excluded from assets available to Halifax AU and Halifax NZ,[51] it was only by January 2016 that a client moneys' shortage of AUD 273,092 existed even if the various term deposits were available to Halifax AU and Halifax NZ. That client moneys' shortage increased to AUD 857,592 by June 2016, and AUD 5 million by March 2017.

[165] In arguing for a general pooling of the assets held by the liquidators, including shares, Mr Scruby submitted the appropriate date to take as the date of deficiency was the date of the first trust deficiency.

[166] Mr Scruby supported his argument by reference to the decision of *Sonray*.[52] In *Sonray*, Gordon J had confirmed that:[53]

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50 *Finnigan v Yuan Fu Capital Markets Limited (in liq)*, above n 27; and *Eaton v LDC Finance Ltd (in rec)* [2012] NZHC 1105.

51 For example, on 9 June 2015 Halifax AU lent Halifax NZ NZD 1.2 million to satisfy the requirements of its FSP's licence.

52 *Sonray*, above n 21.

53 At [83]. References omitted.

> … all contributors to a deficient mixed fund hold an equitable charge over the entire fund and its traceable proceeds to the value of the 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.

And then later, at [218], Gordon J held that as the transferred cash went through a tainted segregated account, it was also tainted, before concluding that shares purchased with transferred cash or assets purchased with deficient mixed client funds:[54]

> … should be treated as subject to the equitable charge or equitable tenancy in common in favour of all contributors to the tainted segregated accounts …

[167] The issue is whether the shares of the Category 5(c) clients were tainted like other shares acquired through the Halifax entities. Whether they were tainted depends on whether they were purchased from the deficient mixed fund. I agree with Mr Scruby that logically it follows that the relevant date and focus of the inquiry must be when the first trust deficiency arose rather than when the first client money shortfall occurred.

[168] While acknowledging the evidence about when the deficiency first arose was imperfect, Mr Scruby submitted it was sufficient in the context of an application for directions. Again, he made reference to Brereton J's judgment in *Re BBY Ltd*:[55]

> (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.

And:[56]

> (7) … 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 …

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54 At [218].
55 *BBY (No 2)*, above n 22, at [83].
56 At [83].

[169] Mr Scruby submitted that it was clear from Mr Sutherland's "deficiency affidavit" that there were a series of trust defalcations over an extended period of time involving large amounts of money. It could not be said at any particular time there was no trust deficiency in Halifax AU. Put another way, it could not be said at any particular time the shares were purchased through Halifax AU from funds that were not tainted.

[170] Mr Scruby submitted that, on the evidence, there was a breach of trust as early as 17 November 2009. On that day AUD 442,260 was transferred out of the trust account to open a term deposit to enable Halifax AU to provide security for a bank guarantee. However, as Mr Scruby recognised, Mr Sutherland was unable to establish whether that led to a trust deficiency at the time as there was insufficient information to confirm it.

[171] Mr Sutherland was, however, able to confirm a trust deficiency as at 1 May 2012 when AUD 5.5 million was transferred from the SAXO Allocated Account to a HSBC Term Deposit. That was a clear example of client moneys being applied in breach of trust and at a time when Halifax AU had insufficient moneys to meet client entitlements.

[172] The applicants agree with Mr Scruby's submissions on this point and submit there is no basis for concluding there was a particular time when there was not a single mixed fund which was not deficient.

[173] Ms Holmes submitted there was a clear inference that funds belonging to clients on the Saxo and IB Platforms and later the MT4 and MT5 Platforms had always been commingled. The pattern of funds' movement, in particular transfers between the bank accounts of Halifax AU and Halifax NZ, confirmed the practice was ongoing. The various redemptions from bank accounts of Interactive Brokers to bank accounts of Halifax AU and Halifax NZ were not isolated into independent transfers. There was a continuous pattern in the evidence from the beginning of 2016 to that effect. But there was no reason to suggest the pattern would only have started in 2016. While there were practical reasons to explain why the liquidators' detailed investigations only

started in January 2016, there was no reason to think there was any moment after Halifax AU acquired a majority interest in Halifax NZ that there was not a comingling.

[174] As the authorities confirm, the Court must take a pragmatic approach to determining the appropriate date. Taken overall, the evidence satisfies the Court, on balance, that the date should be 1 May 2012 in relation to Halifax AU. By that date there was the first apparent shortfall in available assets held by Halifax AU as trustee as well as in its own right (a client moneys' shortage). There was also an established trust deficiency in the Saxo allocated account. In relation to Halifax NZ clients, specifically Halifax NZ clients who invested through Halifax AU under the introducing broker agreement, the first relevant date must be 1 July 2013. By investing through Halifax AU they were purchasing investments through a mixed fund which, on Mr Sutherland's evidence, was deficient by that time.

[175] Mr Scruby also argued that the cost and time involved in identifying the clients who might fit the expanded categories could not be justified. He noted Mr Kelly's evidence that the exercise would be extremely time consuming and expensive. The point is well made, but the answer to it is that any such additional expense would have to be borne by the Category 5 clients. If the applicants encounter any substantial difficulties in implementing the relevant orders, they can seek further directions.

Category 1/Category 2 investors

[176] As at the date of the administration of Halifax AU, 23 November 2018, the total value of the 1,028 client account balances notionally in Category 1 was AUD 81,908,935.41. By 31 July 2020, the total value of the client account balances in Category 1 had increased to AUD 138,036,324.77. The Category 1 clients seek the option of an in specie distribution based upon a methodology developed by Barry Taylor, a registered liquidator, and referred to as Distribution Methodology 3 (DM3). Alternatively, they argue there should be a closing out of all extant investments with the date of calculation of respective entitlements being determined as close as practicable to the date of distribution, rather than the administration date.

[177] By contrast, as at 23 November 2018, the total value of the 10,910 client account balances notionally in Category 2 was AUD 129,692,896.28. As at 31 July

2020, the balance had increased only marginally to AUD 126,761,344.07. The Category 2 clients say that client entitlements should be calculated at the date of administration and, while they do not necessarily oppose an in specie distribution, they seek a pooling of investments so that all clients share equally in the gains or losses in investments left open following the date of administration.

[178] Mr Loo, the representative of the Category 1 clients, gave evidence and was cross-examined. Another Category 1 client, Paul McNeil, provided affidavit evidence too. Mr Hyde also led evidence from Mr Taylor about the distribution methodologies that he considered could be available to the applicants. Mr Taylor's opinion was that his distribution method DM3 supported an in specie distribution.

[179] Mr Hyde submitted DM3 was the fairest and most equitable approach to distribution of the deficient mixed fund and would provide the most principled outcome in the present case. It recognised the Category 1 clients' interest in the holdings and the fact their open investment positions had manifestly increased in value since the administration date.

