MF Global Singapore Pte Ltd (in creditors' voluntary liquidation) and others *v* Vintage Bullion DMCC (in its own capacity and as representative of the customers of the first plaintiff) and another matter
[2015] SGHC 162

Case Number : Originating Summons No 289 and 578 of 2013

Decision Date : 25 June 2015

Tribunal/Court : High Court

Coram : Hoo Sheau Peng JC

Counsel Name(s) : Andre Yeap SC, Danny Ong, Sheila Ng, Ong Kar Wei (Rajah & Tann Singapore LLP) for the plaintiffs in OS 289 and the defendant in OS 578; Thio Shen Yi SC, Kelvin Koh (TSMP Law Corporation), Manoj Pillay Sandrasegara, Joy Tan, Lionel Leo, Muhammad Nizam, Stephanie Yeo (WongPartnership LLP) for the defendant in OS 289 and the plaintiff in OS 578.

Parties : MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation) — Chay Fook Yuen (In his capacity as joint and several liquidator of MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation) — Bob Yap Cheng Ghee (In his capacity as joint and several liquidator of MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation) — Tan Puay Cheng (In his capacity as joint and several liquidator of MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation) — Vintage Bullion DMCC (In its own capacity, and for and on behalf of and as representative of all customers of MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation) who have LFX Claims for Profit (as defined in the Originating Summons filed herein) and/or Bullion Claims for Profit (as defined in the Originating Summons filed herein)

Financial and securities markets – Regulatory requirements – Market conduct

Statutory Interpretation – Construction of statute – Commodity Trading Act – Securities and Futures Act

Companies – Winding up

Trusts – Express trusts – Certainties

[LawNet Editorial Note: The appeals to this decision in Civil Appeals Nos 142 and 143 of 2015 were allowed in part while the appeals in Civil Appeals Nos 216 and 217 of 2015 were allowed by the Court of Appeal on 2 August 2016. See [2016] SGCA 49.]

25 June 2015 Judgment reserved.

Hoo Sheau Peng JC:

Introduction

1 The two applications before me are brought under s 310 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") for the court to determine questions arising out of the winding up of MF Global Singapore Pte Ltd ("MFGS"). Originating Summons No 289 of 2013 ("OS 289") was commenced by MFGS and the joint and several liquidators, Mr Chay Fook Yuen, Mr Bob Yap Cheng Ghee ("Mr Yap") and Mr Tay Puay Cheng (collectively, "the Liquidators"), against Vintage Bullion DMCC

("Vintage") in its own capacity and as representative of 57 other customers of MFGS (collectively, "the LFX and Bullion customers"). As Vintage disagreed with the Liquidators' framing of the issues in OS 289, Vintage lodged Originating Summons No 578 of 2013 ("OS 578") in its own capacity against MFGS.

2 Essentially, the central issues in both OS 289 and OS 578 are the same, and concern the treatment of certain forms of profits made by the LFX and Bullion customers under leveraged foreign exchange ("LFX transactions") and leveraged commodity transactions ("Bullion transactions") conducted by MFGS. In relation to these forms of profits, Vintage asserts proprietary claims, while MFGS argues that Vintage only has unsecured claims. In the latter scenario, the LFX and Bullion customers would stand as unsecured creditors, and would have to prove these unsecured debts in MFGS' winding up. Parties thus agreed for both applications to be heard at the same time.

3 While Vintage was appointed, pursuant to an order of court dated 16 July 2013 in OS 289, to represent the LFX and Bullion customers who have claims for these forms of profits arising out of LFX and Bullion transactions, the order provided that Vintage was "not required to keep any [of the other customers] informed of these proceedings or to advance an argument or to take any instructions from any of them". For the avoidance of doubt, any decision made in respect of Vintage in this judgment will apply equally to the LFX and Bullion customers who have equivalent claims against MFGS.

Facts

MFGS and its model of business

4 I now set out the facts (with key terms highlighted in bold italics). MFGS was, at all material times, a member and clearing member of the Singapore Exchange Securities Trading Limited, the Singapore Exchange Derivatives Trading Limited, and the Singapore Exchange Derivatives Clearing Limited. MFGS was also a holder of a Capital Markets Services licence ("CMS licence"), issued by the Monetary Authority of Singapore ("MAS"), authorised to carry out the following regulated activities under the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("SFA"):

(a) dealing in securities;

(b) trading in futures contracts;

(c) leveraged foreign exchange trading;

(d) securities financing; and

(e) providing custodial services for securities.

5 In the ordinary course of business, MFGS offered a range of over-the-counter LFX and Bullion products which included:

(a) cash-settled over-the-counter LFX spot contracts;

(b) cash-settled over-the-counter LFX forward contracts;

(c) cash-settled over-the-counter LFX non-deliverable forward contracts;

(d) over-the-counter LFX option contracts; and

(e) cash-settled over-the-counter Bullion spot contracts.

6 The above over-the-counter products were not traded on any exchange, and involved transactions where the investor would buy or sell currencies or commodities in a bid to profit from fluctuations in exchange rates between two different currencies, or fluctuations in the prices of commodities without physical delivery of the currencies or commodities involved.

7 For the purpose of facilitating trades in LFX or Bullion transactions, customers were required to open and maintain accounts with MFGS. The relationships between the LFX and Bullion customers and MFGS and the trades were governed by the terms and conditions set out in the account opening form and the Master Trading Agreement ("MTA"), which also enclosed a risk disclosure statement ("the Risk Disclosure Statement").

8 Once the accounts were opened, customers would typically place with MFGS funds necessary to enable trades to be executed and to maintain open positions on the trades by way of "margin". The bulk of MFGS' customers traded on margin (*ie*, trading by placing a certain percentage of the value of the position concerned with MFGS). The margin required varied depending on the requirements for trading in the product concerned.

9 MFGS operated a 24-hour dealing and service desk for customers who traded in LFX and Bullion products. Customers could either trade directly with MFGS by calling MFGS' desk dealers or by utilising an online platform. An order could be placed with MFGS via either platform so long as a customer had sufficient margin to enter into the transaction. If the customer did not meet MFGS' margin requirements, MFGS would require the customer to satisfy the margin requirements before entering into an LFX or Bullion transaction.

10 In respect of the LFX and Bullion transactions, MFGS did not act as its customers' agent. Instead, a customer concluded an LFX or Bullion transaction directly with MFGS which acted as principal on its own behalf. In other words, MFGS was the direct counterparty to any LFX or Bullion transaction which a customer entered into.

11 To hedge its own exposure, MFGS engaged in hedge transactions with hedge counterparties, being the Union Bank of Switzerland ("UBS") in respect of the LFX transactions, and Deutsche Bank ("DB") in respect of the Bullion transactions. MFGS funded these transactions with its own funds.

12 The margins placed by customers were deposited into MFGS' bank accounts which MFGS classified as " ***Customer Segregated Accounts*** ". The funds placed in these accounts were segregated from MFGS' own funds, although MFGS maintained some of its own funds in these accounts. According to the Liquidators, the LFX and Bullion customers' margins were not onward-placed with any other party, or otherwise utilised by MFGS for the purposes of MFGS' hedge transactions. Although MFGS maintained a number of Customer Segregated Accounts, MFGS did not open a separate bank account for each customer. MFGS, however, accounted distinctly for each customer's funds in the Customer Segregated Accounts.

The LFX and Bullion transactions, the "Daily FX Activity Statements" and the "Seg Fund Statements"

13 MFGS employed a back-office operations system to record the daily LFX and Bullion trade activity for each customer. Daily statements of the accounts of the customers (" ***Daily FX Activity Statements*** ") were also produced by the system. As a day-to-day chronicle of the relationship between MFGS and a particular customer, the relevant Daily FX Activity Statements are crucial pieces

of documentary evidence presented by the parties.

14 Basically, a Daily FX Activity Statement contained, *inter alia*, the following sections: (i) the "Trade Confirmation" section; (ii) the "Forward Liquidation" section; (iii) the "Open Positions" section; and (iv) the "Financial Statement" section. In the ordinary course of business, an LFX or Bullion transaction between MFGS and its customer would occur as described below, and would be recorded in the Daily FX Activity Statements as follows:

(a) The customer would initiate a position by entering into an initial trade. MFGS would issue a trade confirmation under the "Trade Confirmation" section to its customer in the Daily FX Activity Statement for that particular day.

(b) The transaction was thereafter treated as continuing to remain open until a final trade was entered into. In such a case, the customer would be said to have an "open position". These open positions would be reflected under the "Open Positions" section of the Daily FX Activity Statement.

(c) While a position remained open, the "paper" (*ie*, notional) value of the open position would be determined with reference to the market price of either the underlying currency or reference bullion ("the daily settlement prices") in respect of the LFX and Bullion transactions respectively (*ie*, the transactions were marked to the market). If the movement of the underlying currency or reference bullion favoured the customer, the customer would have unrealised profits. However, if it did not, the customer would incur unrealised losses. The " ***Unrealised Profits*** " or "Unrealised Losses" would be reflected in the "Financial Statement" section of the Daily FX Activity Statement.

(d) If a customer was not able to meet MFGS' margin requirements, MFGS was entitled, by cl E4 of the MTA, to issue a "margin call", *ie*, to require a customer to deposit with MFGS additional margins in order for the position to be maintained. I will discuss the way MFGS calculated a customer's margin requirements at item (j) below.

(e) While the position remained open, the cost of keeping the position open was debited from or credited to the customer based on the total value of the contract. In respect of the LFX transactions, this cost was known as "forex swap", and in respect of the Bullion transactions, this was termed "spot interest".

(f) When a final trade was entered into, this was known as "closing" the position. When the position was closed, MFGS would issue a trade confirmation under the "Trade Confirmation" section. The trade confirmation would state the price of the trade, as well as a " ***Value Date*** ", which is defined in the MTA as "the date on which the respective obligations of the parties to a foreign exchange or [over-the-counter] transaction are to be performed". Generally, though not always, the Value Date would be two days after closing a position. The closure of the position at a profit to the customer also gave rise to a sum which would be reflected in the "Financial Statement" section as " ***Forward Value*** ". The specific transactions which had been closed out would also be reflected under the "Forward Liquidation" section.

(g) On the Value Date, the sum previously reflected under Forward Value (with that particular Value Date) would be credited to a customer's running account with MFGS as "Liquidation Profit" and be added to the sum reflected under " ***Ledger Balance C/F*** " (where C/F stands for "carried forward") under the "Financial Statement" section of that day's Daily FX Activity Statement. In other words, Forward Value with a Value Date "Z" would be shown to have been credited to the

Ledger Balance C/F in the Daily FX Activity Statement dated "Z".

(h) The aggregate sum of the Unrealised Profits, Forward Value and Ledger Balance C/F would be reflected in the "Financial Statement" section as " ***Total Account Equity*** ".

(i) When customers wished to withdraw their realised profits represented under the Ledger Balance C/F, MFGS would then effect physical payment to the customers from the Customer Segregated Accounts.

(j) A separate portion of the "Financial Statement" section deals with a customer's margin requirements. This portion sets out the "Initial Margin Requirement" and "Margin Excess/Deficiency". The Initial Margin Requirement represents the funds or value initially required to maintain an open position. The Margin Excess/Deficiency represents the difference between a customer's Total Account Equity and the Initial Margin Requirement as reflected in the same statement. MFGS would only issue a margin call to its customer when a Margin Deficiency is incurred.

15 At all material times, MFGS ensured that there were sufficient moneys parked in the Customer Segregated Accounts to cover the Total Account Equity of all the LFX and Bullion customers, which *inter alia*, included the three forms of profits: Unrealised Profits, Forward Value and Ledger Balance C/F. The primary dispute between the Liquidators and Vintage is whether the sums representing the Unrealised Profits and Forward Value in the Customer Segregated Accounts belong beneficially to (and therefore are the property of) the LFX and Bullion customers, or whether they are instead MFGS' own moneys, available for distribution to MFGS' unsecured creditors, including the LFX and Bullion customers, on a *pari passu* basis, in MFGS' winding up.

16 During the ordinary course of business, MFGS also submitted a statement of assets and liabilities in the prescribed form under reg 27(1)(*a*), (3)(*a*), (9)(*b*) and (9)(*e*) of the Securities and Futures (Financial and Margin Requirements for Holders of Capital Markets Services Licences) Regulations (Cap 289, Rg 13, 2004 Rev Ed) ("SF(FM)R") on a quarterly basis to MAS. This form included a document with the heading "Segregation Requirements and Location of Segregated Funds" (" ***the Seg Fund Statement*** "). MFGS updated the Seg Fund Statement daily. The Seg Fund Statement is another key piece of documentary evidence referred to by the parties, and I shall describe this in more detail in due course.

Vintage's relationship with MFGS

17 On 21 August 2006, Vintage opened an account with MFGS, and engaged in, *inter alia*, LFX and Bullion transactions through this account. Prior to 1 November 2011, being the date MFGS entered into provisional liquidation, Vintage closed out all its open positions in its LFX and Bullion transactions. In particular, Vintage liquidated 121 lots of silver on 28 October 2011, and a further 241 lots of silver on 31 October 2011. The Value Date for these transactions was 1 November 2011. Vintage also closed out all its LFX transactions on 20 October 2011, and the Forward Value from those transactions had Value Dates of 14 November 2011 and 20 August 2012.

18 In Vintage's Daily FX Activity Statement dated 31 October 2011, the numbers (in USD) were reflected under the "Financial Statement" section as follows:

LEDGER BALANCE C/F	:	4,711,459.18
TOTAL UNREALISED P/L	:	0.00

FORWARD VALUE	:	6,835,995.31
….		
TOTAL ACCOUNT EQUITY	:	11,547,454.49

19 In Vintage's Daily FX Activity Statement dated 1 November 2011, the numbers (again in USD) were reflected as follows:

LEDGER BALANCE C/F	:	10,793,862.06
TOTAL UNREALISED P/L	:	0.00
FORWARD VALUE	:	744,950.78
….		
TOTAL ACCOUNT EQUITY	:	11,538,812.84

The winding up of MFGS and Originating Summons No 22 of 2012

20 On 31 October 2011, MFGS' ultimate parent company, MF Global Holdings Ltd, filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Globally, many affiliates of MF Global Holdings Ltd also declared bankruptcy or were placed into administration or liquidation on or around the same date.

21 In view of the financial condition of MF Global Holdings Ltd at the material time, MAS directed MFGS on 31 October 2011 to, *inter alia*:

> … cease, with immediate effect, from entering into new transactions, except for reduction and/or liquidation of positions, in respect of its carrying on business in –
>
> (i) dealing in securities (including contracts-for-differences);
>
> (ii) dealing in other forms of contracts-for-differences; and
>
> (iii) providing custodial services for securities (including contracts-for-differences) …

22 On 1 November 2011, the directors of MFGS passed a resolution to appoint the Liquidators as provisional liquidators of MFGS and MFGS entered into provisional liquidation.

23 On 10 January 2012, the Liquidators (who were then still provisional liquidators) applied to court by way of Originating Summons No 22 of 2012 ("OS 22") for an order that they be authorised to distribute on an interim basis up to US$350m to customers identified by the Liquidators as having proprietary interests in certain funds which had then been collected by the Liquidators. The application was granted on 8 February 2012 on the following terms:

> 1 The Provisional Liquidators are authorised to transfer and/or distribute, on an interim and provisional basis, from the segregated and proprietary funds of customers as may be accountable by MFGS to its customers, whether presently or in the future, in the control of the Provisional

Liquidators (the "**Available Customers' Funds**"), an amount of up to US$350 million … to those customers identified by the Provisional Liquidators as MFGS' customers with proprietary interests in the Available Customers' Funds on the basis of … key general principles … :

> 1.1.1 whether customers have any proprietary and legal right to customers' segregated and proprietary funds maintained, controlled or recovered by the Provisional Liquidators, and which are comprised in the Available Customers' Funds, as determined by the Provisional Liquidators. Customers whose proprietary funds attributable to them have otherwise yet to be returned by MFGS' counter-parties, correspondent brokers, clearing members and/or clearing houses, where applicable, would not receive any distribution as such unreturned funds would not be comprised in the Available Customers' Funds;
>
> …
>
> 1.1.3 any realised and/or estimated unrealised profits in respect of whatsoever products that a Relevant Customer traded which have yet to be received by the Provisional Liquidators and hence, not comprised in the Available Customers' Funds, would not be taken into account in assessing that Relevant Customer's net provisional entitlement to the Available Customers' Funds… [emphasis in original]

24 It should also be highlighted, for completeness, that the sole shareholder of MFGS, MF Global Overseas Ltd, passed a special resolution on 28 May 2012 for the voluntary winding up of MFGS and appointed the Liquidators as joint and several liquidators of MFGS. A creditors' meeting was also held on that day where the creditors resolved, amongst other matters, to confirm the appointment of the Liquidators.

The present applications

25 On 23 April 2012, Vintage received payment of the sum of US$5,137,229.93 as part of the interim distribution made by the Liquidators. This sum included amounts attributable to the LFX and Bullion transactions, as well as amounts from other futures and options transactions. Vintage was of the view that it had been underpaid. It transpired that parties took a different view of how the Unrealised Profits and Forward Value arising from the LFX and Bullion transactions should be treated as a matter of law. OS 289 and OS 578 were thus taken out by the Liquidators and Vintage respectively in order to determine this and other issues. The Unrealised Profits and Forward Value in dispute amount to about US$13.4m for all the LFX and Bullion customers. It should be noted that Vintage is claiming its Forward Value *only*, a substantial portion of which is attributable to its Bullion transactions. As of 31 October 2011, Vintage did not have any Unrealised Profits.

Summary of the parties' cases

The Liquidators' case

26 According to counsel for the Liquidators, Mr Andre Yeap SC ("Mr Yeap"), given that MFGS acted as principal to the LFX and Bullion customers, the Unrealised Profits constituted only mere uncrystallised contingent debt obligations that were not yet due and payable, and the Forward Value constituted a debt payable only on the future Value Date. Hence, the LFX and Bullion customers only had choses in action against MFGS in respect of the Unrealised Profits and Forward Value. A chose in action could not be converted into trust property which MFGS holds as a "trustee" for a customer. Furthermore, even if it could be said that a "trust" over a chose was possible, it would not have been a trust over actual physical moneys, particularly since such moneys had not been paid, and were in

fact not yet due and payable.

27 As stated above, MFGS maintained sums equivalent to the aggregate of the LFX and Bullion customers' Unrealised Profits, Forward Value and Ledger Balance C/F in the Customer Segregated Accounts. However, according to the Liquidators, only the Ledger Balance C/F is held on trust for its customers, while the Unrealised Profits and Forward Value formed MFGS' "***residual financial interest***" in the Customer Segregated Accounts. On the Value Date of a particular transaction, the Forward Value would be paid by MFGS into a customer's Ledger Balance C/F from this "residual financial interest". It was only after this payment on the Value Date that MFGS would hold the amount on trust for the customer. Indeed, the interim distribution under OS 22 was made on this basis.

28 Specifically, the Liquidators take the view that the statutory trust under the relevant legislation does not capture the Unrealised Profits and Forward Value of the LFX transactions. As for the Bullion transactions, the Liquidators argue that the specific provisions under the relevant legislation apply only when a commodity broker acts as agent for and on behalf of a customer. As MFGS did not act as agent for the Bullion customers, MFGS was not required to segregate any moneys, or hold any moneys on trust. However, the Liquidators' position is that MFGS voluntarily held a customer's Ledger Balance C/F attributable to Bullion transactions on trust.

29 The Liquidators also submit that no express trust was created over the Unrealised Profits and Forward Value. MFGS did not behave in a manner that evinced a clear intention to hold the Unrealised Profits or Forward Value on express trust for the LFX and Bullion customers.

30 Against Vintage's argument that the LFX and Bullion customers' proprietary entitlement to the Ledger Balance C/F should be determined on the basis of the Daily FX Activity Statement dated 1 November 2011, the Liquidators submit that due to the appointment of provisional liquidators on 1 November 2011, MFGS did not and could not pay the Forward Value into MFGS' Customer Segregated Accounts after the close of business on 31 October 2011. As payments in the ordinary course of MFGS' business was made at the close of business on a particular Value Date, the last payment MFGS made (and could have made) to the account and credit of customers prior to the appointment of provisional liquidators was at MFGS' close of business on 31 October 2011, which was 5.00pm New York Time on 31 October 2011 (*ie*, 5.00am Singapore time on 1 November 2011) before MFGS went into provisional liquidation. Thus, the extent of a customer's proprietary entitlement should be limited to the Ledger Balance C/F reflected in the 31 October 2011 Daily FX Activity Statement.

Vintage's case

31 Vintage's primary case is that a statutory trust arose over the Unrealised Profits and Forward Value as a result of the relevant legislation applicable to the LFX and Bullion transactions respectively.

32 Alternatively, even if MFGS was not obliged by the relevant legislation to hold the Unrealised Profits and Forward Value on trust for Vintage and the other LFX and Bullion customers, *in actual fact*, MFGS segregated moneys covering the value of the Unrealised Profits and Forward Value, and held these moneys on trust. Accordingly, a trust by conduct arose.

33 Further, Vintage's argument is that even if MFGS was only required to hold the Ledger Balance C/F on trust for the LFX and Bullion customers, then these customers have a proprietary interest in the Ledger Balance C/F as reflected in the Daily FX Activity Statement dated 1 November 2011, and not of that dated 31 October 2011. Effectively, this means a difference of about US$6m in Vintage's favour. Vintage's last argument is that the LFX and Bullion customers are entitled to amounts reflected as Margin Excess in the Daily FX Activity Statement.

34 On the last day of the hearing before me, Mr Thio Shen Yi SC ("Mr Thio"), counsel for Vintage, also submitted that a number of Mr Yap's affidavits, as well as an LFX and Bullion Report prepared by the Liquidators for OS 298 and OS 578 ("the LFX and Bullion Report") contained matters that were inadmissible for being in breach of O 41 r 5(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court").

Issues

35 Given the positions of the parties, there are a number of substantive issues to be considered. First, I discuss the nature of the Unrealised Profits, Forward Value and Ledger Balance C/F under the contract between MFGS and the LFX and Bullion customers (*sans* the interposition of any statutory trust or express declaration of trust) ("the Preliminary Issue").

36 Next, I will consider whether, in respect of the Unrealised Profits and Forward Value, the LFX and Bullion customers have proprietary claims by way of either a statutory or express trust, or whether they must prove their unsecured debts in the winding up of MFGS ("the Proprietary Claim issue"). To determine the Proprietary Claim issue, the following sub-issues arise:

(a) Given the nature of the Unrealised Profits and Forward Value, whether MFGS is capable of holding them on trust for the benefit of the LFX and Bullion customers.

(b) If so, whether a statutory trust arises over the Unrealised Profits and Forward Value ("the Statutory Trust issue").

(i) In respect of the Bullion transactions, whether MFGS is obliged under the Commodity Trading Act (Cap 48A, 2009 Rev Ed) ("CTA") and Commodity Trading Regulations 2001 (Cap 48A, S 578/2001) ("CTR") to hold the Unrealised Profits and Forward Value on statutory trust for the Bullion customers.

(ii) In respect of the LFX transactions, whether MFGS is obliged under the SFA and Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed) ("SFR") to hold the Unrealised Profits and Forward Value on statutory trust for the LFX customers.

(c) If no statutory trust arises over the Unrealised Profits and Forward Value, whether an express trust arises over the Unrealised Profits and/or Forward Value as a result of MFGS' conduct or the way MFGS held or treated such moneys ("the Express Trust issue").

37 If the Proprietary Claim issue is answered in the negative, and the LFX and Bullion customers have no proprietary interest in funds representing the Unrealised Profits and Forward Value, then the issue is whether they have a proprietary interest in the Ledger Balance C/F as reflected in the Daily FX Activity Statement dated 1 November 2011, or only in the Ledger Balance C/F reflected in the Daily FX Activity Statement dated 31 October 2011 ("the Value Date issue").

38 Lastly, if the LFX and Bullion customers only have a proprietary interest in the Ledger Balance C/F reflected in the 31 October 2011 Daily FX Activity Statement, are they entitled to the amounts reflected as Margin Excess in that statement ("the Margin Excess issue")?

39 I should add that the Liquidators, in OS 289 and their submissions, raised two issues which Vintage does not contest before me. These are (i) whether MFGS acted as principal or as agent/broker vis-à-vis the LFX and Bullion customers, and (ii) whether the LFX and Bullion customers

have any proprietary entitlement to profits from the hedge transactions which MFGS carried out with UBS and DB. Vintage accepts that the LFX and Bullion transactions which it entered into with MFGS were conducted on a principal-to-principal basis, and that MFGS was not acting as Vintage's agent. Vintage also does not assert any proprietary entitlement to profits from the hedge transactions MFGS entered into with UBS and DB in respect of the LFX and Bullion transactions respectively. With that, I turn to the Preliminary Issue.

The Preliminary Issue: The nature of the Unrealised Profits, Forward Value and Ledger Balance C/F under the contract between the parties

Parties' submissions

40 In their written submissions, the Liquidators refer to the Unrealised Profits and Forward Value as "mere uncrystallised contingent or future debt obligations that were not yet due and payable as at the time of MFGS' winding up and consequential appointment of provisional liquidators to MFGS". On its part, Vintage has in the course of oral submissions characterised the Unrealised Profits as "contingent debts" and the Forward Value as "future" or "crystallised" debts owed by MFGS to the LFX and Bullion customers. In my view, it would aid the analysis which follows to first clarify the meaning of these terms and the appropriate legal characterisation of the Unrealised Profits, Forward Value and Ledger Balance C/F under the contract between the parties, without the interposition of the statutory framework under the CTA or SFA, or any declaration of trust on MFGS' part.

Analysis and findings

41 I first consider the meaning of "contingent debts", a term which both the Liquidators and Vintage have used in their submissions. In the context of the winding up of a company, s 253(1)(*b*) of the Companies Act provides that a "contingent or prospective creditor" may apply to court to wind up a company. Similarly, s 327(1) of the Companies Act, which sets out what debts are provable in the winding up of a company, provides that:

> **327.**—(1) In every winding up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of bankruptcy) *all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages*, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as are subject to any contingency or sound only in damages, or for some other reason do not bear a certain value. [emphasis added]

With respect to an insolvent company, the rules relating to debts provable in bankruptcy apply (see s 327(2) of the Companies Act). Under ss 87(1) and (3) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("Bankruptcy Act"), any liability arising out of a contract to which a bankrupt (i) is subject at the date of the bankruptcy order or (ii) may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy order shall be provable in bankruptcy. Section 2 of the Bankruptcy Act provides that "liability" means a liability to pay money or money's worth, irrespective of whether such liability is present or future, certain or contingent or of an amount that is fixed or liquidated or that is capable of being ascertained by fixed rules or as a matter of opinion.

42 In *Kon Yin Tong and another v Leow Boon Cher and others* [2011] SGHC 228, Judith Prakash J set out the differences between contingent liability and prospective liability as follows (at [40]):

> A "contingent liability" would refer to a liability or other loss which arises out of an existing legal

obligation or state of affairs, but which is dependent on the happening of an event that may or may not occur. "Prospective liability" however, has been judicially defined as "a debt which will certainly become due in the future, either on some date which has already been determined or on some date determinable by reference to future events". It thus embraces both future debts, in the sense of liquidated sums due, and non-liquidated claims.

43 Therefore, a contingent liability or debt is one that arises out of an existing state of affairs, but is dependent on the happening of a future event which may or may not transpire. On the other hand, a prospective liability may also be understood as a debt payable in the future. In this light, the parties' respective obligations under the MTA in respect of the LFX and Bullion transactions may be more properly characterised.

44 The MTA is silent on whether specific property should be held on trust for the customer. Clause A15.1 of the MTA states:

15. TRUST ACCOUNT

15.1 MFGS shall keep all funds and other assets held by MFGS on trust for the Customer separate from the funds and assets of MFGS. The Customer's funds and assets shall be placed into a trust account, where they may be held commingled with excess funds or assets of other Customers in accordance with Applicable Laws.

As may be observed, cl A15.1 of the MTA sets out the contractual position in relation to how trust funds and assets are to be treated. However, it does not state what funds or assets are to be held on trust for the customer by MFGS. In other words, there is no *contractual* definition of what MFGS is obliged to hold on trust for its customers.

45 In fact, in relation to a customer's margins, cl A6.8 of the MTA provides that MFGS "shall be entitled to deposit, pledge, re-pledge or lend any funds, assets or property in any form given to MFGS by way of margin". The clause also provides that MFGS is not required to either account to the customer for "any interest, income or benefit that may be derived from such margin" or return to the customer "identical funds, property or assets … and may return equivalent collateral or margin". This is to be contrasted with the requirements of the CTA and SFA as to the treatment of margins, which will be discussed later.

46 In the ordinary course of MFGS' business, unrealised profits or losses arise when a customer has entered into an open position against MFGS. The terms of the MTA applicable to the LFX and Bullion transactions provide that there will be no physical settlement between MFGS and its customer unless otherwise agreed upon. The relevant provision, cl C1.1 of the MTA, states that:

The Customer acknowledges that unless otherwise agreed in writing with MFGS, all Transactions shall be cash-settled, and the Customer shall not be entitled to hold any open position until its maturity or settlement date with the intention to effect physical settlement on its settlement or maturity date. Unless otherwise liquidated pursuant to the Customer's instructions, an open position may be liquidated and cash-settled by MFGS in its sole discretion as it deems fit to prevent the crystallising of any physical settlement obligation with respect to any open position.

47 Hence, in the case of LFX and Bullion transactions, the contract between the parties requires the close-out of open positions (whether voluntarily pursuant to a customer's instructions, or involuntarily). Until the close-out of the transaction where a customer has entered into an opposite trade, no sums are due and payable (and unless otherwise agreed, no physical settlement is

contemplated) either from MFGS to the customer (where the customer makes an unrealised profit) or from the customer to MFGS (where the customer makes an unrealised loss). During this period, the quantum of profit or loss fluctuates on a daily basis as the transaction price for the position is marked to market, and indeed, what may be an unrealised profit on one day, could turn into an unrealised loss on another.

48 Thus, all that a customer has as against MFGS before he or she enters into an opposite trade, thereby crystallising the profit or loss, is a *contingent* debt obligation which would be represented by the sum of Unrealised Profits, if at the time the customer is in a position of net gain as against MFGS. In order for this contingent debt to crystallise into an actual liability that MFGS owes to a customer, two events must happen, being (i) the close-out of the transaction and (ii) the movement of the currencies or commodities prices such that the customer is in a position to close-out at a net profit.

49 Upon close-out of the transaction, a customer's profit or loss is then quantified. However, under the terms of the MTA, MFGS' obligation to pay the quantified profit to the customer only arises on the transaction's Value Date. Under the MTA, the Value Date is defined as "the date on which the respective obligations of the parties to a foreign exchange or [over-the-counter] transaction are to be performed". In my view, between the close-out of the transaction and the Value Date, what the customer has (in circumstances where the customer is in a position of profit as against MFGS) is a claim against MFGS which has been quantified, but is not yet payable. In other words, this is a prospective liability, and in the framework of s 327 of the Companies Act, the Forward Value may be classified as certain future debt. Hence, while MFGS' obligation to pay has arisen, it need not be *performed* until the Value Date.

50 Finally, upon the Value Date arriving, the quantified profits are due and payable to the customer. The quantified profits are no longer reflected as Forward Value in the Daily FX Activity Statement of that particular Value Date, but are reflected as standing to the client's account under the Ledger Balance C/F, and are available for withdrawal by the client subject to MFGS' margin requirements. There is a dispute between the parties as to when on Value Date MFGS performed or should perform this payment – which will be discussed below at the Value Date issue – but this is not material here. In such a situation, I would characterise the Ledger Balance C/F as a certain present debt. A customer could require MFGS to effect immediate payment of the sum representing the Ledger Balance C/F standing to his credit in his account to him. In this regard, the legal position of a customer of MFGS with credit amounts standing to the Ledger Balance C/F would not be unlike the person who deposits money into a bank account.