[180] As noted, in the alternative, Mr Hyde submitted that if an in specie distribution was not possible, the date for calculating the clients' proportionate entitlement should be as close as possible to the distribution date itself rather than the administration date. That would permit Category 1 clients to retain the benefit of the increase in value of investments they had chosen to make and had retained. Mr Hyde observed that while clients were unable to enter new transactions, they were able to close out if they wished. While some clients had done that, Category 1 clients such as Mr Loo had not.

[181] During the presentation of the first respondent's case it was suggested at one stage that Mr Loo may have been able to acquire shares post administration by exercising an option. While Mr Loo's affidavit evidence on the point was somewhat ambiguous, it appears clear that Mr Loo was only able to acquire the additional shares because the right to the options was in existence prior to the administration date. In effect, by exercising the option Mr Loo was closing out his position in relation to it. It was not the exercise of a fresh right.

[182] At the outset it is necessary to clarify that the in specie distribution pursued on behalf of the Category 1 clients is effectively a hybrid in specie distribution rather than an in specie distribution of identifiable, traceable assets held on trust for particular clients. The in specie distribution Mr Hyde argued for was of particular proportions of the investments made from the deficient mixed fund.

Barry Taylor and DM3

[183] As Mr Taylor's DM3 underpinned Mr Hyde's submissions on behalf of Category 1 clients for a form of in specie distribution, it is necessary to consider it in more detail. The essence of DM3 is that it would enable clients to retain the increase in the value of their investment portfolio. Mr Taylor provided two affidavits and two reports dated 19 and 27 October 2020. In summary, under Mr Taylor's preferred methodology, DM3 client claims would be determined as a proportion of the total claims of all clients at the administration date. All clients would receive their proportionate share of net assets as at the administration date subject to each of them contributing a proportionate share of the deficiency. Clients would be required to maintain a minimum cash contribution (MICR) to fund their share of the deficiency as at the administration date (and all subsequent recovery and liquidation costs). Once the MICR was deducted from the client's portfolio, the client would be entitled to the remainder of their portfolio and all fluctuations in value to the distribution date would accrue to that client.

[184] Mr Taylor demonstrated the DM3 in the following example:

Distribution Methodology 3		
Adjudication Date	Administration Date	
Claims Assessed at Adjudication Date	$211,601,822	**(a)**
Fund Deficiency	$40,150,845	**(b)**
Investor Claim at Administration Date	*$10,000,000*	**(c)**
Investor proportionate share (Investor Claim %)	*4.73%*	(c) ÷ (a) = **(d)**
Minimum Investor Cash Requirement ("MICR")	*$1,897,472*	(b) x (d) = **(e)**
Investor Distribution Entitlement (Notional)	**$8,102,528**	(c) – (e)
Value of Investor Portfolio at Distribution Date	$20,000,000	**(f)**
Investor Distribution Entitlement (Actual)	**$18,102,528**	(f) – (e)

[185] Mr Taylor supported DM3 for the following reasons:

(a) fixing the administration date as the date for determining claims removed the uncertainty of fixing a future date given the nature of assets in the deficient mixed fund;

(b) notionally distributing to clients their investment portfolios on the investment administration date subject to withholding the MICR gave certainty as to entitlements;

(c) the deficiency of the fund was able to be forecast with reasonable accuracy so that each client would be informed as to the MICR required to fund their proportionate contribution to the deficiency if necessary;

(d) the methodology most effectively attributed the outcomes of each client's individual investment choices since the administration date to that client;

(e) the methodology provided the simplest and most effective method for clients to elect to receive a distribution in specie in cash or in a combination; and

(f) the methodology reduced the risk of error in distributing the fund to clients by removing the risk of market volatility after the administration date.

[186] Mr Taylor accepted the liquidators' evidence that a number of open clients' positions were not able to be distributed in specie. The MT4 is a virtual trading platform which does not have underlying assets or shares available for an in specie distribution. He agreed that an in specie distribution would not be available for such clients. He also agreed with the applicants' conclusion that assets in that IB AU Prop Account would not be available for an in specie distribution.

[187] Mr Taylor considered that the liquidators' concern as to the potential cost and time burden of undertaking an in specie distribution could be met, in part at least, if the liquidators perform an exercise to determine a profile of clients and investments

for exclusion from an in specie distribution. He noted that the liquidators had assumed in excess of 1,549 clients may wish to have an in specie distribution, but he considered there would likely be further reductions in that number. In response to the liquidators' point that the assets held for an in specie distribution will continually change value, which added to the complication of calculating client entitlements, Mr Taylor considered a date as close to the distribution date as possible would still be workable.

[188] Under cross-examination Mr Taylor accepted that applying DM3 would lead to clients having different proportionate entitlements. He also accepted that the alternative approach of a proportionate entitlement calculated after all unrealised investments had been realised, which would lead to each client retaining the same original proportionate entitlement of the whole, would not.

[189] Mr Taylor accepted that there would be practical issues with the application of DM3 because of the inherent volatility in the nature of the investment assets. He also accepted he had not made any analysis of the additional processes required by the liquidators or the likely costing associated with the implementation of DM3.

[190] Mr Kelly did not support the proposed DM3. Apart from issues of equity between investor clients, he considered it raised a number of practical issues. In his affidavit of 22 June 2020 in particular, he noted the following steps would be required for an in specie distribution under DM3:

(a) First, each client would be advised of the value of their claims. In theory those clients on the IB AU and IB NZ platforms with open positions would be entitled to transfer some of the open positions without liquidating those positions.

(b) Next clients would advise the liquidators about their decision by completing a form setting out the assets which they would like to be transferred to an alternative broker as part of an in specie distribution. An investor would need to have an account with the alternative broker.

(c) Next Halifax would process each individual transfer form completed by clients. Mr Kelly has assumed that 1,549 clients would like an in specie distribution so there would be an equivalent number of transfer forms to be processed. That would take around three weeks for the Halifax staff members to complete. But it would take longer than that to complete the transfer forms because the staff have additional tasks to perform. Further, it may take longer in individual cases.

(d) Once transfers had been effected, the liquidators would undertake the closeout of remaining investor positions. Assets remaining in the AU IB client subaccounts for which the liquidators had not received a request for an in specie distribution would be addressed.

[191] In Mr Kelly's initial estimate, the whole process might take as long as 13 to 14 months when a pooling and subsequent distribution would be closer to six months. Further, an in specie distribution might hold up the process of a cash distribution as the open positions on the IB AU and IB NZ platforms could not be realised until the applicants knew which positions were to be transferred rather than realised.