51 Professor Alastair Hudson explains it as follows (Alastair Hudson, *Equity and Trusts* (Routledge, 8th Ed, 2015) ("*Equity and Trusts*") at p 1294):

> A bank account is merely a chose in action: a contractual recognition by the bank that the account-holder has deposited money with it and that the bank is required to return that money to the customer in accordance with the terms of their contract. It is not true to say that there is money *in* a bank account. Rather, the bank account is an acknowledgment of a claim in favour of the account-holder with a given value attached to it. [emphasis in original]

52 I should clarify though, that an account a customer had with MFGS was not entirely analogous to a bank account. The observations of Sir Andrew Park in *Re Global Trader Europe Ltd (in liquidation)* [2009] 2 BCLC 18 ("*Re Global Trader*") are instructive. In *Re Global Trader*, Sir Park was also concerned with the legal analysis of transactions conducted by Global Trader and its customers. Like MFGS, Global Trader was a brokerage firm. Global Trader required its customers to open an account with the brokerage, and maintain a sufficient margin sum. It did not act as agent for its customers

but was itself the counterparty to the contracts which were primarily contracts for differences and spread bet transactions. In describing the customer's account with Global Trader, Sir Park stated (at 29–30):

> [The client's account with Global Trader] was not an account analogous to a bank account. Rather it was the sort of running account which operates between regular trading counterparties and which records by how much they are respectively in credit or in debit with each other from time to time.
>
> …
>
> … When a position was closed a profit or loss arose to the client. If it was a profit Global Trader credited the amount of it to the client's running account between himself and Global Trader. Unless the amount of the credit in the client's account was required by way of margin to support open positions under other trading contracts between him and Global Trader, the client could draw on his account and require the company to pay the balance of it (or part of the balance) to himself …
>
> …
>
> … Alternatively he could leave it, or part of it, in place with a view to it being instantly available as margin should he wish to open a new position under a future trade.

Sir Park then concluded (at 59):

> The basic relationship between Global Trader and a client was contractual. If a client had a credit balance in his running account and had no open positions he was entitled under the contract to call on Global Trader to pay him the balance. The balance was a debt, and … the client was entitled to have it repaid. It was just the same as a case where a customer of a bank whose account is in credit can call on the bank to pay him money up to the amount of the balance.

53 For present purposes, the above analysis is helpful in showing that although the customer's account with the brokerage is not directly equivalent to a bank account, a customer's Ledger Balance C/F is MFGS' acknowledgement of sums which are due and payable to the customer. In the ordinary course absent any statutorily imposed or expressly declared trust, the Ledger Balance C/F therefore represents a *chose in action* which the customer could enforce by calling on MFGS for payment.

54 On the nature of a "chose in action", guidance may also be taken from the Court of Appeal in *Lim Lye Hiang v Official Assignee* [2012] 1 SLR 228 (at [27]–[28]) where the Court of Appeal explained:

> … A chose in action is an expression used to describe "all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession": see *Torkington v Magee*…
>
> *It is trite law that the existence of a chose in action does not depend upon immediate enforceability.* In *Kwok Chi Leung Karl v Commissioner of Estate Duty* … , the Privy Council (on an appeal from Hong Kong) was faced with the issue of, *inter alia*, whether an obligation to pay a sum of money on demand after sixty days constituted an existing chose in action at the time when the obligation was entered into. Lord Oliver of Aylmerton (delivering the judgment of the court) held that the obligation was indeed an existing chose in action at the time when the

obligation was entered into. He stated … :

> *A chose in action is no less a chose in action because it is not immediately recoverable by action ...*
>
> *... A debt which is payable in futuro is no less a debt ...*

[emphasis added]

55 From the preceding analysis, it can be seen that on the terms of the MTA alone, MFGS would have different legal obligations in respect of the Unrealised Profits, Forward Value and Ledger Balance C/F, given that these constitute contingent, certain future and certain present debts respectively. What the customer has in relation to all three forms of profits would be a chose in action against MFGS. It is only when MFGS is obliged, by the terms of the MTA, to effect immediate payment of the quantified profits, that a customer has the right as against MFGS to demand *immediate payment* of those moneys, and even then, only if MFGS is solvent. In other words, taking reference from the terms of the contract between the customer and MFGS, the contents of each chose – if enforced – are slightly different from the others.

The Proprietary Claim Issue: Whether the LFX and Bullion customers have proprietary rights in the Unrealised Profits and Forward Value

Whether a trust is capable of arising over the Unrealised Profits and Forward Value

56 With the discussion on the nature of Unrealised Profits and Forward Value in mind, I turn next to consider whether the Unrealised Profits and Forward Value are capable of being the subject-matter of a trust. Mr Yeap strenuously argues that it is not possible for a trust to arise over the Unrealised Profits and Forward Value because the LFX and Bullion customers' interests in them are merely choses in action. It is not possible for the obligor (here, MFGS) to hold these choses in action on trust for the obligee (the LFX and Bullion customers), as this would contemplate the "obligor-trustee" having to sue itself for the benefit of the "obligee-beneficiary" in the event the obligation was not performed.

57 Further, Mr Yeap submits that even if this is possible, Vintage still has to conjure up "two magical conversions", being (i) the conversion of a contingent or future "right to a receivable" into a "trust over the receivable arising from a contractual principal to principal relationship"; and (ii) a further conversion of a trust over such "right to a receivable" into a "trust over actual moneys" in circumstances where such a receivable was not even due and payable, let alone paid to the account and credit of the LFX and Bullion customers.

58 There is force in the Liquidators' submissions. As stated above, Vintage's claims in relation to the Unrealised Profits and Forward Value are properly characterised as choses in action. The right to sue MFGS under these choses vests, at all times, in the LFX and Bullion customers. Although choses in action may be considered "items of property", they are only property to the extent they may be transferred to third parties. Professor Hudson considers them "quasi-property rights", analysing them as follows (see *Equity and Trusts* at p 1298–1299):

> … [The status of personal claims] as property is said to rest primarily on their transferability…
>
> … The chose in action is a claim which attaches to one person and is exercisable over another. The chose in action is accepted in English law as being itself an item of property capable of transfer at law and having a value of its own. It is this transferability and this possibility of

> distinct value which imbue such personal claims with the status of property. … This transferable personal claim is therefore property with no identifiable proprietary base.

59 Similarly, Dr Joanna Benjamin in *Interests in Securities: A Proprietary Law Analysis of the International Securities Markets* (Oxford University Press, 2000) at para 13.10 states:

> … [A]n intangible asset may be the subject of a real action, but *only as against a third party*. *For example*, ***as against the debtor, the creditor can only assert personal rights in relation to the debt.*** However, if the debt is held through an intermediary, the creditor can assert real rights in relation to the debt, as against the intermediary. On this basis, intermediation is not merely compatible with property rights in relation to intangibles; it is their precondition. [emphasis added in italics and bold italics]

60 Thus, the LFX and Bullion customers are able to assert only *personal* (and not proprietary) rights against MFGS in respect of the Unrealised Profits and Forward Value. Indeed, this would also be the position for the Ledger Balance C/F. Additionally, it is not possible for the chose in action to be transferred by the LFX and Bullion customers to MFGS, so as to be held by MFGS as legal owner and trustee for the benefit of another. In effect, this would require MFGS to sue itself in order to enforce the chose. This was illustrated in the case of *Simpson and Company v Thomson, Burrell* [1877] 3 App Cas 279.

61 In that case, two ships which collided were owned by the same person. Under the applicable legislation, the ship owner could pay a sum fixed by statute into court to require any one who had a claim against him for damage caused by the ship to prove it against that sum. The ship owner paid the sum into court in respect of one ship. There were competing claims to this sum by the owners of cargo aboard this ship, as well as the ship owner's underwriters for loss caused by this ship to the ship owner's other ship. The House of Lords held that as the underwriters had to sue in the name of the person insured (*ie*, the ship owner) it was not possible for the underwriters to claim against the sum paid into court as this would contemplate the ship owner having a right of action against himself. Lord Penzance stated the position that it would be "an absurdity, and a thing unknown to the law" for a person to have a right of action against himself (at 288). In the same vein, it would be a logical impossibility for an obligor of a chose in action to hold that chose in trust for the obligee.

62 In any event, even if this were possible and the LFX and Bullion customers had somehow vested the choses they had against MFGS in MFGS itself as trustee, it would not give them any proprietary rights to MFGS' moneys. The claims would remain debts provable in MFGS' winding up. However, this is not the argument Vintage advances. Vintage's argument is that MFGS was required by statute to segregate funds amounting to the value of the Unrealised Profits and Forward Value and hold these segregated funds on trust for the LFX and Bullion customers or, alternatively, did so voluntarily.

63 Vintage relies on the case of *Mac-Jordan Construction Ltd v Brookmount Erostin Ltd (in receivership)* [1992] BCLC 350 ("*Mac-Jordan*") to support this position. In *Mac-Jordan*, the plaintiff was a building contractor, and the defendant was a property developer. The contract between the parties provided for interim payments against architect's certificates, but entitled the defendant to retain 3% from each certified amount. The contract also imposed an obligation on the defendant to set aside as a separate trust fund a sum equal to the sums the defendant was entitled to retain. However, the defendant did not set aside any moneys. Subsequently, the defendant became insolvent. The contest was between the plaintiff and a bank which had a floating charge over the defendant's assets. The plaintiff argued that even though the requisite fund was not appropriated, the contractual obligation to segregate the moneys operated to confer on the plaintiff an equitable interest in the notional fund that ought to have been segregated by the defendant.

64 Scott LJ (with whom Parker and Farquharson LJJ agreed) rejected this argument, holding that the plaintiff had to show either that it had an equitable interest in identifiable assets, or that the bank was bound in equity to permit the plaintiff's contractual right that the defendant segregate the retained sums to have effect. The English Court of Appeal found that there were no identifiable assets impressed with trusts which could be said to be applicable to the retention fund. As for the second point, the court also found that the plaintiff had no equity against the bank to require the bank to make available funds from the floating charge in order for a retention fund in favour of the plaintiff to be set up. Scott LJ considered that the contractual obligation was only an "unsatisfied and unsecured contractual right for the payment of money". The defendant's obligation to segregate the moneys was, on Scott LJ's analysis, "no more than an obligation to pay money, the payee being [the defendant] itself as trustee" (at 358–359).

65 Unlike the defendant in *Mac-Jordan*, MFGS had in the present case segregated funds daily to cover its obligations to the LFX and Bullion customers in respect of the Unrealised Profits and Forward Value. This, Vintage submits, is the critical and defining factor. In order to show that it has a proprietary interest over those segregated funds, Vintage seeks to establish that the relevant statutory provisions required MFGS to hold those funds on statutory trust, or that the relevant statutory provisions imposed a trust over such funds. Alternatively, Vintage seeks to show that MFGS had done so with the intention of settling an express trust. I turn first to the Statutory Trust issue.

The Statutory Trust issue

Principles of statutory interpretation

66 The question whether a statutory trust arises over the funds segregated by MFGS to cover its Unrealised Profits and Forward Value obligations is a question of statutory interpretation. Evidence of how MFGS treated the Unrealised Profits and Forward Value is therefore not relevant to this issue.

67 In interpreting the SFA, CTA, SFR and CTR, the court's starting point is s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("Interpretation Act"), which provides that statutes should be interpreted in a manner that would promote the purpose or object of the written law. It should be pointed out that under s 1 of the Interpretation Act, "written law" includes "all Acts … and subsidiary legislation made thereunder for the time being in force in Singapore". Thus, a purposive interpretation must be given to both the SFR and CTR as well. V K Rajah JA (sitting in the High Court) in *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 summarised the approach to be taken under s 9A of the Interpretation Act as such (at [57]):

> … [Section] 9A of the Interpretation Act mandates that a purposive approach be adopted in the construction of all statutory provisions, and allows extrinsic material to be referred to, even where, on a plain reading, the words of a statute are clear and unambiguous. The purposive approach takes precedence over all other common law principles of interpretation. *However, construction of a statutory provision pursuant to the purposive approach stipulated by s 9A is constrained by the parameters set by the literal text of the provision.* The courts should confine themselves to interpreting statutory provisions purposively with the aid of extrinsic material within such boundaries and assiduously guard against inadvertently re-writing legislation. … [emphasis added]

68 Thus, and as Vintage submits, the language of a particular statutory provision is the framework within which the legislative purpose must expressly or implicitly manifest, and the court should not construe statutes in a manner that would re-write the words of the statute.

69 Besides the principle of purposive interpretation, the Liquidators also submit that a statute should not be taken as fundamentally altering the common law unless it uses words that point unmistakably to that conclusion. This principle has been applied by the Court of Appeal in *Ying Tai Plastic & Metal Manufacturing (S) Pte Ltd v Zahrin bin Rabu* [1983–1984] SLR(R) 212 at [19], and more recently by Rajah JA (sitting in the High Court) in *Goldring Timothy Nicholas and others v Public Prosecutor* [2013] 3 SLR 487 at [51]. On this basis, the Liquidators argue that the court should be slow to construe the SFA and CTA and the regulations promulgated under these Acts as changing the fundamental nature of a trust, when the statutes have not expressly provided so.

70 Nonetheless, I note that a statutory trust is created by statute essentially stipulating that the legal owner of certain property is not to have beneficial ownership of that property. It may not "bear all the indicia which characterise a trust as it was recognised by the Court of Chancery apart from statute" (see *Ayerst (Inspector of Taxes) v C. & K. (Construction) Ltd* [1976] AC 167 ("*Ayerst*") at 178 cited in *Power Knight Pte Ltd v Natural Fuel Pte Ltd (in compulsory liquidation) and others* [2010] 3 SLR 82 at [50]).

71 In *In the matter of the intervention into the solicitors' practices known as Ahmed & Co* [2006] EWHC 480 (Ch), Justice Lawrence Collins considered the concept of a statutory trust in the context of the exercise of the English Law Society's regulatory functions under the Solicitors Act 1974 (c 47) (UK). Collins J stated (at [111] and [113]):

> There is no doubt that when the word "trust" is used in a statute it does not necessarily mean a classic private trust. …
>
> …
>
> Accordingly, it does not follow that, when the word "trust" is used, that brings with it the full range of trust obligations attendant upon a traditional private law trust, particularly so when the trust is imposed by statute and in the context of the exercise of a public function. The meaning of a word depends on its context. …

In the final analysis, what falls within the ambit of the statutory trust and the obligations of a statutory trustee are matters of statutory interpretation, to be analysed with reference to the specific applicable statutory provisions.

The Bullion transactions

(1) Whether the CTA and CTR apply to the Bullion transactions

72 The long title of the CTA provides that it is "An Act for the regulation of certain types of commodity trading, and for matters connected therewith". These concern the licensing of commodity brokers, the accounts to be kept by commodity brokers, and the conduct of commodity trading business among other things.

73 Section 2 of the CTA defines "commodity" as:

> … any produce, item, goods or article that is the subject of any —
>
> (*a*) commodity forward contract;
>
> (*b*) *leveraged commodity trading*;

(*c*) contract made pursuant to trading in differences; or

(*d*) spot commodity trading,

and includes an index, a right or an interest in such commodity, and such other index, right or interest of any nature as the Board may, by notification in the *Gazette*, prescribe to be a commodity; but does not include any produce, item, goods or article that is the subject of a commodity futures contract and any index, right or interest in such produce, item, goods or article[.] [emphasis added]

Commodity futures contracts are excluded from the definition of "commodity" under s 2 of the CTA as these contracts are governed by the SFA instead (see [82] below). Section 2 of the CTA provides that a "commodity futures contract" is:

(*a*) a contract the effect of which is that —

(i) one party agrees to deliver a specified commodity, or a specified quantity of a specified commodity, to another party at a specified future time and at a specified price payable at that time pursuant to the terms and conditions set out in the business rules of a futures market or pursuant to the business practices of a futures market; or

(ii) the parties will discharge their obligations under the contract by settling the difference between the value of a specified quantity of a specified commodity agreed at the time of the making of the contract and at a specified future time, such difference being determined in accordance with the business rules or practices of the futures market at which the contract is made; or

(*b*) such other contract or class of contracts as the Board may prescribe,

and includes a futures option transaction[.]

74 The Bullion transactions were not commodity futures contracts as they were not carried out pursuant to the business rules or practices of a futures market. Instead, as Mr Yap deposed in his affidavit, the Bullion transactions were "cash-settled leveraged bullion (gold or silver) spot contracts". The LFX and Bullion Report prepared by the Liquidators states that these Bullion transactions mirrored the price movements of the underlying reference bullion without involving ownership of the reference bullion. These were therefore "leveraged commodity trading" under s 2 of the CTA, which is defined as, *inter alia*:

(*a*) the act of entering into or offering to enter into, or inducing or attempting to induce a person to enter into or offer to enter into, a contract or an arrangement on a margin basis (other than a commodity futures contract) whereby a person undertakes as determined by the terms and conditions of the contract or arrangement —

(i) to make an adjustment between himself and another person according to whether a commodity is worth more or less, at a specified point in time;

(ii) to pay an amount of money determined or to be determined by reference to the change in value of a commodity over a specified period of time; or

(iii) to deliver to another person at an agreed future time an agreed amount of commodities

at an agreed price[.]

75 Thus, on a general level, the CTA and CTR apply to the Bullion transactions. At the hearing, Mr Yeap clarified that the Liquidators do not dispute this. The more specific issue raised by the Liquidators is whether the statutory trust and segregation obligations under the CTA and CTR apply to MFGS and to the Bullion transactions. This will be considered below in the context of the relevant provisions.

(2) The relevant provisions under the CTA and CTR

76 The primary provision in the CTA is s 30 which states:

Segregation of customer's funds by broker

30.—(1) The Board may, with the approval of the Minister, make regulations to provide that every commodity broker shall treat and deal *with all money, securities or property received by him from a customer in such manner and in such separate accounts as may be prescribed*.

(2) Without prejudice to the generality of subsection (1), such regulations may provide —

(*a*) for the circumstances in which funds, securities or property received from a customer may be segregated and deposited in the same account;

(*b*) for the circumstances in and purposes for which funds may be withdrawn from separate trust accounts;

(*c*) for the exemption by the Board of any commodity broker or class of commodity brokers, or any transaction or class of transactions relating to trading in commodity contracts, from any of the provisions of such regulations; and

(*d*) that a contravention thereof shall be punishable with a fine not exceeding $30,000 or with imprisonment for a term not exceeding 3 years or with both.

(3) Money, securities or property received from a customer and held by a commodity broker in a separate trust account under any regulations made under subsection (1) shall not be —

(*a*) available for payment of the debts of the commodity broker to a creditor of the commodity broker; or

(*b*) liable to be attached or taken in execution under the order or process of any court at the instance of such creditor,

unless the creditor is a customer of the commodity broker and the debt owed to the creditor was incurred in connection with trading in any commodity contract.

(4) Nothing in this section shall take away or affect a lawful claim or lien that a commodity broker has against, or on, any money, securities or property held in an account under any regulations made under subsection (1).

(5) Nothing in this Act or any written law shall prevent a commodity market or a clearing house, with the approval of the Board, from using the money, securities or property held in a trust account to meet the obligations of a commodity broker, being a member of the market or the

clearing house, who defaults, if —

(*a*) the default of the commodity broker is directly attributable to the failure of his customer to meet the obligations under a commodity contract; and

(*b*) the failure to use the money, securities or property held in a trust account may jeopardise the financial integrity of the market or the clearing house.

(6) In this section, "customer" means a person on whose account a commodity broker carries on trading in any commodity contract, but does not include directors, employees and representatives and related corporations of the commodity broker. [emphasis added]

77 Under s 63(1) of the CTA, the International Enterprise Singapore ("IE Singapore") Board is vested with power to "make regulations for carrying out the purposes and provisions of [the CTA] and for the due administration thereof". The relevant regulations made in the CTR pursuant to, *inter alia*, ss 30 and 63 of the CTA, are:

Segregation of customer's funds by brokers

21.—(1) Every commodity broker and spot commodity broker shall —

(*a*) treat and deal with *all money, securities or property received by him from a customer* to margin, guarantee or secure contracts in commodity trading or spot commodity trading, *or accruing to a customer as a result of such trading*, *as belonging to that customer*; and

(*b*) account in a separate trust account, designated or evidenced as such, for all the money, securities or property received from the customer or accruing to the customer pursuant to sub-paragraph (*a*),

and shall not commingle that money, security or property with his own funds or use them to margin, guarantee or to secure the contracts or extend the credit of any other customer or person other than the person for whom they are held.

…

(4) Notwithstanding paragraph (1), a commodity broker or spot commodity broker may have a *residual financial interest* in a customer's trust account and may from time to time advance from his own funds sufficient money to prevent any or all of his customers' trust accounts from becoming under-margined.

…

Segregated accounts

22.—(1) All customer's moneys shall be segregated as *belonging to customers* and separately accounted for.

(2) Any customer's moneys received shall be paid without delay into a customer's account unless authorised otherwise by the customer concerned.

…

[emphasis added]

78 As can be seen, s 30 of the CTA deals largely with the making of regulations, and does not set out in great detail the substantive obligations of a commodity broker. Thus, the main provisions which set out the scope of a commodity broker's obligations are to be found in regs 21 and 22 of the CTR. In my view, insofar as regs 21(1)(*a*) and 22(1) of the CTR state that a commodity broker shall treat certain funds as *belonging to that customer*, this is language which imposes a statutory trust over money, securities or property falling within its ambit. Admittedly, the provisions do not expressly use the term "statutory trust". However, I find that this is *in substance* what the provisions provide for. The clear implication of regs 21(1)(*a*) and 22(1) is that a commodity broker will not be able to dispose of the funds falling within the scope of regs 21(1)(*a*) and 22(1) for its benefit. This is consistent with s 30(3) of the CTA which prohibits a commodity broker from using money, securities or property held in a separate trust account as required by the CTR for the payment of the commodity broker's debts. These provisions effectively disallow a commodity broker from using such moneys beneficially in the course of its business, which is the fundamental feature of a trust, *viz*, that the beneficial ownership of these funds is vested in the customer. This protection is supplemented by further provisions which impose segregation obligations (see for example regs 21(1)(*b*) and 22(2) of the CTR).

(3) The purpose and object of the statutory trust and the segregation obligations in the CTA and CTR

79 Before analysing the relevant provisions further, I briefly consider the purpose and object of the statutory trust and the segregation obligations.

80 The CTA was enacted in 1992 as the Commodity Futures Act 1992 (Act 17 of 1992) ("the Commodity Futures Act") to regulate trading in rubber futures contracts and other commodities, beginning with trading in rubber futures contracts (see *Singapore Parliamentary Debates, Official Report* (20 March 1992) vol 59 at cols 1345–1348 (BG Lee Hsien Loong, Minister for Trade and Industry) ("the Second Reading of Commodity Futures Act")). Section 30 of the Commodity Futures Act provided for the segregation of "customer's funds". The relevant regulations at the time were to be found in regs 22 and 23 of the Commodity Futures Regulations (Cap 48A, Rg 1, 1993 Rev Ed) ("CFR"). In relation to these provisions, the Minister explained that (at col 1347):

> (3) *Conduct of commodity futures business.*
>
> The Bill requires funds placed by customers with their brokers to be separately accounted for, to prevent brokers from making use of their client's funds for any other purposes.

81 In 2001, the Commodity Futures Act was renamed the "Commodity Trading Act". Parliament also amended the Act in order to expand its scope to deal with not just commodity futures contracts, but also commodity forward contracts, trading in differences, leveraged commodity trading and certain forms of spot commodity trading (see Commodity Futures (Amendment) Act 2001 (No 22 of 2001)). This change was prompted by the rise of "bucket shops". Parliament also enacted provisions to require persons who wished to engage in such commodity trading activities to apply for a licence under the CTA. In this regard, in Parliament, the Acting Minister for Trade and Industry ("Acting Minister") stated (*Singapore Parliamentary Debates, Official Report* (16 May 2001) vol 73 at col 1714–1719 (Peter Chen, Acting Minister for Trade and Industry) ("the Bucket Shop Debate") at col 1715):

> "Bucket shops" are firms that entice the public to open trading accounts with them and to grant them wide discretion to *trade on the investors' behalf*. Instead of trading with the investors' interest in mind, the contractual terms are such that they favour the firms. They may claim to

effect transactions when they did not; or "churn", that is, make repeated transactions to earn commissions, without regard to the interest of investors. Investors are enticed with small initial profits but may end up losing their entire investment. [emphasis added]

82 Subsequently in 2007, Parliament amended the CTA once more to "transfer regulatory oversight of commodity futures trading from IE Singapore under the CTA to MAS under the SFA and [Financial Advisers Act]" (see *Singapore Parliamentary Debtates, Official Report* (17 July 2007) vol 83 at col 1223 (Lim Hng Kiang, Minister for Trade and Industry)). The result of these amendments was that commodity futures transactions were governed by the provisions of the SFA, with MAS acting as the regulator. IE Singapore retained regulatory oversight of over-the-counter commodity derivatives and spot commodity contracts under the CTA.

83 Despite these numerous amendments, the obligations originally enacted in s 30 of the Commodity Futures Act and reg 22 and 23 of the CFR remain materially unchanged. In my view, the Second Reading of the Commodity Futures Act and the Bucket Shop Debate show that the provisions relating to the statutory trust as well as segregation under the CTA and CTR were enacted for the purpose of protecting consumers and investors, and to ensure that *customers' funds* are not misused. With this understanding, I now consider whether these provisions apply to MFGS.

(4) Whether the statutory trust and segregation obligations under the CTA and CTR apply to MFGS

(A) Parties' submissions

84 Vintage takes the position that the requirements under s 30 of the CTA and under regs 21 and 22 of the CTR apply to any person who acts as a "commodity broker" within the meaning of the CTA. As MFGS carried on "leveraged commodity trading" through the Bullion transactions, it acted as a "commodity broker" under the CTA. Therefore, these provisions apply to MFGS and the Bullion transactions.

85 The Liquidators do not quarrel with Vintage's submissions that MFGS acted as a "commodity broker". However, the Liquidators submit that the regulations made under s 30 of the CTA do not apply to MFGS and the Bullion transactions as Vintage and the other Bullion customers were not "customers" as defined by s 30(6) of the CTA. They argue that s 30(6) specifically limits the application of the statutory trust and segregation obligations to a customer "*on whose account* the commodity broker carries on trading" [emphasis added]. The Liquidators submit that the phrase "on whose account" should be interpreted to mean "on behalf of", and the use of the phrase shows that the statutory trust and segregation obligations prescribed under s 30 of the CTA apply only to situations where the commodity broker acts as an agent on behalf of the customer, holding moneys, securities and property which are beneficially owned by the customer.

86 The Liquidators also refer to the Bucket Shop Debate (reproduced at [81] above), and argue that Parliament's intention is to protect customers' moneys only where the broker "trade[s] on the investor's behalf". Since MFGS contracted with the LFX and Bullion customers on a principal-to-principal basis, the provisions do not apply to MFGS.

(B) Analysis and findings

87 I accept Vintage's submission that the statutory trust and segregation obligations made under s 30 of the CTA apply to any person who acts as a "commodity broker". In my judgment, MFGS is a "commodity broker" under the CTA and CTR.

88 Section 2 of the CTA defines a "commodity broker" as:

> … a person who (*whether as principal or agent*) carries on the business of soliciting, or accepting orders, for the purchase or sale of any commodity by way of or relating to any commodity contract, whether or not the business is part of, or is carried on in conjunction with, any other business[.] [emphasis added]

89 Put simply, a commodity broker is defined in the CTA as a person who accepts orders for the purchase or sale of "any commodity" by way of or relating to "any commodity contract". The definition also makes clear that a commodity broker may act as both principal and agent. I have set out the definition of "commodity" under the CTA above at [73]. Under s 2 of the CTA, a "commodity contract" is defined as:

> (*a*) a commodity forward contract;
>
> (*b*) any contract made pursuant to trading in differences with respect to a commodity, not being a commodity futures contract; or
>
> (*c*) *any contract made pursuant to a transaction in leveraged commodity trading*[.][emphasis added]

90 The Bullion transactions were over-the-counter "leveraged commodity trades" (as defined under s 2 of the CTA, see [74] above). In respect of these trades, MFGS acted as its customers' direct counterparty. Thus, by virtue of carrying out "leveraged commodity trading" with its customers as principal, MFGS fell under the definition of "commodity broker" under the CTA.

91 The evidence also shows that MFGS appeared to accept the applicability of the CTA without qualification. The MTA makes multiple references to the CTA. MFGS also states in the Risk Disclosure Statement that the section that deals with "Commodity Contracts" therein is provided in accordance with s 32(1) of the CTA.

92 I do not accept the Liquidators' arguments that there is a further qualification, and that by virtue of the definition of "customer" under s 30(6), s 30 of the CTA and the regulations in the CTR do not apply to MFGS. The general definition of customer under s 2 of the CTA and the specific definition in s 30(6) of the CTA are similar in material respects. The definition of "customer" in s 2 of the CTA provides:

> "customer" means a person *on whose account* a commodity broker carries on trading in commodity contracts …[emphasis added]

Similarly, for the purposes of s 30 of the CTA, s 30(6) provides that:

> (6) In this section, "customer" means a person *on whose account* a commodity broker carries on trading in any commodity contract, *but does not include directors, employees and representatives and related corporations of the commodity broker.* [emphasis added]

93 It is true, as the Liquidators argue, that the definition in s 30(6) is narrower than the definition in s 2 of the CTA. However, it is only narrower in that "directors, employees and representatives and related corporations of the commodity broker" are excluded from the definition of "customer" for the purposes of s 30 and any regulations prescribed. These persons, it may be pointed out, are all persons *connected* with the commodity broker. To that extent, s 30(6) makes clear that the

commodity broker does not need to segregate funds for "customers" who are related or connected persons or entities. However, there is no merit in the argument that based on this narrowed definition, the obligations imposed by s 30 of the CTA and the attendant regulations apply *only* to situations where the broker acts as agent, while the other obligations imposed by the CTA on commodity brokers are not thus confined.

94 I am also not persuaded that the Bucket Shop Debate (see [81] above) sheds much light on the phrase "on whose account" in s 30(6) of the CTA. In the first place, although the Acting Minister used the phrase "on the investor's behalf", this does not necessarily mean that Parliament had intended to limit the scope of protection under s 30 only to situations where the commodity broker acts as agent on behalf of another. As pointed out earlier, these provisions were first introduced in the Commodity Futures Act and the CFR, which antedated the Bucket Shop Debate, and have remained substantially unchanged since (see [80]–[83] above). In fact, the Commodity Futures Act already contained the narrower definition of "customer" in s 30(6) alongside the broader general definition of "customer" under s 2 of the Commodity Futures Act. As stated above at [83], the purpose and object of these provisions is the protection of consumers and investors. In this context, the court should not interpret the law narrowly.

95 Further, the interpretation of the phrase "on whose account a commodity broker carries on trading in any commodity contract" turns on the definition of "account". The term "account" possesses many meanings, and may be used as a noun or as a verb, depending on the context. *Black's Law Dictionary* (Bryan A Garner chief ed) (Thomson Reuters, 10th Ed, 2014) ("*Black's Law Dictionary*") gives the following definitions of "account" as a noun (at p 20–21):

> **3.** A statement by which someone seeks to describe or explain an event … **4.** A detailed statement of the debits and credits between parties to a contract or to a fiduciary relationship; a reckoning of monetary dealings … **5.** *A course of business dealings or other relationship for which records must be kept <open a brokerage account>*. [emphasis added in italics]

Black's Law Dictionary also defines the term "account for", which is a verb, as (at p 23):

> **1.** To furnish a good reason or convincing explanation for; to explain the cause of. **2.** To render a reckoning of (funds held, esp. in trust). **3.** To answer for (conduct).