[192] In addition, Mr Kelly considered there would be significant additional costs involved in an in specie distribution. There would be brokerage and commission costs, continued platform operating costs and additional liquidator's remuneration. If the in specie distribution took 13 to 14 months, the additional operating costs could be at least AUD 1.5 million. He also believed that an in specie distribution would be complex because of the complications arising from movements in the market.

[193] While accepting practicality is one reason an in specie distribution may not be appropriate, Mr Hyde made the point that in cross-examination Mr Kelly had accepted his estimate of time involved in an in specie distribution had been overstated. Mr Hyde submitted that, in light of Mr Kelly's concessions, there could be as much as a six month saving on Mr Kelly's original estimate of time for an in specie distribution. Effectively the time required would not be materially different to what was required for a cash distribution following the closing out of positions. He submitted Mr Kelly had overstated the practical issues associated with an in specie distribution.

[194] Further, in relation to costs, he noted the figure of AUD 1,500 for each Category 3 client had been suggested. He submitted a similar cost could be applied to an in specie distribution to each Category 1 client but, even if the actual cost was more, those clients opting for an in specie distribution could be required to do so on a cost recovery basis.

[195] Mr Hyde acknowledged the following comments regarding the application of a pari passu approach from the *Courtenay House* decision:[57]

> [88] The *pari passu* approach to the distribution of a fund as between investors or contributors makes perfect sense in circumstances where all deposits were received at one time or, if not at one time, then before any material withdrawals from the fund were made, and where no subsequent deposits were made after those material withdrawals. As Debelle J observed in *Magarey* (at [120]):
>
> > "[t]here is a marked difference between this case which involves dealings in a trust account over a long period of time and those cases where a number of investors contribute to a trust fund in a relatively short period of time, where a *pro rata* distribution may be a suitable means of distribution, especially in the absence of records".
>
> [89] The *pari passu* approach may also be, and certainly has been, treated as appropriate where the nature of the investment involves investors knowing that their funds will be pooled with those of other investors for investment purposes. …

[196] However, he noted that at [175] of the *Courtenay House* decision, Bell P identified the critical questions were how limited funds were to be distributed between clients and whether there was a principled basis to differentiate between them. Mr Hyde submitted there was such a principled basis in the present case.

[197] Mr Hyde made the point that in cases where pooling was favoured or adopted there was generally an acceptance that funds would be pooled. But where, as here, parties had made and retained investments, there was not the same imperative for pooling. The Category 1 clients had chosen to retain their holdings rather than close out and the holdings had increased in value. Why should other clients who had chosen to close out share in those gains? Mr Hyde submitted the following question posed by Professor Smith had some resonance in the present case:[58]

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57 *Courtenay House (No 2)*, above n 37.
58 At [98].

> "Is it really a principle of private law that parties' rights may be forfeited to convenience? And if so, whose convenience?"

[198] Mr Hyde adopted the comments of McGechan J cited with approval at [133] of the *Courtenay House* decision:[59]

> … "where there can be tracing, there shall be tracing. Where there cannot, the 'nearest approach practicable to substantial justice' shall be taken." …

[199] Mr Hyde submitted the reasoning of Bell P in *Courtenay House* also supported his argument. The position had changed after the administration date. It was not appropriate to adopt a general pooling of investments approach as Mr Scruby argued for or the simple pari passu approach as advocated for by Mr Gooley for the Category 2 clients. While accepting that no method would result in justice for all he submitted that the Court should adopt the "least unfair method" which was DM3. It was the nearest possible approach to substantial justice.

[200] Mr Hyde referred in particular to the comments of Bell P at [165] of the *Courtenay House* decision:[60]

> [165] … application of the simple *pari passu* approach is to force one victim to subsidise another in the face of evidence before the Court (namely that some or all of an earlier investor's deposit had been dissipated) and openly to redistribute property.

He submitted such an outcome would occur in this case. Mr Hyde of course accepted that the *Courtenay House* case was different factually but submitted the statements of principle were still applicable.

[201] Mr Hyde noted that the in specie distribution could apply to those clients who had kept an open position after the administration date and those clients who had acquired shares after the administration date (by the exercise of options). It could apply equally to certain Category 2 clients.

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59 At [133].
60 At [165].

[202] Mr Hyde also noted that the likely imposition of a capital gains tax, if the fund was distributed on a pooled and cashed out approach, was an additional reason to support an in specie distribution.

[203] Mr Gooley submitted that the Category 2 clients he represented were the majority of clients. They held 91.4 per cent of the investments as at 31 October 2020. While the Category 2 clients had no objection in principle to an in specie distribution, that was on the basis the date for fixing their proportionate entitlement was the date of administration, with all clients sharing equally in the gains or losses in open investments following that date.

[204] Mr Gooley noted that the in specie distribution referred to in this context cannot be an in specie distribution in the traditional form because, save for Category 3 clients (and some limited Category 5 clients), the investments held by clients had been purchased from a tainted fund, so no single investor could claim a particular holding as theirs. Effectively, the in specie distribution was a distribution of a monetary equivalent.

[205] Mr Gooley referred to the decision of *Australian Securities and Investments Commission v Idylic Solutions Ltd* and the following statement of Barrett J:[61]

> "[o]nce a contribution is made to the fund, the contribution ceases to have any identity linked to its contributor. The contributor's rights become proportionate rights in relation to the fund as *it exists from time to time*, as distinct from rights in respect of specifically traceable assets within it…". (emphasis added).

[206] Mr Gooley submitted the same situation applied in this case. There was a deficient mixed fund. That fund represented shares and money recorded in bank accounts. The second respondents submitted that those funds were held on trust(s) constituted under the general law or pursuant to statutory trusts. Mr Gooley submitted the two questions for the Court were: first, should a single date be adopted for the quantification of entitlements; and second, what was the appropriate date.

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[61] At [93] citing *Australian Securities and Investments Commission v Idylic Solutions Ltd* (2009) 76 ACSR 129, [2009] NSWSC 1306 at [74].

[207] Mr Scruby argued that all trust assets held by Halifax AU and Halifax NZ should be pooled or grouped together for the purpose of a pari passu distribution. For the purposes of argument, Mr Scruby accepted the applicants' contention that it is not feasible or practical to trace all the transactions within the Halifax group to ascertain what happened to every dollar invested by each client.

[208] In large part, Mr Scruby's submissions for the Category 4 investor clients that pooling was appropriate supported Mr Gooley's argument for a pari passu distribution. However, as noted, Mr Gooley was open to the possibility of an in specie distribution whereas Mr Scruby accepted that, on the applicants' evidence, such a distribution was not possible.