9 6 *The Oxford English Dictionary* vol 1 (Clarendon Press, 2nd Ed, 1989) ("*Oxford English Dictionary*") defines the term "on account" and "on account of" as (at p 86):

> *on account*: as an item to be accounted for at the final settlement, in anticipation of or as a contribution to final payment, as an interim payment on account of something in process. ***on one's account* : so that it shall be charged or entered to his account; in his behalf and at his expense.** *on one's own account*: for one's own interest, and at one's own risk.
>
> …*on account of*: (*a*) In consideration of, for the sake of, by reason of, because of. [italics in original; emphasis added in bold]

97 In my opinion, the term "account" takes its meaning from the context in which it is used. A "customer" under the CTA and CTR is one who possesses a brokerage account with a commodity broker under which trades in commodity contracts are entered into and charged to his or her expense. I find that this accords with a purposive interpretation of the CTA and is also aligned with the daily practice of MFGS. Whenever counterparties entered into an LFX or Bullion transaction, MFGS would issue in the Daily FX Activity Statement of that particular day a trade confirmation (see [14(a)]

above). The confirmation would state that "the following trades have been made this day *for your account* and risk" [emphasis added]. A person who possesses an account with MFGS is conventionally referred to as a "customer", and indeed, MFGS refers to such persons as "customers" in the MTA. Any other interpretation would be artificial.

98 It is also significant that where appropriate, the CTA and CTR make a distinction between situations where a commodity broker acts as an agent or as a principal. One example of this distinction is within the definition of "commodity broker" itself (see [88] above) – the CTA makes clear that an agent or principal counterparty may both be considered "commodity brokers". Another illustration of this may be found in reg 24 of the CTR. Regulation 24(1) provides that a commodity broker should "furnish to his *customers* a written confirmation of each contract executed by the broker on behalf of that *customer*" [emphasis added]. Regulation 24(2)(*b*) then provides that if "the broker is dealing *as principal*" [emphasis added] the written confirmation should provide a statement that he is acting as such. Consequently, if s 30 of the CTA is meant to be restricted only to situations where a commodity broker acted as agent, the CTA would have expressly stated so.

99 One last miscellaneous point ought to be addressed. MFGS (and its predecessor, Man Financial (S) Pte Ltd) was licensed by IE Singapore as a "Commodity Futures Broker" from 1995 to 30 June 2008. After the transfer of regulatory jurisdiction over commodity futures contracts from IE Singapore to MAS, MFGS took the view that it was no longer required to be licensed, and accordingly did not apply for a further licence post-July 2008. This is not an issue in these proceedings. However, I note that there are exemptions to the licensing requirement which are set out under the Schedule of the CTA. Additionally, I note that the segregation obligations under s 30 apply to a "commodity broker" and not to a licensed person. Separately, under reg 21(5) of the CTR, the IE Singapore Board may also exempt a commodity broker from the requirements under reg 21(1) of the CTR, subject to terms and conditions which provide reasonable protection for customers. As Vintage points out, there is no evidence of IE Singapore exempting MFGS from the requirements under reg 21(1) of the CTR. Consequently, for the reasons given above, I find that s 30 of the CTA and the relevant regulations within the CTR apply to MFGS, and to the Bullion transactions.

(5) Whether the Unrealised Profits and Forward Value (attributable to Bullion transactions) are "money … accruing to a customer"

100 As I have stated above at [78], the main provisions which impose the statutory trust and lay down substantive obligations on a commodity broker in relation to customers' funds are to be found in regs 21 and 22 of the CTR. Regulation 21(1)(*a*) of the CTR requires a commodity broker to treat and deal with (i) all money, securities or property *received by* a commodity broker from a customer to margin, guarantee or secure contracts in commodity trading (limb (i) of reg 21(1)(*a*)), and (ii) all money, securities or property *accruing to* a customer as a result of such trading (limb (ii) of reg 21(1)(*a*)), *as belonging to the customer*. Under reg 21(1)(*b*), the commodity broker is required to account in a separate trust account, designated or evidenced as such, for money *received from* the customer or *accruing to* the customer pursuant to reg 21(1)(*a*).

101 It appears to me that it is reg 21(1)(*a*) which delineates the scope of the statutory trust and the funds that MFGS is required to segregate. Interpreting reg 21(1)(*a*) in line with the legislative intention of protecting customers' funds, I find that this statutory trust arises on the *receipt* or *accrual* of the money, securities or property. In other words, where money, securities or property is *received from* a customer or *accrues to* a customer in accordance with reg 21(1)(*a*), they are, *by operation of reg 21(1)(a)*, beneficially owned by the customer. Consequently, a customer may assert proprietary rights to the money, securities or property if the money, securities and property falling within the scope of the statutory trust are identifiable. In this regard, the obligations to segregate

these funds pursuant to regs 21(1)(*b*), 22(1) and 22(2) do not create the trust, but are obligations which flow from the imposition of the statutory trust over certain property by reg 21(1)(*a*) and provide additional protection to ensure that customers' moneys subject to the statutory trust are not dissipated or misused.

102 Evidently, money received by MFGS from a customer to margin Bullion transactions is "money received by [MFGS] from a customer to margin … contracts in commodity trading" and therefore falls within the first limb of the statutory trust (*viz*, limb (i) of reg 21(1)(*a*)). I pause to note that this statutory obligation is in fact contrary to the terms of the contract between MFGS and its customers (see cl A6.8 of the MTA set out at [45] above) and affords the customers a greater degree of protection than they would otherwise possess under the MTA. However, it is not so clear from the language of reg 21(1)(*a*) itself whether the statutory trust also captures the Unrealised Profits, Forward Value and Ledger Balance C/F.

(A) Parties' submissions

103 Vintage argues that the Unrealised Profits and Forward Value represented moneys "accruing to" Vintage as a result of commodity trading. Vintage submits that the concept of "accruing" should be interpreted as referring to moneys which a party is "*entitled to*" after having done all that is required of it to earn that sum, even if such sums are not yet due and payable. Hence, even if the Unrealised Profits and Forward Value were not contractually payable debts, moneys segregated to cover these obligations should still be construed as "accruing to" Vintage as Vintage was already entitled to these moneys.

104 The Liquidators do not propose a different interpretation of the term "accruing to". However, they argue that no statutory trust can arise over the Unrealised Profits and Forward Value as it would be a trust over choses in action, and not over any actual underlying moneys. The Liquidators point out that neither the CTA nor the CTR state that a commodity broker would be required to pay actual moneys into the Customer Segregated Accounts on account of debts payable in the future, with the result of a trust being created over physical moneys. In this regard, I also refer to the Liquidators' submission above at [69], that the court should be slow to construe legislation as changing the fundamental nature of a trust. Having taken the position that the statutory trust and segregation obligations within the CTA and CTR do not apply to MFGS and the Bullion transactions, the Liquidators also adopt the position that the Ledger Balance C/F is held on trust for their customers on a "purely voluntary" basis, and "not as a consequence of any (inapplicable) segregation obligations under the CTA".

(B) Analysis and findings

105 The crux of the issue is whether the Unrealised Profits, Forward Value and Ledger Balance C/F can be said to be "*money … accruing to* a customer as a result of [commodity trading]". Vintage does not contend that there is "property" or "securities" accruing to the Bullion customers. However, I note that "property" is defined under reg 2 of the CTR as including:

> … movable and immovable property, and any estate, share and interest in any property, movable or immovable, and any debt, and *anything in action*, and any other right or interest, whether in possession or not[.] [emphasis added]

As analysed above at [41]–[55], what MFGS represented in Vintage's Daily FX Activity Statements as Unrealised Profits and Forward Value are, on deeper legal analysis, choses in action (in the nature of contingent debts or certain debts payable at a future date by MFGS to Vintage) that Vintage had

against MFGS, and which vested, at all times in Vintage. The Unrealised Profits and Forward Value thus fall within the meaning of "property" in the CTR. Nonetheless, as the choses always vested in the customer vis-à-vis MFGS in the principal-to-principal transactions, they do not form *property* in MFGS' hands that MFGS is able to hold on trust or segregate.

106 To the extent that Vintage argues that *money* (as opposed to property) amounting to the value of Unrealised Profits and Forward Value had been segregated by MFGS, thereby forming the proprietary basis of a statutory trust, this requires Vintage to show that this is *money accruing to* Vintage. I note at the outset that there is no definition of "money" within the CTA or the CTR. In my view, the term, when used in the context of the CTA and CTR, may be broadly understood. For example, reg 22(5) of the CTR states that customers' moneys deposited with any bank must be deposited under an account name which clearly identifies such moneys as customers' moneys and shows that such moneys are segregated in the manner which reg 21 of the CTR requires. Thus, the term "money" in this context means actual physical money, as well as "money" in bank or other accounts (although this is not a *strictly* accurate analysis of a bank account: see Professor Hudson's analysis of this above at [51]).

107 There is also no definition of the phrase "accruing to" under the CTA or CTR. The *Oxford English Dictionary* defines the term "accrue" as (at p 90):

> **1.** To fall (*to* any one) as a natural growth or increment; to come by way of addition or increase, or as an accession or advantage. …
>
> **2.** To arise or spring as a natural growth or result. … *Esp*. of interest: To grow or arise as the produce of money invested. [emphasis in original]

108 *Black's Law Dictionary* defines the term "accrue" as (at p 25):

> **1.** To come into existence as an enforceable claim or right; to arise <the plaintiff's cause of action for silicosis did not accrue until the plaintiff knew or had reason to know of the disease>. …
>
> **2.** To accumulate periodically; to increase over a period of time <the savings-account interest accrues monthly>.

109 Vintage cites cases from three legal contexts, *viz*, income tax law, garnishee proceedings and the accrual of causes of action, as part of its effort to urge the court that money should be treated as "accruing to" a customer as a result of commodity trading when the customer has done all that is required of it to earn that sum, even if such sums were not due and payable.

110 Section 10(1) of the Income Tax Act (Cap 134, 2014 Rev Ed) ("Income Tax Act") provides that income tax is payable upon "the *income* of any person *accruing in* or derived from Singapore or received in Singapore from outside Singapore" [emphasis added]. The cases which discuss the concept of accruing income deal largely with whether certain payments received by a taxpayer could be considered as "income". In *Pinetree Resort Pte Ltd v Comptroller of Income Tax* [2000] 3 SLR(R) 136, the Court of Appeal interpreted the term "accrue" in the context of s 10(1) of the Income Tax Act to mean "to which any person has become entitled" (at [23]). This was followed by Andrew Phang Boon Leong JA in *ABD Pte Ltd v Comptroller of Income Tax* [2010] 3 SLR 609 ("*ABD Pte Ltd*").

111 In *ABD Pte Ltd*, the issue was whether an entrance fee paid to the taxpayer-club upon a member's admission should be wholly taxed within the year during which the member paid the fee, or

whether it should be taxed equally over the period of club membership. This depended on whether the club earned the fee at the time the members were admitted, or whether the fees were instead earned over the period of club membership. The court discussed various authorities and held that "the stage at which a taxpayer will be deemed to have done all that is required of it to earn the income depends on the particular trade it is engaged in" (at [28]). On the facts of *ABD Pte Ltd*, Phang JA was of the view that the entrance fees accrued as *income* to the club upon the club's *receipt* of the moneys (see [30]). The court stated (at [20] and [29]):

> 20 … In the present case, the Appellant became legally entitled to the entrance fees once a member was admitted to membership. This is apparent from the fact that, should the Appellant allow a member to pay the entrance fees by monthly instalments, any unpaid balance of the monthly instalments becomes immediately due and payable if a member transfers his membership … , resigns his membership … , or if he is expelled from the Club … . Moreover, there appears to have been no restriction on the right of the Appellant to deal with the entrance fees as it wished once they were received.
>
> …
>
> 29 ... [T]he obligation of the Appellant, upon receipt of the entrance fees, was merely to admit the payer of the entrance fees to membership. … The entrance fees paid to the Appellant *can fairly be said to have "come home" to the Appellant* upon the grant of membership since the Appellant was legally entitled to the whole of the entrance fees once the application for membership was approved. [emphasis added]

Phang JA therefore held that the club should be taxed on the full sum of the entrance fee in the year it was paid.

112 The analysis above reveals that whether the court considered that income had "accrued" depended on whether the taxpayer was "legally entitled" to the entrance fees. This in turn depended on what the club was obliged to do upon receipt of the fees. In essence, once the club had performed its obligation, the fees could be said to have "come home" to the taxpayer, and was consequently income that was liable to income tax. It is important to note that in *ABD Pte Ltd*, the club had already *received* the entrance fees from its members before the question as to whether income had accrued arose.

113 In the context of garnishee proceedings, O 49 r 1(1) of the Rules of Court provides that the court may "order the garnishee to pay the judgment creditor the amount of any debt due or *accruing due to* the judgment debtor from the garnishee" [emphasis added]. Vintage cites the Malaysian case of *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353, which in turn relied on the Indian case of *Shanti Prasad Jain v Director of Enforcement Foreign Exchange Regulation Act* AIR 1962 SC 1764, to interpret the term "accrued debt" in this context to mean a debt payable in the future. In the latter case, Venkatarama Iyer J delivered the judgment on behalf of the Full Bench of the Supreme Court of India, stating:

> A contingent debt is strictly speaking not a debt at all. In its ordinary as well as its legal sense, a debt is a sum of money payable under an existing obligation. It may be payable forthwith, solvendum in praesenti, then it is a debt "due" or it may be payable at a future date, solvendum future; then it is a debt "accruing". But in either case it is a debt. But *a contingent debt* has no present existence, because it *is payable only when the contingency happens*, and ex hypothesi that may or may not happen. [emphasis in original]

114 The preceding analysis is also consistent with the position in England (see *Webb v Stenton* (1883) 11 QBD 518) and in Singapore (see *Lim Boon Kwee (trading as B K Lim & Co) v Impexital SRL (Sembawang Multiplex Joint Venture, garnishee)* [1998] 1 SLR(R) 757 at [15]). Thus, in the context of garnishee proceedings, "accrued debts" are debts which arise out of a present obligation, but are payable only in the future (*ie*, future debts). Contingent debts are not debts "accruing due to" the judgment debtor under the Rules of Court, and are not attachable in garnishee proceedings.

115 Lastly, Vintage refers to the use of the term "accrue" in the context of the accrual of causes of action. Here, the relevant provisions are to be found in the Limitation Act (Cap 163, 1996 Rev Ed), which sets out various timelines as to when specific types of causes of action accrue. In *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal* [2014] 2 SLR 318 ("*Fairview Developments*"), the Court of Appeal held that an architect's entitlement to sue the client for payment only accrues when the architect issues an invoice to the client, stating (at [87]):

> When [the relevant clauses applicable to the parties' relationship] are read together, it was evident that while an architect became entitled to progress payments upon the completion of the various stages, such progress payments only became "due and payable" upon the issuance of the relevant invoice(s). Accordingly, while an architect's entitlement to payment accrues upon completion of various stages, *no right and corresponding cause of action to sue upon such a right arises unless and until the relevant invoice(s) had been issued*. To put it another way, the entitlement to fees crystallises into a right upon which a cause of action accrues only when the invoice is issued. [emphasis in original]

116 It is pertinent that the Court of Appeal separated the concept of (i) the architect's *entitlement to payment* and (ii) the accrual of the architect's *cause of action*. Although the architect's entitlement to payment had arisen, the architect's cause of action only accrued (for the purposes of limitation periods) when the debt became "due and payable" on the issuance of the invoice.

117 As may be observed from the preceding analysis of the term "accrue" or "accruing" in varying legal contexts, the interpretation is not uniform for all contexts and purposes. In the three different contexts considered, the subject-matter of the accrual (*ie*, income, debt or causes of action) influenced the interpretation of the term. Regard must also be had to the framework in which the term operates, as well as the purpose and object of the provisions. In this regard, I have found that Parliament's intention in imposing a statutory trust through reg 21(1)(*a*) of the CTR is primarily for the protection of what should be the customers' funds (see [83] above).

118 It appears to me that "money, securities or property … accruing to a customer as a result of [commodity] trading" should simply be interpreted to mean the accumulation or accretion of money, securities or property *to* a customer as a result of commodity trading. More critically, I am of the view that much will depend on the specific rights and obligations that exist between the commodity broker and its customer so as to determine what money is accruing to a customer such that a commodity broker is obliged to hold the money *for* the customer. This is similar to the approach in *ABD Pte Ltd*.

119 In my view, the Unrealised Profits and Forward Value, being contingent and future debts owed by MFGS to a customer, are not "money[s] … accruing to a customer as a result of [commodity] trading" and do not fall within the ambit of the statutory trust under reg 21(1)(*a*) of the CTR.

120 I elaborate. The Unrealised Profits, even on Vintage's argument, would not be considered moneys accruing to Vintage as it had not done all that it was required to earn the sum (*ie*, close-out was still required). Indeed, based on the cases which Vintage relies on in the context of garnishee proceedings, the Unrealised Profits, being contingent debt obligations, would not be debts "due or

accruing due" under the Rules of Court (see [115] above). If a contingent debt is not a debt "accruing due" in the context of garnishee proceedings, *a fortori*, it cannot give rise to the accrual of *money*.

121 Vintage argues that as the Bullion transactions were marked-to-market, the gains (*ie*, the Unrealised Profits) and losses would be considered as *accruing* on a daily basis. The concept of marked-to-market is defined in s 2 of the CTR as "the *process* whereby the daily closing price of a commodity contract is used to value all outstanding positions of that contract at the end of the day and to establish the resulting gains and losses" [emphasis added]; marking the position to market is therefore only a *process* by which the quantum of the contingent debt claim is valued. The fact that a process is required to value the Unrealised Profits belies its unpredictable nature. As Unrealised Profits are *contingent* debt obligations, MFGS is not required or obliged to hold any money for a customer in relation to those Unrealised Profits.

122 On the Forward Value, Vintage argues that it represents the "quantified profit … following the closure of an open position". As the profit *crystallises* upon close-out and becomes Forward Value, Vintage must be held to be *entitled* to money equivalent to the Forward Value. I note that analogising from the approach in garnishee proceedings, it may be argued that the Forward Value, being a certain future debt, is "accruing to" the creditor. However, what would be "accruing to" would be a debt (which is *property*), and not *money*. Drawing from the income tax cases discussed, it may be argued that Vintage has done all that is necessary to be entitled to the Forward Value. To answer that question, in the context of the tax cases, the court clearly considered the *obligations* between the parties to be relevant. Under the contractual provisions, MFGS is not obliged to pay a customer the Forward Value until the Value Date, when the Forward Value becomes due and payable. Before the Value Date, Vintage could not have claimed payment of the Forward Value. Insofar as Vintage did not have a right to receive actual money from MFGS prior to the Value Date, it could not be said, in the words of Phang JA in *ABD Pte Ltd*, that *money* had "accrued" or "come home" to Vintage at that stage. Similarly, in *Fairview Development*, the Court of Appeal held that the *cause of action* did not accrue until the sums were due and payable (although the architect was already *entitled to be paid*).

123 Thus, I find that prior to the Value Date, there is no *money* accruing to Vintage, and any money placed by MFGS into the Customer Segregated Accounts to cover the value of the Unrealised Profits and Forward Value does not fall within the scope of the statutory trust under reg 21(1)(*a*) of the CTR. Rather, consistent with reg 21(4) of the CTR, I accept the Liquidators' position that this remained MFGS' "residual financial interest" in the Customer Segregated Accounts.

124 Vintage also relies on the fact that Vintage was entitled to use the Unrealised Profits and Forward Value for trading purposes. Specifically, MFGS would take into account any Unrealised Profits and Unrealised Losses in computing whether Vintage's margins were sufficient. Vintage thus argues that those moneys accrued to Vintage. I find difficulty with this submission. It appears to me that this only shows that MFGS allowed Vintage to use the value of the *choses in action* Vintage had against MFGS to engage in further trades. However, this does not show that a statutory trust arises over MFGS' *money* which MFGS segregated to cover its obligations attributable to Unrealised Profits and Forward Value arising from the Bullion transactions. On this, I also refer to my discussion at [222]–[223] below.

125 Vintage submits that a distinction cannot be drawn between the Forward Value and the Ledger Balance C/F as this would cause the protection afforded by the CTA and CTR to depend on the contractual agreement between each commodity broker and its customers. With respect, this argument is misconceived. The CTA and CTR do not operate in a vacuum, and must be applied to the context of each agreement. I agree with the Liquidators that the terms and timing of settlement and

payment are matters properly left for parties to contract. Indeed, the requirement imposed on a commodity broker by reg 24(2)(*b*) of the CTR to state when he is acting as principal that he is doing so in all contract confirmations, is recognition of the fact that different rights and obligations will be generated when the broker acts as principal to or agent for the customer.

126 Vintage also cites *In the matter of Lehman Brothers International (Europe) (In Administration) and In the matter of the Insolvency Act 1986* [2012] UKSC 6 ("*Re Lehman Brothers*") and *In Re MF Global Australia Ltd (in liq)* [2012] NSWSC 994 ("*Re MF Global Australia*") to show that international practice leans in favour of protection of the investor. On this basis, Vintage urges this court to hold that the Unrealised Profits and Forward Value should be the subject-matter of a statutory trust under the CTA and CTR. I do not derive much guidance from either decision as these cases deal largely with jurisdiction-specific legislation. Also, it would be mischaracterising the regime in Singapore to state that the CTA and CTR do not protect investors should the Unrealised Profits and Forward Value fall outside the ambit of the statutory trust imposed thereunder. Without the protection afforded by the CTA and CTR, the margins and the Ledger Balance C/F would not even be the subject of proprietary claims.

(6) Whether the Ledger Balance C/F (attributable to Bullion transactions) is "money … accruing to a customer"

127 Although the parties did not contest that the Ledger Balance C/F in respect of Bullion transactions is held on trust, it would nonetheless be useful to complete the analysis. On the Value Date, MFGS is obliged to pay the Forward Value due on that date to the customer. As I have explained above at [53], where money is paid by crediting the customer's Ledger Balance C/F, absent any statutory or express trust, a customer would only have *in personam* rights to those funds as against MFGS.

128 In this scenario, the customer is vulnerable to misuse, misappropriation or dissipation of those funds by the commodity broker. To address this, the CTA and CTR confer additional protection on customers. Hence, where a customer has a right to receive money *immediately* from MFGS, and where this money is paid by crediting sums to the Ledger Balance C/F and has not been actually paid to the customer, this is *money* which *accrues* to the customer, and which may be said to have "come home" to the customer. Therefore MFGS, by virtue of reg 21(1)(*a*), holds money paid by crediting the Ledger Balance C/F on trust for the customer.

129 Insofar as the payment by crediting the Ledger Balance C/F is accompanied by the concomitant segregation of the equivalent value of funds into or within the Customer Segregated Accounts, the customer has proprietary rights to the value of such funds in the Customer Segregated Accounts. A question one might have at this juncture is what the position would be if MFGS failed to segregate the moneys into or within the Customer Segregated Accounts on the Value Date despite having credited the Ledger Balance C/F. In my provisional view, as the statutory trust arises on receipt or accrual of the money, securities or property, a customer may assert proprietary rights if the money, securities or property are identifiable. To that extent, segregation is a useful and often necessary tool to ensure that customers' rights are adequately protected. For example, where MFGS receives money from a customer as margin for commodity trades, the margins are protected upon MFGS' *receipt* by virtue of reg 21(1)(*a*) of the CTR. However, if MFGS fails to place the margins (or equivalent funds) into the Customer Segregated Accounts, those moneys may be dissipated or become unidentifiable. In such a case, the customer may not be able to assert proprietary rights to those funds against MFGS, although the customer may have a separate claim for breach of trust or statutory duty. Nevertheless, this does not really arise for determination in this case.

130 Save for the dispute over when payment by the crediting of the Forward Value with a Value Date of 1 November 2011 occurred or should have occurred (which will be discussed below as the Value Date issue), it is not in contention that MFGS paid and credited moneys to its customers' Ledger Balance C/F, and segregated moneys accordingly in the Customer Segregated Accounts. A statutory trust thus arises, by virtue of the provisions in the CTR, over such funds in the Customer Segregated Accounts equivalent to the value of a customer's Ledger Balance C/F (attributable to Bullion transactions).

The LFX transactions

(1) Whether the SFA and the SFR apply to the LFX transactions

131 The long title of the SFA states that it is an Act "relating to the regulation of activities and institutions in the securities, futures and derivatives industry, including leveraged foreign exchange trading". MFGS was the holder of a CMS licence issued by MAS and was authorised, among other things, to carry out leveraged foreign exchange trading. The SFA and the SFR thus apply to the LFX transactions, which were leveraged foreign exchange trading transactions. These matters are not disputed by the parties.

(2) The relevant provisions under the SFA and SFR

132 Division 2 of Part V of the SFA deals with "customer assets". At the material time, the relevant provisions in the SFA provided as follows:

> **Interpretation of this Division**
>
> **103A.** In this Division, unless the context otherwise requires, "money or other assets" means money *received or retained by*, or any other asset deposited with, a holder of a capital markets services licence in the course of its business *for which it is liable to account* to its customer, and any money or other assets *accruing therefrom*.
>
> **Handling of customer assets**
>
> **104.**—(1) A holder of a capital markets services licence shall, to the extent that it *receives money or other assets from or on account of* a customer —
>
> (*a*) do so on the basis that the money or other assets shall be applied solely for such purpose as may be agreed to by the customer, when or before it receives the money or other assets;
>
> (*b*) pending such application, pay or deposit the money or other assets in such manner as may be prescribed; and
>
> (*c*) record and maintain a separate book entry for each customer in accordance with the provisions of this Act in relation to that customer's money or other assets. [emphasis added]

It should be noted that s 104(1)(*a*) of the SFA was amended slightly in 2012, but I am not concerned with the amended provision here.

133 Unlike the CTA, the SFA clearly provides that for the purposes of Part V of the SFA, "customers" can include counterparties with whom a CMS licence holder enters into transactions as

principal (see s 2 of the SFA). Parenthetically, I note that this lends weight to my interpretation of "customer" under the CTA, as I am of the view that it is unlikely that the protection under the CTA and SFA would differ in such a material aspect.

134 Section 104A of the SFA states that customer money and assets are not (i) available to a CMS licence holder for payment of its debts or (ii) liable to be paid or taken in execution under an order or process of any court, unless provided for in Part V of the SFA or the applicable regulations, being the SFR.

135 Pursuant to, *inter alia*, s 104(2) of the SFA, regulations were made under the SFR to govern the handling of "money or other assets" by a CMS licence holder. Regulation 16 of the SFR states:

> **Money received on account of customer**
>
> **16.**—(1) The holder of a capital markets services licence —
>
> (*a*) shall treat and deal with all *moneys received on account* of its customer *as belonging to that customer*;
>
> (*b*) shall deposit all *moneys received on account* of its customer in a trust account or in any other account directed by the customer; and
>
> (*c*) shall not commingle *moneys received on account* of its customer with other funds, or use the moneys as margin or guarantee for, or to secure any transaction of, or to extend the credit of, any person other than the customer.
>
> (2) The holder shall deposit the money received *on account of* its customer in the trust account no later than the business day immediately following the day on which the holder receives such money or is notified of the receipt of such money, whichever is the later, unless the money has in the meantime been paid to the customer or deposited in an account directed by the customer or unless it is deposited in accordance with regulation 19 or invested in accordance with regulation 20.
>
> (3) In paragraph (2), "business day" means the business day of the holder or, if the custodian with whom the trust account is maintained is closed for business on that day and the holder is unable to deposit the money in the account, the next business day of the custodian.
>
> (4) Moneys received by the holder *on account of* its customers may be commingled and deposited in the same trust account.

136 Regulation 15(2) of the SFR then sets out what "money received on account" means:

> (2) For the purposes of this Part, a reference to money *received on account* of a customer of the holder of a capital markets services licence includes —
>
> (*a*) money *received from, or on account of*, the customer in respect of a sale or purchase of futures contract or a transaction connected with leveraged foreign exchange trading;
>
> …
>
> (*e*) money *received from, or on account of*, the customer for the purpose of managing the customer's funds; and

(*f*) money *received from, or on account of*, the customer in the course of the business of the holder,

but does not include —

(i) money which is to be used to reduce the amount owed by the customer to the holder;

(ii) money which is to be paid to the customer or in accordance with the customer's written direction;

(iii) money which is to be used to defray the holder's brokerage and other proper charges; and

(iv) money which is to be paid to any other person entitled to the money. [emphasis added]

137 Unlike the provisions under the CTA and CTR, the relevant obligations imposed by the SFA and SFR do not explicitly refer to a requirement to "segregate". However, I am of the view that insofar as regs 16(1)(*b*) and (*c*) state a CMS licence holder shall deposit "moneys received on account of a customer" into a trust account and shall not commingle those moneys with its own funds or use those moneys for cross-margining purposes, regs 16(1)(*b*) and (*c*) of the SFR *in effect* impose segregation obligations on a CMS licence holder.

(3) The purpose and object of the statutory trust and the segregation obligations in the SFA and SFR

138 In order to aid the analysis of the relevant provisions in the SFA and SFR that follow, the history of the SFA and SFR and the object and purpose of these provisions will be briefly examined.

139 The SFA was enacted as an omnibus Act in 2001 in an effort to consolidate the provisions governing the securities and futures industry (*eg*, the Futures Trading Act (Cap 116) ("FTA"), the Securities Industry Act (Cap 289) ("SIA") and certain provisions in the Exchanges (Demutualisation and Merger) Act (Cap 99B) and the Companies Act (Cap 50)) into a single licensing regime which covered leveraged foreign exchange trading, among other activities.

140 Leveraged foreign exchange trading first came to be regulated under the FTA in 1995. Section 37 of the FTA set out the obligations of brokers in a manner similar to reg 16 of the SFR. Given the similarity of the provisions, it would be useful to examine the underlying object and purpose of the obligations as originally enacted in the FTA. In Parliament, the following was stated (see *Singapore Parliamentary Reports, Official Report* (31 March 1986) vol 47 at cols 1431–1436 (Dr Hu Tsu Tau, Minister for Finance) at col 1435–1436):

The conduct of business

In the futures industry, the segregation of customers' funds plays a key role in the protection of their interests. The Bill provides that the funds placed by customers with their brokers for margin requirements must be separately accounted for and not be comingled with those of the brokers. *This is to prevent brokers from making use of their clients' funds for any other purpose than for the benefit of the clients themselves.* [emphasis added]

141 The second main predecessor Act to the SFA was the SIA. Sections 103A and 104 of the SFA

appear to be derived from s 64 of the SIA. On s 64 of the SIA, the Minister stated (*Singapore Parliamentary Debates, Official Report* (31 March 1986) vol 47 at cols 1440–1447 (Dr Hu Tsu Tau, Minister for Finance) at col 1445):

> Under the Bill, fund managers will be required to be licensed as investment advisers so as to afford greater protection for investors. *An entire new Division 2 in Part VII of the Bill* [under which s 64 is found] *sets out the basic requirements of fund managers which fund managers have to abide by, such as the keeping of proper accounts. Clients' funds are also required to be kept in separate trust accounts and are not to be commingled with those of the fund manager nor to be used for purposes other than for the clients' benefit.* [emphasis added]

142 To the extent that the various provisions in the FTA and SIA relating to customers' moneys and assets have been consolidated and re-enacted in the SFA or SFR, it is clear that the purpose and object behind these provisions is to protect customers' moneys in order to guard against the risk of dissipation, misuse or misappropriation. With this in mind, I turn to consider whether the Unrealised Profits and Forward Value fall within the Parliament's intended scope of protection.

(4) Whether the Unrealised Profits and Forward Value (attributable to LFX transactions) are "money received on account of" a customer

(A) Parties' submissions

143 The Liquidators submit that under s 103A of the SFA, what constitutes "money or other assets" which the CMS licence holder is obliged to segregate are moneys or other assets which it is "liable to account" to its customer for. This, the Liquidators say, then depends on whether the moneys or assets are beneficially owned by the customer.