[209] Mr Scruby submitted that, with the possible exception of the Category 3 clients (and such Category 5 clients as may be relevant), the assets held by the Halifax entities were acquired from the deficient mixed fund and it was not in any practical sense possible to identify the clients on whose behalf they were held. He noted that Mr Sutherland's evidence was that to trace the 26,489 deposits made by clients since 1 January 2016 would cost between AUD 26.4 and AUD 37.5 million.

[210] Mr Scruby submitted that the evidence established that:

(a) there was extensive commingling between Halifax AU and Halifax NZ accounts;

(b) there was extensive commingling of monies in accounts which were to be used for investments though the IB platform and the MT4 and MT 5 platforms;

(c) there was no principled basis or pattern to the commingling; and

(d) the commingling included the use of client funds to discharge other clients' obligations to Halifax and obligations owed by Halifax to other clients. As a result the funds were mixed and commingled.

[211] Mr Scruby referred to the principles summarised by Brereton J in *Re BBY (No 2)*[62] and submitted that while the statutory provisions Brereton J was considering had been repealed there was no reason to consider the general principles did not still apply. Further, similar principles had been expressed in New Zealand authorities.[63]

[212] Finally, Mr Scruby made the point that there was, on the evidence, no practically feasible way for the applicants to ascertain whether the shortfall was attributable to particular clients' investments or introduced funds. Further, the applicants' have not been able to discern or establish the cause of the balance of the deficiency.

[213] In the circumstances, he submitted it was appropriate to treat the entitlements of all clients as rateably equal. Given the extensive commingling of monies between accounts in the IB and MT4 and MT5 platforms there was no basis to pool or group clients by reference to the platforms.

Discussion

[214] As counsel have submitted, the facts of this case are different to a number of the authorities discussed before us. Nevertheless, there are a number of relevant principles that emerge from them. The starting point is that the Court, on an application for directions in this context, is being asked to determine the rights of parties to a fund which is insufficient for all clients to be made whole.

[215] The Category 1 clients' argument is essentially that they made the decision to invest in certain shares and to hold those shares rather than to close out following the administration of the Halifax entities. They should be entitled to retain the benefit of their decisions rather than having to share the benefit with other clients who either invested in poorly performing shares or made the decision to close out.

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62 *BBY (No 2)*, above n 22, at [83].

63 *Re Waipawa Finance Company Ltd (in Liq)* [2011] NZCCLR 14 (HC); and *Re Ross Asset Management Ltd (in Liq)* [2018] NZHC 2007.

[216] The principal difficulty with the argument for the Category 1 clients is that it fails to take account of the fact that the shares held by them were purchased through a deficient mixed fund from funds provided by other clients.

[217] In *Priest v Ross Asset Management Ltd (in liq)*, Clifford J observed that:[64]

> In *Re International Investment Unit Trust* (another Ponzi), pari passu distribution was seen as being fairest because all investors had paid into a mixed fund knowing their money would be blended with that of other investors. Therefore, their presumed intention was also for pari passu sharing.

[218] As Clifford J went on to note, where pari passu sharing has been adopted it is considered:[65]

> a pragmatic and fair way to share a common misfortune. It is the misfortune being common that gives rise to the pari passu distribution, rather than some pre-existing proprietary right held in common.

[219] Where most, if not all, investments were funded from a deficient mixed fund then I accept Mr Gooley's submission that all clients should share in the increase in value of retained investments. Otherwise, as he submitted, the more the post administration accretions get pushed over to Category 1, the more the fund available for Category 2 clients becomes more proportionately deficient.

[220] Further, despite Mr Hyde's criticism of Mr Kelly's estimate of the time an in specie distribution might take, I consider the proposed in specie distribution under DM3 would be more complex and time consuming than a distribution following pooling and cashing up of investments. It would inevitably place further administrative burdens on the applicants which would increase the cost to all clients. While part of that cost could be recoverable from the Category 1 clients, it adds a further unnecessary complication to the process.

[221] Where it is not possible, either as a matter of law or where it is not practically pragmatic or possible because of the time and expense involved, to distinguish between clients, then the Court must do the best it can. The courts have put this principle a number of different ways. In *McKenzie v Alexander Associates Ltd (No 2)*

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64 *Priest v Ross Asset Management Ltd (in liq)*, above n 30, at [105].
65 At [107].

McGechan J noted the Court searches for "the nearest approach practicable to substantial justice".[66] In *Re International Investment Unit Trust (in statutory management)* Williams J said "what is required is a search for the least unfair result for the investors".[67]

[222] A further objection to the DM3 methodology proposed by the first respondent is that it will lead to widely differing results for individual client investors. The MICR has the potential to impose disproportionate obligations on investor clients with open positions whose investments have not increased in value.

[223] As Mr Leopold put to Mr Taylor in cross-examination, there is a degree of artificiality in DM3 because, while it purports to calculate proportionate entitlements as at apportionment date, the ultimate in specie distribution to clients would be what ends up in their hands, which would not be proportionate.

[224] It is also relevant that the proposed in specie distribution would only be available to those clients on the IB AU and IB NZ platforms with open positions. As at 29 May 2020 there were 1,549 such clients, but they represent only 13 per cent of all client accounts.

[225] For those reasons, I do not accept the arguments for an in specie distribution. Apart from those clients coming within Category 3 or 5, the investments of other clients of Halifax NZ should be pooled for distribution on a pari passu basis.

[226] There is no real issue between the parties that there should be a single date for ascertaining client entitlements. The issue is whether it should be the administration date or, as Mr Hyde argued for, a date close to the ultimate distribution.

[227] Mr Hyde argued that if an in specie distribution was not available, the clients' entitlement should be valued as close to the date of distribution as possible. While he accepted that, in a number of cases, the date had been fixed as at the administration date and pooling had been applied, he made the point that in those cases, the date had

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66 *McKenzie v Alexander Associates Ltd (No 2)* (1991) 5 NZCLC 67,046 (HC) at 67,065.

67 *Re International Investment Unit Trust (in statutory management)* [2005] 1 NZLR 270 (HC) at [73].

not been in issue. For example, in *Sonray*[68] the administration date was accepted by the Judge as the logical date, but no party had expressed a different view.

[228] Further, in both *BBY (No 2)* at [372], *BBY (No 3)* and *MF Global Australia Ltd (in liq)* the dates were taken on the basis that no-one spoke against them.[69] Mr Hyde noted there was a difference between shares and open investments and bank accounts.

[229] Mr Hyde then submitted that there was no principled reason why the valuation date ought not to be when each of the positions has closed out, accepting it would have to be a single date close to the closing out and the distribution of all investments.

[230] Mr Hyde acknowledged that the Category 1 clients knew there was a risk that the appropriate date for the calculation of entitlements would be the administration date. But he suggested that the liquidators' advice to clients about the appropriate date for closing out and valuing positions was somewhat equivocal. He noted that in their report of 12 March 2019 regarding Halifax AU, the applicants had said:

> The recent decision in *BBY Ltd* suggests that … the date of appointment of administrators is the appropriate date at which to calculate entitlements. …
>
> Such a position is somewhat complicated where Client positions remained open on the appointment date. In such circumstances, it may be appropriate to determine the value of the positions by reference to the value of those positions when closed out.
>
> …
>
> It appears that it is reasonably practicable to carry out a calculation of the value, as at the appointment date, of positions which were open on the appointment date but which were closed out subsequently. Accordingly, it appears that the appointment date of 23 November 2018 is likely to be accepted by the Court as the appropriate date for crystallising the value of all investments.

[231] Further, during the course of these proceedings, the applicants had sought confirmation from the Court that they were not required to close out clients' open positions on the basis the Court might order an in specie distribution.[70]

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68 *Sonray*, above n 21.

69 *BBY (No 2)*, above n 22, at [372]; *In the matter of BBY Ltd (recs and mgrs. apptd) (in liq) (No 3)* [2018] NSWSC 1718 at [2]–[4]; and *MF Global*, above n 26.

70 Minute No 8 of Venning J, dated 21 February 2020.

[232] In *Courtenay House*, Bell P acknowledged the date advocated by some of the parties was not a principled date.[71] The date was the date that an ex parte freezing order had been made. By contrast, the date of administration is a principled date. Black J noted in *Re MF Global*:[72]

> In my view, the adoption of the Appointment Date as the date for the quantification of entitlements finds strong support in the approach adopted in trust law generally and in insolvency.

[233] There are also the worked examples from the liquidators' updated report to clients of 31 August 2020 which support Mr Gooley's submission that the administration date provides a more equitable basis for sharing. In that report the applicants' analysis showed that the estimated dollar return to investors with entitlements calculated on asset values as at 31 July 2020 (taking account of estimated costs) for a Category 2 investor was between a low of 87 and a high of 89. By contrast for a Category 1 investor it was between a low of 119 and a high of 122. That compares with the entitlements calculated as at 23 November 2018 of between 99 and 102 for a Category 2 investor and between 98 and 102 for a Category 1 investor.[73]

[234] I accept the appropriate date for quantification of entitlement is the administration date. A complicating factor is that there are two dates of administration in this case.

[235] While Mr Gooley argued for the Australian date of 23 November, the applicants accept that, on balance, 27 November, the date of administration in New Zealand, would be the appropriate date. There is a logic in that later date. There will have been no relevant activity in Halifax AU from 23 November, but there may have been some activity in the accounts in Halifax NZ between 23 and 27 November. I take the appropriate date as 27 November 2018.

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71 *Courtenay House (No 2)*, above n 37.
72 *MF Global*, above n 26, at [114].
73 Liquidators' Report to Investors and Creditors, dated 31 August 2020 at 9.6.2.

Remaining issues

Post appointment deposits

[236] These are deposits made to the bank accounts of Halifax NZ after the date of administration of Halifax NZ. They are held on trust and are able to be identified by the liquidators. There were no investments made from the fund they were paid into after the date of appointment. They should be refunded.

Set-off

[237] A number of clients have multiple accounts on the various investment platforms, some of which have positive balances and some of which have negative balances. The applicants seek directions enabling them to combine the balances of those accounts to calculate the net position of a client.

[238] As at close of trading on the 26 November 2018, the IB NZ consolidated account recorded out of money positions on CFDs of AUD 356,096. By 30 May 2020 the IB NZ consolidated account disclosed out of money positions of AUD 3,157 for equity and index options and AUD 17,078 in relation to CFDs. Across all platforms, as at 30 May 2020, there were 271 accounts with a negative balance totalling AUD 541,735. One hundred and seventy two of those accounts had balances of less than AUD 100.

[239] While the Halifax NZ CSAs do not expressly permit positive balances to be set-off of against negative balances, such set off has been permitted in other cases and is also consistent with the intent of s 310 of the Companies Act 1993.[74] It is in the interests of the general body of clients to set off such balances.

Low/minimal balances

[240] The applicants also seek directions enabling them to exclude clients who have a credit balance of AUD 100 or less from participation in the final distribution.

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[74] *BBY (No 2)*, above n 22, at [375]–[392]

[241] As at 23 November 2018, 179 Halifax NZ clients had a balance of less than AUD 100. The total value on the IB NZ platform of the 179 clients was AUD 5,945.

[242] I accept Mr Kelly's evidence that the cost of distributing those minor balances to clients would considerably exceed the funds held.

Currency

[243] As noted, there are a number of bank accounts and funds held in several different currencies. It would assist the applicants to be able to convert foreign accounts into one currency, the AUD, for the purpose of determining the total value of the pool of assets for distribution. If the liquidators determine that it is more cost efficient to convert AUD to NZD for the purpose of distributing to Halifax NZ clients, then they should be able to do so.

Final orders

[244] To give effect to the above and notwithstanding the contentions by each of the first to ninth respondents, the Court makes the following orders/directions:

Category 3 investors

(a) The applicants are justified in organising for the shares of clients of Halifax AU and Halifax NZ that were transferred from another broker to the IB AU Platform or the IB NZ Platform, and were never traded (Category 3 shares), to be transferred to a person nominated in writing (including by email) by the client in respect of whom the entitlement to those shares is recorded by Halifax AU or Halifax NZ (as the case may be).

(b) The applicants are justified in conclusively identifying clients of Halifax AU and Halifax NZ as those with an entitlement to Category 3 shares by:

(i) sending a written communication (which may include an email) to all clients of Halifax AU and Halifax NZ with accounts on

the IB AU Platform or the IB NZ Platform, which have open share positions recorded, asking them to confirm in writing within 21 days whether they contend they have an entitlement to Category 3 shares (Category 3 communication); and

(ii) proceeding on the basis that only affirmative responses of clients to the Category 3 communication are to be further considered as to whether the clients responding hold an entitlement to Category 3 shares.

(c) If the applicants do not receive, within 35, days a written response to the Category 3 communication, the applicants are justified in treating those who have not responded as having no entitlement to Category 3 shares.[75]

(d) The applicants are justified in requiring that all clients of Halifax AU and Halifax NZ from whom they receive an affirmative response to the Category 3 communication, pay to the liquidators a fee of AUD 1,500 within 21 days of the applicant's request for such a fee, together with a proportionate share of all the additional fees and expenses of the liquidators concerning their work in relation to the Category 3 shares as approved by the Court.