144 The Liquidators take the position that a customer's margins and Ledger Balance C/F are moneys which MFGS is "liable to account" for. However, as the Unrealised Profits and Forward Value were not due and payable to its customer, there could be no underlying moneys to which a customer could have a proprietary interest in unless and until these debt obligations were discharged by payment into the Customer Segregated Accounts. Thus, there were no physical moneys or assets which could have been beneficially owned by MFGS' customers.

145 Vintage anchors its case on the basis that the funds segregated by MFGS to cover the Unrealised Profits and Forward Value were moneys which MFGS held "on account of" Vintage under s 104(1) of the SFA and reg 15(2)(*a*) of the SFR. Since the segregation obligations under the SFA were enacted to protect customers' moneys, especially in the context of insolvency, both customers' margins and the funds segregated to cover the Unrealised Profits and Forward Value should be protected by being made the subject of a statutory trust. As the phrase "received from" requires the CMS licence holder to segregate moneys received as margins from customers, the phrase "on account of" should apply to the Unrealised Profits and Forward Value.

146 Vintage also refers to the phrase "accruing therefrom" under s 103A of the SFA. Similar to the submissions advanced in relation to the CTA, Vintage argues that the phrase "any money or asset accruing therefrom" under s 103A should be defined as being that which a party is entitled to after having done all that is required of it to earn that sum but which was not yet due.

(B) Analysis and findings

147 The provisions in the SFA and SFR relating to customer moneys and assets are not structured

in an entirely straightforward manner. As stated, the Liquidators construct their case largely on the definition of "money or other assets" under s 103A of the SFA. The Liquidators argue that what a CMS licence holder is obliged to segregate are moneys or other assets which it is "liable to account to its customer" for, and in turn, that a CMS licence holder is only "liable to account to its customer" for what the customer is beneficially entitled to. I have considerable difficulties with this argument.

148 I refer to [95]–[96] above, where I have explained that the term "account" possesses many meanings. Used as a noun, "account" may be defined as "a detailed statement of the debits and credits between parties *to a contract or to a fiduciary relationship*; a reckoning of monetary dealings" [emphasis added] (see *Black's Law Dictionary* at p 20). When used as a verb, the term "account for" may be defined as "to furnish a good reason or convincing explanation for", or "to render a reckoning of" (see *Black's Law Dictionary* at p 23). It appears to me that s 103A stipulates that Div 2 of Part V of the SFA is concerned with the treatment of "money or other assets" for which a CMS licence holder is to provide a proper explanation of to the customer.

149 In other words, s 103A of the SFA does not prescribe that the provisions under Div 2 of Part V of the SFA apply *only* to "money or other assets" that are already being treated by the CMS licence holder as beneficially owned by the customer without the aid of statutory intervention. Further, in and of itself, s 103A of the SFA does not set out *what* "money or other assets" a CMS licence holder is in fact "liable to account" for. Thus, there is no basis for the Liquidators to rely on s 103A to argue that the provisions in the SFA and SFR only apply to "money or other assets" which belong beneficially to the customer. Moreover, to my mind, this would run counter to the legislative purpose behind these provisions, which is to confer protection on investors and consumers (see [142] above). Little purpose would be served if Div 2 of Part V is confined to trust property already protected by equity.

150 More importantly, s 103A does not introduce any substantive obligations on CMS licence holders, which are to be found in other provisions, which I have set out at [132]–[137] above. I now turn to these specific provisions. To begin, it is useful to recap the wording of s 104 of the SFA:

> **104.**—(1) A holder of a capital markets services licence shall, to the extent that it *receives money or other assets from or on account of a customer* —
>
> (*a*) do so on the basis that the **money or other assets** shall be applied solely for such purpose as may be agreed to by the customer, when or before it receives the **money or other assets**;
>
> (*b*) pending such application, pay or deposit the **money or other assets** in such manner as may be prescribed; and
>
> (*c*) record and maintain a separate book entry for each customer in accordance with the provisions of this Act in relation to that customer's **money or other assets**.
>
> (2) The Authority may … make regulations in respect of all or any of the matters in this Division, including the handling of **money or other assets** by a holder of a capital markets services licence.
>
> [emphasis added in italics and in bold]

151 Plainly, the definition in s 103A does not lend itself to easy application within s 104 of the SFA. For example, where the phrase "money or other assets" is used within the larger phrase "receives

money or other assets from or on account of a customer", such as in s 104(1) of the SFA (marked in italics above), applying the definition in s 103A creates an overly tedious and illogical reading of the provisions. In this regard, s 103A expressly states that it does not apply where "the context otherwise requires".

152 It should be noted that s 104(1) of the SFA did not originally include the words "on account of". Also, s 104, as enacted, contained a definition of "money or other assets" in sub-section (3). In 2003, s 104(1) was amended to include the words "on account of". The definition originally found in s 104(3) was also removed and re-enacted as the standalone section, *viz*, the current s 103A. Parliament explained that the amendment to include the words "on account of" in s 104(1) was to clarify that "the section *also* applies to money or assets … received by a [CMS licence holder] on account of its customers" [emphasis added] (see Explanatory Statement to the Securities and Futures (Amendment) Bill (Bill No 15/2003)). Given that Parliament's express intention was to make clear that the provisions in s 104(1) apply to money or assets received *on account of* a customer *as well as* money or assets received *from* a customer, the operative words in s 104 are whether money or assets are *received* by a CMS licence holder *from or on account of* its customers. Hence, where s 104(1)(*a*), (*b*) and (*c*) are concerned, the phrase "money or other assets" in these sub-sections must be read with reference to the overarching ambit of s 104(1) (*ie*, money or other assets received from or on account of a customer).

153 Under s 104(1) of the SFA, a broad level of protection is to be given to customers in respect of these money and assets which a CMS licence holder receives from or on account of a customer. However, under s 104(2) read with s 103A of the SFA, MAS also has the power to make rules concerning the handling of "money or other assets". In fact, the bulk of protection is to be found in the SFR.

154 Under the SFR, different classes of assets are treated differently and given different protection. More specifically, money is treated differently from other forms of assets. Div 2 of Part III of the SFR sets out the regulations which apply to "customer's moneys", while Div 3 of Part III of the SFR concerns other assets to the exclusion of money. It is not disputed that we are only concerned with "customer's moneys" in the present case.

155 In this regard, the main provisions that confer protection over customer's moneys are regs 15 and 16 of the SFR (reproduced at [135]–[136] above). In my view, it is reg 16(1)(*a*) of the SFR which *specifically* creates or imposes a statutory trust. Similar to reg 21(1)(*a*) of the CTR, reg 16(1)(*a*) of the SFR requires CMS licence holders to treat and deal with "all moneys received on account of its customer" *as belonging to that customer*. As I have explained above in the context of the CTR (see [78] above), the effect of the language of reg 16(1)(*a*), read with Parliament's intention to protect customers' moneys, is to create or impose a statutory trust over certain moneys by effectively stipulating that those moneys belong beneficially to the customer. This is also consistent with s 104A of the SFA, which prohibits a CMS licence holder from using these moneys beneficially in the course of its business. Regulation 16(1)(*a*) defines the property to which the trust attaches to as being "all moneys received [by a CMS licence holder] on account of its customer". The further requirement to segregate the moneys is then found in reg 16(1)(*b*), and the prohibition against commingling the moneys or using it for cross-margining purposes in reg 16(1)(*c*). Here, I would point out that a precondition to the operation of reg 16(1) is that the money is held by the CMS licence holder. Indeed, the use of the phrase "*received* on account of" [emphasis added] in reg 16(1) presupposes that money is in the CMS licence holder's hands.

156 Reg 15(2)(*a*) then specifies that "money received on account of a customer" of a CMS licence holder includes "money *received from, or on account of*, the customer in respect of … a transaction

connected with leveraged foreign exchange trading" [emphasis added] (*ie*, the LFX transactions). Thus, where the LFX transactions are concerned, the statutory trust is created by reg 16(1)(*a*) read with reg 15(2)(*a*) of the CTR over (i) money received from a customer in respect of a transaction connected with leveraged foreign exchange trading (limb (i) of the LFX trust) and (ii) money received on account of a customer in respect of a transaction connected with leveraged foreign exchange trading (limb (ii) of the LFX trust). Moneys which a customer places with MFGS as collateral or margins for LFX transactions are clearly *moneys received from* the customer (within limb (i) of the LFX trust), and MFGS, by virtue of reg 16(1)(*a*) holds the moneys on trust for the customer and is only allowed to use such moneys for the purposes provided by reg 21 of the SFR. Once again, this affords more protection over a customer's margins than a customer would otherwise have under the terms of the MTA alone (see cl A6.8 of the MTA at [45] above).

157 I pause to note that the phrase "received from, or on account of, the customer" in reg 15(2)(*a*) echoes the operative words of s 104(1) of the SFA ("receives money or other assets from or on account of a customer"). The issue to be considered is whether the money segregated to cover the Unrealised Profits, Forward Value and Ledger Balance C/F is "money received from, or on account of" the LFX customers, and therefore falls within the protection of the statutory trust under reg 16(1)(*a*) of the SFR. As I have set out in [96] above, the *Oxford English Dictionary* defines "on account of" as "in consideration of, for the sake of, by reason of, because of". Taken together, I am of the view that reg 16(1)(*a*) and reg 15(2) of the SFR provide that a statutory trust arises over any money a CMS licence holder receives *from* or receives *for* its customer.

158 In my view, the LFX customers' Unrealised Profits and Forward Value *do not* fall within Parliament's intended scope of protection, and therefore of the statutory trust. To reiterate, the Unrealised Profits and Forward Value were choses in action against MFGS which vested in the LFX customers at all times. There was *no underlying money* which MFGS could receive *from* its customer or *for* its customer in either instance. Before a trade was closed-out, a customer only had a contingent claim, and was not entitled to receive any money. MFGS was also not obliged to pay any money, as no obligation to pay had yet arisen. Even after a trade was closed-out and a Forward Value arose, MFGS' obligation to pay those moneys, only materialised on the relevant Value Date.

159 Does the fact that MFGS segregated moneys amounting to the value of its obligation to the LFX customers in respect of the Unrealised Profits and Forward Value change the above analysis? In my opinion, it does not. These moneys were not placed by MFGS into the Customer Segregated Accounts to the credit of each customer's respective account. Rather, these moneys, in accordance with reg 23 of the SFR, formed MFGS' "residual financial interest" in the Customer Segregated Accounts. Until MFGS' payment obligation arrived on the Value Date, and MFGS paid the money to the account and credit of its customer, these moneys properly remained MFGS' own funds to which no LFX customer could have a proprietary interest. These segregated moneys thus did not fall within the scope of the statutory trust imposed by reg 16(1)(*a*) of the SFR.

160 Vintage also argues that in interpreting whether the Unrealised Profits and Forward Value are received "on account of" the LFX customers, regard should be had to s 103A of the SFA which defines "money or other assets", and in particular, the phrase "accruing therefrom" within the section. Vintage does not deal with *where* the money or assets accrue *from*, but in line with its submission on the Bullion transactions (see [103] above), submits that the phrase should be defined as being that which a party is *entitled to* after having done all that is required of it to earn that sum but which was not yet due or received. Vintage also does not submit on how s 103A interrelates with s 104 of the SFA and regs 15 and 16 of the SFR. As explained, s 103A does not create or impose a statutory trust. Hence, even if I accept Vintage's proposed interpretation of the term "accruing", Vintage must still show that such funds fall within the scope of the statutory trust imposed by reg 16(1)(*a*) of the SFR,

ie, the Unrealised Profits and Forward Value must be shown to be money *received* by MFGS *on account of* Vintage. For the reasons given above, the Unrealised Profits and Forward Value are not moneys received by MFGS *for* Vintage.

(5) Whether the Ledger Balance C/F (attributable to LFX transactions) is "money received on account of" a customer

161 Parties have accepted that the Ledger Balance C/F is held by MFGS on trust under the SFA and SFR for the LFX customers. For completeness, I briefly set out why I agree that the sum representing the Ledger Balance C/F is money which MFGS *received for* (*ie*, on account of) its customers under reg 16(1)(*a*) of the SFR.

162 Vintage points out that if money must actually be *received* by MFGS, then the Ledger Balance C/F does not fall within the ambit of the statutory trust as this is money which was "paid or credited to Vintage after the relevant Value Date", and not actually received by MFGS. In my view, given that the purpose of these provisions is to protect customer's funds (see [142] above), the meaning of "received" must not be read so narrowly as to require a separate counterparty. Here, I also highlight Scott LJ's analysis in *Mac-Jordan* where he stated that the defendant's obligation under the contract was to pay itself as trustee (see [64] above).

163 On the Value Date, MFGS is obliged to discharge its debt obligation to its customers under the terms of the MTA. MFGS is therefore required, by the terms of its contract with its customers, to *pay* the debt which is due and payable on that date. In order to discharge this obligation, MFGS could receive the money on the customer's behalf. This receipt occurs when MFGS credits a customer's Ledger Balance C/F with the Forward Value due on that date. The payment received from MFGS (as principal-payor) by MFGS (as payee on its customers' behalf) is money received *on account of* its customers and therefore subject to the statutory trust. This is largely in line with the discussion on the Bullion transactions above at [128].

164 Regulations 15(2)(ii) and 16(2) (set out above at [135]–[136]) support this position. The effect of regs 15(2)(ii) and 16(2) is that moneys *paid to the customer* do not form moneys received on account of the customer and do not have to be paid into the trust account by the next business day after receipt of the money. The corollary of this is that if the moneys which ought to be paid are *not* paid to the customer, they should be "received on account of" the customer and deposited into a trust account on the next business day. On the Value Date, MFGS was obliged to pay its customers the realised profits from the close-out of the LFX transactions. To the extent that MFGS credited funds to the Ledger Balance C/F on the Value Date and did not pay the customers these moneys directly, I find that these are moneys which are received by MFGS on account of its customers. The amount standing in the Ledger Balance C/F is thus held on statutory trust by MFGS for the benefit of the LFX customers under reg 16(1)(*a*) of the SFR. There is a dispute over the amount that should stand in the Ledger Balance C/F, which will be covered in the discussion of the Value Date issue.

Conclusion on the Statutory Trust issue

165 In conclusion, I find that the SFA, SFR, CTA and CTR *do not* require MFGS to hold the segregated funds amounting to the value of the Unrealised Profits and Forward Value attributable to the LFX and Bullion transactions on trust for the LFX and Bullion customers.

The Express Trust issue

Parties' submissions

166 In order to assert a proprietary right to the moneys in the Customer Segregated Accounts amounting to the value of the Unrealised Profits and Forward Value, Vintage argues, in the alternative, that MFGS has declared an express trust over these funds.

167 In this respect, Vintage's case is that MFGS *thought* that it was required by law to segregate and hold the moneys on trust, and accordingly did so. Vintage submits that there is ample evidence which shows that prior to winding up, MFGS held moneys representing the Unrealised Profits and Forward Value as if they belonged to the LFX and Bullion customers. In the circumstances, an express trust can be inferred from MFGS' conduct in the ordinary course of business. Such conduct included the following:

(a) MFGS did not declare the Unrealised Profits and Forward Value of the LFX and Bullion customers as its liabilities and did not declare the money it segregated to cover the Unrealised Profits and Forward Value as its assets in its audited financial statements. In fact, in 2009 and 2010, the financial statements used the words "held in trust" to describe the money MFGS segregated to cover, *inter alia*, the LFX and Bullion customers' Unrealised Profits and Forward Value.

(b) MFGS ensured on a daily basis, through the Seg Fund Statements, that sufficient money was segregated to cover, *inter alia*, the substantial Unrealised Profits and Forward Value of the LFX and Bullion customers. MFGS also calculated, through the Seg Fund Statements, its "residual financial interest" in the segregated funds, which did not include the Unrealised Profits and Forward Value of the LFX and Bullion customers.

(c) Vintage had the ability to withdraw sums in excess of its Ledger Balance C/F. This shows that MFGS considered that the Unrealised Profits and Forward Value were Vintage's proprietary moneys as of right, and therefore capable of withdrawal.

(d) MFGS' directors and the Liquidators had previously taken the position that the Unrealised Profits and Forward Value from the LFX and Bullion transactions are segregated and trust moneys of Vintage.