(e) If the liquidators do not receive the fee of AUD 1,500 requested in Order (d) within 35 days of their request, the applicants are justified in treating the shares the subject of the Category 3 communication as not being Category 3 shares and in distributing them in accordance with the directions at (m) and following.

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[75] I consider this to be a practical approach and analogous to the reasoning adopted in *MF Global UK Ltd* [2013] EWHC 1655 (Ch).

Category 5 investors[76]

(f) The applicants are justified in organising for the shares of clients of Halifax AU and/or Halifax NZ who:

(i) transferred from another broker to the Saxo platform and never traded in those shares, which shares were transferred from the Saxo platform to the IB AU platform or the IB NZ platform and were recorded in a client account on MT5 platform, or the IB AU platform or the IB NZ platform; or

(ii) purchased shares through Halifax NZ prior to 1 July 2013 and never traded those shares; or

(iii) purchased shares through the IB AU platform, the IB NZ platform or the MT5 platform prior to 1 May 2012 and who never traded those shares;

(known collectively as Category 5 shares) to be transferred to a person nominated in writing (including by email) by the client in respect of whom the entitlement to those shares is recorded by Halifax AU or Halifax NZ (as the case may be).

(g) The applicants are justified in conclusively identifying clients of Halifax AU and Halifax NZ as those with an entitlement to Category 5 shares by:

(i) sending a written communication (which may include an email) to all clients of Halifax AU and Halifax NZ with accounts on the IB AU platform or the IB NZ platform, which have open share positions recorded, asking them to confirm in writing within 21 days whether they contend that they have an

[76] The Court has already made an order extending the ambit of Category 5 clients: [150]–[151].

entitlement to Category 5 shares (Category 5 Communication); and

(ii) proceeding on the basis that only affirmative responses of clients to the Category 5 Communication are to be further considered as to whether the clients responding hold an entitlement to Category 5 shares.

(h) If the applicants do not receive, within 35 days, a written response to the Category 5 Communication, the applicants are justified in treating those who have not responded as having no entitlement to Category 5 shares.

(i) The applicants are justified in requiring all clients of Halifax AU and Halifax NZ from whom they receive an affirmative response to the Category 5 Communication pay to the liquidators a fee of AUD 1,500 within 21 days of the applicants' request for such a fee together with a proportionate share of all the additional fees and expenses of the liquidators concerning their work in relation to the Category 5 shares as approved by the Court.

(j) If the liquidators do not receive the fee of AUD 1,500 requested in order (i) within 35 days of their request, the applicants are justified in treating the shares the subject of the Category 5 Communication as not being Category 5 shares and in distributing them in accordance with the directions at (m) and following.

Post-appointment deposits

(k) The applicants are justified in arranging for post-appointment deposits deposited on or after 27 November 2018 into the ANZ Halifax NZ account and the ANZ USD account to be returned to the investor(s) who made those deposits.

Date of calculation of value of clients' entitlements

(l) Subject to the above orders the applicants are justified in adopting the appointment date of 27 November 2018 as the date on which the proportionate entitlements of clients are to be calculated.

Pooling and distribution

(m) Subject to the above orders the applicants are justified in calculating client entitlements using the pari passu approach.

(n) Subject to the above orders as soon as reasonably practicable the applicants are justified in closing out or directing the closing out of:

(i) open position of clients of Halifax NZ recorded in accounts on the IB AU Platform and the IB NZ Platform; and

(ii) open positions of clients of Halifax NZ recorded in client accounts on the MT4 and MT5 Platform.

(o) Subject to the above orders the applicants are justified in pooling the funds in the Bank Accounts listed in the schedule hereto.[77]

(p) For the purpose of calculating each client's entitlement in accordance with the above orders or for the purpose of making a distribution to clients in accordance with the above orders the applicants are, prior to making the calculation and/or distribution, justified in converting into Australian dollars or New Zealand dollars any foreign currency in their Halifax NZ's control.

Distribution process

(q) The applicants are justified in adopting the following process to distribute investor entitlements.

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[77] Schedule attached as annexure 'D'.

(r) The applicants are to email each investor (or, if email is not, in the liquidators' opinion, the most appropriate means of communication with an individual investor, post to the investor's last known address) a notification providing them with unique login details to a secure, web-based investor portal (Investor Portal) and instructing them that, upon logging into the Investor Portal, they will be notified of the value of their entitlement for the purpose of any distribution (Distribution Notice).

(s) In the Investor Portal, the applicants are:

(i) to ask clients to verify their identity and to confirm the value of their investment;

(ii) if a client disputes the value of their entitlement, to ask the investor to notify the applicants of this and provide reasons and supporting documentation (if any) in support of their position; and

(iii) to ask clients to provide their bank account details (nominated bank account) for the distribution of an entitlement.

(t) Clients are to be given 21 days to respond to the Distribution Notice by logging into the Investor Portal and completing the steps identified in order (s)(ii) above.

(u) If, in response to the Distribution Notice, a client affirmatively disputes the value of their entitlement, then, on the condition that their response is accompanied by both reasons and any necessary supporting documents:

(i) the applicants are to assess whether the dispute is well-founded;

(ii) if the dispute is well-founded, the applicants are to notify the client that the liquidators agree with the issues raised in the

dispute and have agreed to amend the value of the entitlement; and

(iii) if the dispute is not well-founded, the applicants are to notify the client that they may apply to the Court (in these proceedings) if the client considers that their dispute is well-founded and that otherwise the liquidators may proceed to distribution on the basis of the value of the entitlement as set out in the Distribution Notice.

(v) The applicants are to proceed to distribution on the basis of the value of the entitlement of each client as recorded in the Investor Portal if:

(i) within 35 days of the Distribution Notice, the client confirms the value of their entitlement on the Investor Portal; or

(ii) the client does not log into the Investor Portal to confirm or dispute their entitlement within 35 days of the Distribution Notice; or

(iii) the client logs into the Investor Portal and disputes their claim but provides no particularity as to the basis of their dispute within 21 days of notification that the client must provide further particularity or else the distribution will proceed on the basis of the client's entitlement as set out in the Distribution Notice; or

(iv) the applicants notify the client that their dispute is not well-founded in accordance with the process in order (u)(iii) above and the client does not apply to the Court (in these proceedings) within 21 days of that notification.

Set-off

(w) The applicants are justified in proceeding on the following basis in respect of the calculation of entitlements of clients:

(i) where a client has multiple accounts on the IB AU Platform and/or the IB NZ Platform and/or the MT4 Platform and/or the MT5 Platform, the applicants are entitled to combine the balances of those accounts to calculate the net position of a client; and

(ii) setting-off positive account balances credited to a particular client against negative account balances incurred by the same client.

Low account balances

(x) The applicants are justified in treating clients who have a credit balance of AUD 100 or less as having no right to participate in the distribution of funds by the applicants.

Electronic communications

(y) Subject to (r) above, the applicants are justified in publishing or sending any notices, correspondence or other relevant material to clients as part of the distribution process by:

(i) sending copies of any notices, correspondence or other relevant materials to the email address of each client for whom the liquidators or Halifax AU or Halifax NZ holds an email address;

(ii) by notice or link on:
https://home.kpmg/au/en/home/creditors/halifax-investment-services.html
https://home.kpmg/au/en/home/creditors/halifax-nz-limited.html.

Reservation of leave

[245] Issues may arise regarding implementation of the above. Leave is reserved to the applicants to seek such further directions as may be required on 72 hours' notice to affected respondents.

Costs

[246] There is a protocol in place for fixing the liquidators' and trustees' costs. The costs of the first to fifth respondents as representative parties have been covered. As noted previously I do not propose to make any order for costs in relation to the eighth and ninth respondents' very limited involvement in these New Zealand proceedings.

[247] The remaining issue in relation to costs is the position of the sixth and seventh respondents, the Whitehead Interests. When they were joined to pursue their own interests, the issue of costs was reserved. Mr Leopold for the applicant liquidators sought costs on an indemnity basis against them. While the Whitehead Interests have failed on their major arguments, they raised some issues which were relevant to Halifax NZ clients generally. My preliminary view is that while they should pay costs, an award of scale costs on a Category 2B basis is appropriate. However, as requested by counsel, I formally reserve the issue of costs involving the sixth and seventh respondents. If the parties wish to pursue the matter further, the applicants are to file submissions within 15 working days. The sixth and seventh respondents are to respond within a further 15 working days and the applicants may reply within five working days. Costs memoranda are not to exceed three pages in length. The Court will then determine costs on the papers.

_____

Venning J

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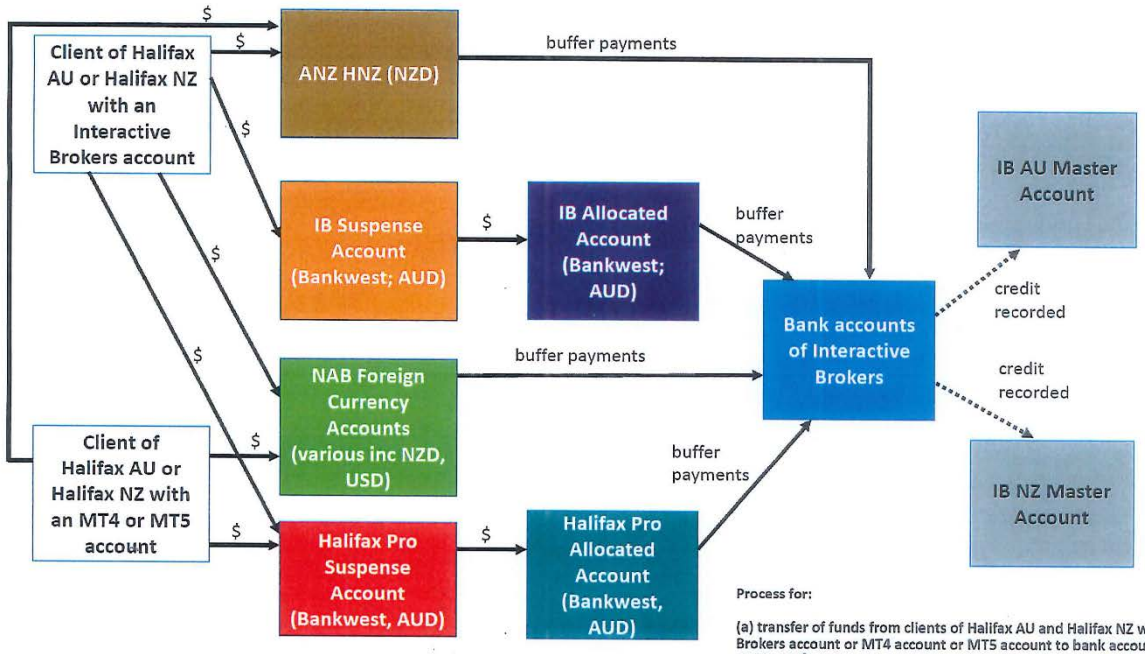
	Murdoch Clarke, Australia
Counsel:	A Leopold SC, Australia
	V Whittaker SC, Australia
	R Scruby SC, Australia



Process for:

(a) transfer of funds from clients of Halifax AU and Halifax NZ with an Interactive Brokers account or MT4 account or MT5 account to bank accounts of Halifax AU or Halifax NZ*; and

(b) transfer of buffer payments from bank accounts of Halifax AU or Halifax NZ to bank accounts of Interactive Brokers,#**

*** This diagram does not show all accounts of Halifax AU and Halifax NZ into which clients transferred funds. The diagram depicts the accounts into which clients most commonly deposited funds.**

**** This diagram does not show all accounts from which buffer payments were transferred from Halifax AU or Halifax NZ. The diagram depicts the accounts from which buffer payments were most commonly made.**

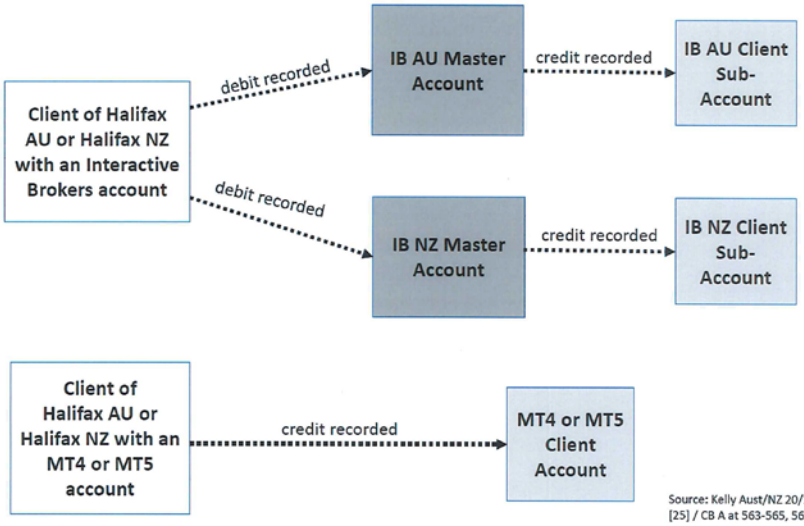
 # This diagram does not show the transfer of funds between bank accounts of Halifax AU and Halifax NZ, or from bank accounts of Interactive Brokers to bank accounts of Halifax AU and Halifax NZ.

Source: Funds Flow Memorandum (Ex MJK-1) at 13, 15-16, 18 / CB B at 4061, 4063-4064, 4066; Kelly Aust/NZ 20/10/20 at [12]-[13], [17], [22], [24] / CB A at 563-565, 567-568; Kelly Aust/NZ 27/11/20 at [11]-[12] / CB A at 2522

'A'

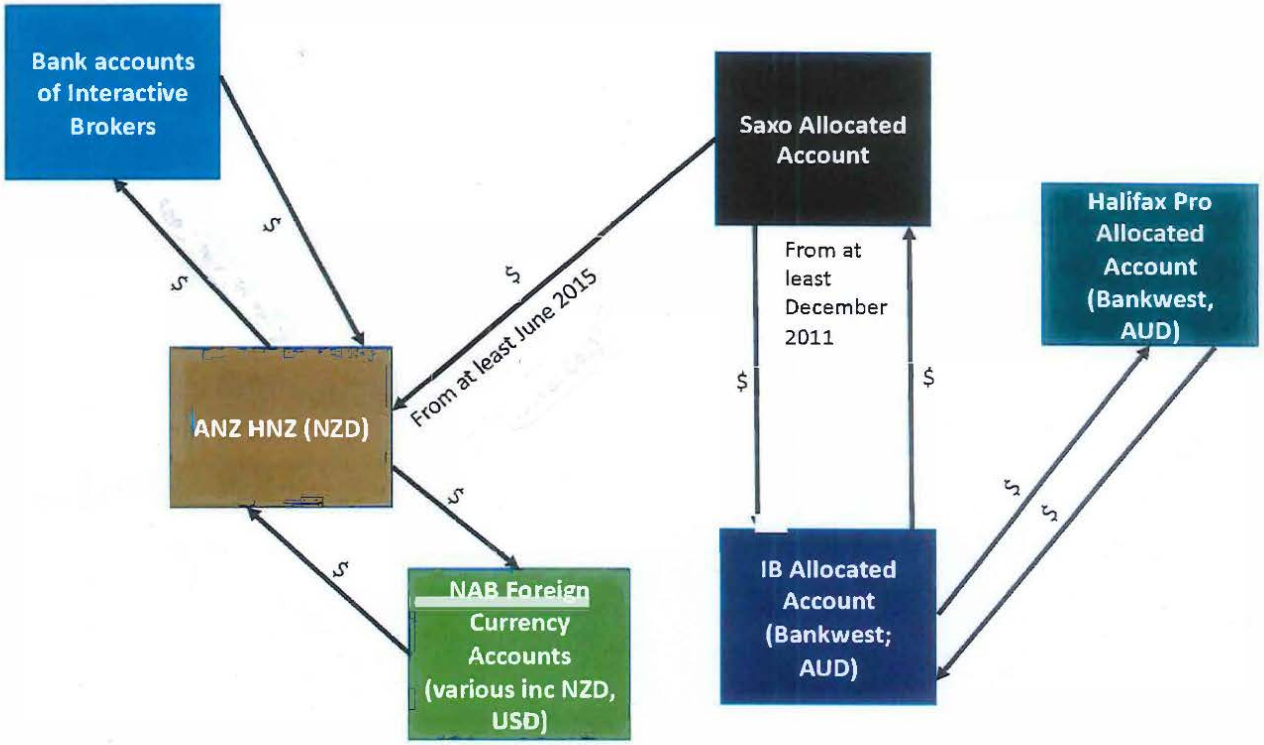
‘B’

Credits to IB Client Sub-Accounts and client accounts on MT4 or MT5 following transfer of funds from a client of Halifax AU or Halifax NZ to a bank account of Halifax AU or Halifax NZ



Source: Kelly Aust/NZ 20/10/20 at [10], [16]-[18], [24]-[25] / CB A at 563-565, 567-568

Example of commingling between bank accounts



‘D’

HALIFAX DRAFT ORDERS – NZ PROCEEDINGS

Bank	Account Name	Account Number	Currency	Note
				the Orders dated 2 July 2020
NAB	HALIFAX INVESTMENT SERVICES PTY LTD (IN LIQUIDATION) - IB AU CASH ACCOUNTS (AU)	HALIIUSD01	USD	This account contains US dollars withdrawn from IB AU Investor accounts as per the Orders dated 2 July 2020

Bank accounts of Halifax NZ

Bank	Account Name	Account Number	Currency	Note
ANZ	FCA (EUR)	205964EUR00001	EUR	
ANZ	FCA (USD)	205964USD00001	USD	
ANZ	Business Current Account **(ANZ HNZ Account)**	01-0121-0135307-02	NZD	
ANZ	FCA (GBP)	205964GBP00001	GBP	
ANZ	FCA (AUD)	205964AUD00020	AUD	
ANZ	HALIFAX NEW ZEALAND LTD (IN VOLUNTARY ADMINISTRATION)	06-0323-0537865-00	NZD	
ANZ	HALIFAX NEW ZEALAND LTD (IN VOLUNTARY ADMINISTRATION)	06-0323-0537865-01	NZD	
ANZ	FCA (AUD) (Post-Appointment)	257085AUD00001	AUD	
ANZ	FCA (EUR) (Post-Appointment)	257085EUR00001	EUR	
ANZ	FCA (GBP) (Post-Appointment)	257085GBP00001	GBP	

Bank	Account Name	Account Number	Currency	Note
ANZ	FCA (USD) (Post-Appointment)	257085USD00001	USD	
NAB	HALIFAX NEW ZEALAND LIMITED (IN LIQUIDATION) - IB NZ Cash Accounts (AU)	082005429619754	AUD	This account contains Australian dollars withdrawn from IB NZ Investor accounts as per the Orders dated 2 July 2020
NAB	HALIFAX NEW ZEALAND LIMITED (IN LIQUIDATION) - IB NZ Cash Accounts (AU)	HFNZLNZD01	NZD	This account contains New Zealand dollars withdrawn from IB NZ Investor accounts as per the Orders dated 2 July 2020
NAB	HALIFAX NEW ZEALAND LIMITED (IN LIQUIDATION) - IB NZ Cash Accounts (AU)	HFNZLUSD01	USD	This account contains US dollars withdrawn from IB NZ Investor accounts as per the Orders dated 2 July 2020