168 Vintage also submits in the alternative that by cl A15.1 of the MTA (see above at [44]) MFGS expressly declared a trust in writing.

169 The Liquidators accept that MFGS had taken into account the quantum of the Unrealised Profits and Forward Value in ascertaining the sufficiency of the segregated funds maintained. However, their position is that MFGS did not intend to create a trust over its own money for the benefit of the LFX and Bullion customers in anticipation of meeting its obligations relating to the Unrealised Profits or Forward Value. The Liquidators say that there is no evidence of such an intention, which runs against commercial logic. Rather, they say that MFGS did so for "internal risk management" purposes, and to ensure that there was an adequate "operational float" in the Customer Segregated Accounts. In the alternative, the Liquidators submit that *if* this court finds that MFGS held the money in its Customer Segregated Accounts on trust to satisfy its Unrealised Profits and Forward Value obligations, the court should nonetheless exercise its equitable jurisdiction to set aside this trust on the ground of MFGS' mistake.

The applicable legal principles

170 It is settled law that in order for an express trust to arise, the three certainties being the certainty of intention, certainty of subject matter and certainty of objects must be present.

171 The first certainty required is the certainty of intention. It must be clear that the settlor intended to create a trust, and subject the trust property to trust obligations, rather than do an act or impose obligations that are not trust obligations. As stated in *Snell's Equity* (John McGhee QC gen ed) (Sweet & Maxwell, 32nd Ed, 2010) ("*Snell's Equity*") at para 22–013, this intention must be clear on two levels: first, the trustee's duties must be intended to be legally enforceable and not merely social or moral obligations, and second, that the relationship is to involve trust duties, as opposed to other forms of relationships, such as a debtor and creditor relationship.

172 The easiest way to prove such an intention is where the trust is declared in writing through a trust instrument. However, trust instruments are not necessary in order to prove the certainty of intention. Courts have often found the certainty of intention to be satisfied, even in the context of insolvency, where no trust instrument existed (see, *eg*, *In re Kayford Ltd* [1975] 1 WLR 279). Thus, an intention to create a trust may be inferred by examining evidence of the alleged settlor's words and conduct as well as the circumstances surrounding the alleged express trust, and through the interpretations of any agreements that the parties might have entered into (see *Guy Neale and others v Nine Squares Pty Ltd* [2015] 1 SLR 1097 at [58]).

173 The commercial context must also not be overlooked. As stated by the Court of Appeal in *Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd (under judicial management)* [2001] 3 SLR(R) 119 ("*Sogo Department Stores*") at [33]:

> The ultimate question to decide is whether, in the light of the terms of the agreement, as exemplified by the actual arrangement, there was an intention to create a trust. No general rule may be laid down in this regard. *In a case where there is no express term in the agreement on the question of trust, whether the equitable rules would be implied would depend on* ***what may correctly be inferred to be the expectations of the parties in the light of the commercial context*** . … [emphasis added in italics and in bold italics]

174 Generally, courts are disinclined toward finding a trust relationship in everyday commercial transactions (see *Neste Oy v Lloyds Bank PLC* [1983] 2 Lloyd's Rep 658 at 665). What is necessary is that there "must be *clear evidence* from what is said or done of an intention to create a trust" [emphasis added], being "an intention to dispose of a property or a fund so that somebody else to the exclusion of the disponent acquires the beneficial interest in it" (see *Paul v Constance* [1977] 1 WLR 527 at 531). In the context of insolvency, this is all the more crucial (*Snell's Equity* at para 22–015):

> … The imposition of a trust, without *strong evidence* of an intention to declare one, would upset the usual proportionate distribution of assets in insolvency. … [emphasis added]

175 In this regard, the mere segregation of money is not conclusive of the intention to create a trust. The United Kingdom Supreme Court considered, in the case of *Re Lehman Brothers*, the importance of segregation of client's moneys. Lord Hope stated (at [2]):

> Under English law the mere segregation of money into separate bank accounts is not sufficient to establish a proprietary interest in those funds in anyone other than the account holder. A declaration of trust over the balances standing to the credit of the segregated accounts is needed to protect those funds in the event of the firm's insolvency. Segregation on its own is not enough to provide that protection. …

This point was also echoed by Lord Collins (at [186]):

> … under English law mere segregation of funds was not enough to protect those funds from the firm's creditors in the event of its insolvency, and investors' money could be safeguarded by segregation only if it was segregated in such a way that ownership remained with them, ie under a trust …

176 In my judgment, the principle stated by Lord Hope and Lord Collins above applies equally under Singapore law. Thus, the mere segregation of money *per se* is insufficient to prove an intention on the part of the alleged settlor to create a trust over the segregated funds. Clear and strong evidence must be shown that the alleged settlor *intended* to hold these sums on trust for the benefit of another.

177 The second certainty is the certainty of subject matter. What this requires is that the assets which are to be the subject of the trust are identifiable and clearly defined. The beneficiary's interest in the subject matter should also be sufficiently certain so that the trust may be executed in accordance with the settlor's intentions. It is here that the segregation of the trust assets may play an important role in identifying the specific assets over which the trust arises. Oliver J stated the traditional position in *Re London Wine Co (Shipper)* [1986] PCC 121:

> I appreciate the point taken that the subject matter is part of a homogenous mass so that specific identity is of as little importance as it is, for instance, in the case of money. Nevertheless, as it seems to me, *to create a trust it must be possible to ascertain with certainty not only what the interest of the beneficiary is to be but to what property it is to attach.* [emphasis added]

178 The last certainty required is the certainty of objects. This means that the objects of the trust must also be clearly defined so as to enable the trustees to execute the trust in accordance with the settlor's intention.

179 The main dispute between the parties which requires an examination of the factual matrix and documentary evidence is with respect to the certainty of intention, *viz*, whether there is clear and strong evidence that MFGS intended to create a trust in favour of the LFX and Bullion customers.

Analysis and findings

180 Vintage's alternative argument, being its reliance on cl A15.1 of the MTA, may be briefly dealt with first. It is clear, in my judgment, that there was no agreement between MFGS and its customers as to how or in what manner the Unrealised Profits or Forward Value were to be held or applied. Vintage's reliance on cl A15.1 as being an express declaration of trust in writing, with respect, is untenable. Clause A15.1 of the MTA, the substance of which is set out at [44] above, merely states that MFGS shall place "Customer's funds and assets" into a trust account. It also stipulates that customer's funds and assets are to be kept separate from MFGS' funds and assets. Hence, cl A15.1 only deals with the manner in which MFGS may deal with "Customer's funds and assets" but does not indicate whether the Unrealised Profits and Forward Value would fall within such "funds and assets". It is unhelpful for Vintage to assert that this court should interpret "funds and assets" as covering the Unrealised Profits and Forward Value without more.

181 In the absence of an express declaration of trust, and in the context of MFGS' winding up, what must be shown in order to ground an intention to create an express trust is *clear and strong evidence* of a course of conduct or the presence of circumstances from which it can be inferred that the settlor-trustee treated the property as if it were beneficially owned by the beneficiaries.

182 During oral submissions, Mr Thio urged me to be cautious when dealing with aspects of Mr Yap's affidavits that purported to set out the "intentions" of MFGS because Mr Yap's evidence in this respect was hearsay and contravened O 41 r 5 of the Rules of Court. Mr Thio points out that although a number of MFGS' former directors were in Singapore at the time of the hearing, no affidavits were filed by the former directors, who were the persons best placed to give evidence on MFGS' intentions at the material time the transactions were carried out. However, Mr Thio accepts that where documentary evidence exists, the documents speak for themselves.

183 It is true that this court has not had the benefit of evidence from any of the former directors or employees of MFGS. I accept that Mr Yap's evidence on the true intentions of MFGS is not conclusive. In any event, evidence of MFGS' intentions in segregating the amounts, even if given by a former director of the company, would not have been conclusive. It is the court's task to ascertain from all the evidence, especially the documentary and undisputed evidence, whether MFGS had, at the material time, intended to create an express trust over moneys equivalent to the Unrealised Profits and Forward Value.

184 Before turning to consider Vintage's arguments in further detail, an important distinction must be highlighted. An intention to hold moneys or property *as required by the applicable laws and regulations* may not be the same as an intention to create a trust *in the general law of equity*. As I have stated at [70]–[71] above, a statutory trust may not bear the full indicia of a trust recognised by law apart from statute. Hence, the mere fact that MFGS might have mistakenly believed that it had certain obligations under statute which it accordingly sought to discharge did not *ipso facto* mean that MFGS had equally intended for an express trust to arise under the normally applicable equitable principles. In my view, even if some of the evidence Vintage put forth coheres with the theory that MFGS intended to hold the moneys as it believed it was required to under the applicable statutes and regulations, the evidence does not go so far as to show that MFGS intended to be an *express trustee* of the moneys equivalent to the Unrealised Profits and Forward Value on the LFX and Bullion customers' behalf.

185 In this regard, two important facts stand out. First, MFGS commingled its own money with funds which Vintage alleges are held on trust for customers; and second, MFGS commingled funds between customers. To my mind, both these facts show that MFGS was acting in accordance with the provisions of the CTR and SFR. Although reg 21(1) of the CTR and reg 16(1)(*c*) of the SFR do not allow MFGS to commingle customer's funds with its own funds or any other funds, an exception to this general rule may be found in reg 21(4) of the CTR and reg 23(1)(*a*) of the SFR. The exceptions allow a commodity broker or CMS licence holder respectively to advance its own funds to customer trust accounts (in MFGS' case, the Customer Segregated Accounts) in order to prevent the accounts from becoming under-margined, cross-margined or under-funded.

186 Regulation 23(1)(*b*) of the SFR also allows a CMS licence holder to advance its own funds to the trust accounts to ensure the continued maintenance of that account with a financial institution or custodian as the case may be. Section 30(4) of the CTA and reg 24 of the SFR then preserves the commodity broker's or CMS licence holder's "lawful claim or lien" to those funds. Where a commodity broker's or CMS licence holder's own funds have been advanced to customer trust accounts, reg 21(3)(*d*) of the CTR and reg 21(*e*) of the SFR permits the commodity broker or CMS licence holder to reimburse itself the moneys which it has advanced into the trust accounts. Such funds have been referred to above as MFGS' "residual financial interest".

187 Similarly, reg 21(2) of the CTR and reg 16(4) of the SFR allow commodity brokers and CMS licence holders to commingle moneys as between customers. While cl A15.1 of the MTA provides that the customer's "funds and assets … may be held commingled with excess funds or assets of other

Customers *in accordance with Applicable Laws*", it also stipulates that "MFGS shall keep all funds and other assets held by MFGS on trust for the Customer *separate from* the funds and assets of MFGS" [emphasis added]. In commingling its own money with funds which MFGS held on trust for its customers in the Customer Segregated Accounts, and commingling funds between customers, MFGS was acting within the perimeters of the CTR and SFR, but was in fact in breach of cl A15.1 in relation to co-mingling of its own funds.

188 The fact that MFGS commingled its own funds with what Vintage alleges are funds held on express trust militates against a finding that MFGS intended to hold moneys equivalent to the Unrealised Profits and Forward Value on express trust for the LFX and Bullion customers. Channell J articulated the applicable principles in *Henry v Hammond* [1913] 2 KB 515 ("*Henry v Hammond*") at 521, which was cited with approval by the Court of Appeal in *Sogo Department Stores* at [18]:

> It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his *cestui que trust*. If on the other hand *he is not bound to keep the money separate*, but is *entitled to mix it with his own money* and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor. [emphasis added]

189 The Court of Appeal in *Sogo Department Stores* continued (at [22]):

> … it is clear that where under an arrangement there is no prohibition against the mixing of funds by the agent, that is a very significant consideration in the overall determination of the question whether there is a trust. In the absence of an express term creating a trust, the maintenance of a separate account by the agent is crucial to constituting the money as trust money: see *Re Nanwa Gold Mines Ltd* … and *Re Kayford Ltd* … . Here we are reminded of the words of Slade J in *Re Bond Worth Ltd* … :
>
> > ... where an alleged trustee has the right to mix tangible assets or moneys with his own other assets or moneys and to deal with them as he pleases, this is incompatible with the existence of a presently subsisting fiduciary relationship in regard to such particular assets or moneys.

190 The statement of principle in *Henry v Hammond* and the Court of Appeal's analysis in *Sogo Department Stores* shows that in searching for the presence of an intention to create an express trust in the absence of any express declaration, the general position is that the maintenance of a separate account with a prohibition (whether express or implied) against mixing lends much weight to the finding of an intention to create a trust. This is because such conduct shows that the legal holder of the money is not to have free disposal of it, which is consistent with an intention to confer beneficial ownership of the money on another. To the extent that cl A15.1 prohibited the mixing of MFGS' assets and funds with those it held on trust, this shows that MFGS too recognised this principle. I also note that the mixing of a trustee's own funds with those he holds on trust for a beneficiary, and the mixing of funds between beneficiaries, may also lead to further issues in the identification of property through the tracing process (see for example the discussion in *Barlow Clowes International Ltd (in liq) and others v Vaughan and others* [1992] 4 All ER 22 at 35–36 on the different methods of tracing through bank accounts). Thus in the normal course, the mixing of alleged trust funds between "beneficiaries" and with the "trustee's" own funds is, in the absence of an express declaration of trust, likely to negative a finding of an intention to create a trust.

191 I will now deal specifically with the various pieces of evidence which Vintage uses to show that MFGS intended to hold the moneys equivalent to the Unrealised Profits and Forward Value on trust for the LFX and Bullion customers, before showing, on the whole, why MFGS' intention to create an express trust for the benefit of the LFX and Bullion customers in respect of the Unrealised Profits and Forward Value has been insufficiently proven.

(1) MFGS' audited financial statements

192 Vintage relies on MFGS' audited financial statements for the years ended 31 March 2009, 31 March 2010 and 31 March 2011 ("AFS 2009", "AFS 2010" and "AFS 2011" respectively) to support its case that MFGS intended to hold moneys equivalent to the Unrealised Profits and Forward Value on express trust for the LFX and Bullion customers.

193 In order to aid the subsequent discussion, pertinent portions of the financial statements will be reproduced here. The "Current assets" section of AFS 2011 stated:

	Note	2011
		US$
ASSETS		
Current assets		
Cash and bank balances	9	15,928,655
Amount segregated for customers	9, 11	29,051,154
…		…
		120,261,902

194 As can be seen above, there is a cross-reference under the "Amount segregated for customers" in AFS 2011 to Note 9 and Note 11 of the financial statements. Note 9 is titled "Cash and cash equivalents" and the following table is set out under it:

		2011
		US$
Cash and bank balances		**15,928,655**
Amount segregated for customers	(Note 11)	**29,051,154**
Cash and cash equivalents per statement of cash flows		**44,979,809**

195 Note 11 is titled "Clients' segregated funds", and sets out the following table:

	2011
	US$
Customer segregated assets	

- Margin deposits with brokers	**278,301,541**
- Margin deposits with SGX-DC	**82,902,494**
- Bank balances	**372,159,342**
	733,363,377
Less: Company's assets segregated for customers	**(29,051,154)**
	704,312,223

[emphasis added in underline]

196 As the above tables demonstrate, in AFS 2011, MFGS only declared the figure of US$29,051,154 as its assets under "amount segregated for customers" on its balance sheet. The location of this US$29m may be found under MFGS' "customer segregated assets", as Note 11 reveals. Note 11 also shows that MFGS did not declare on its balance sheet the additional sum of US$704,312,223, which it instead parked as "customer segregated assets". Vintage submits that MFGS accounted for the LFX and Bullion customers' Unrealised Profits and Forward Value under the "customer segregated assets", which the Liquidators have not disputed. Although it is not set out above, I should also mention that MFGS did not declare the Unrealised Profits and Forward Value of its customers under the "Liabilities" portion of its balance sheet in AFS 2009, 2010 and 2011.

197 In AFS 2009 and 2010, the balance sheet contained a further section titled "Clients' segregated accounts". This section in AFS 2010 is reproduced below:

	Note	2010
		US$
…		
Clients' segregated accounts		
Clients' segregated funds	12	643,254,368
Less: *Amounts **held in trust** in respect of clients*	22	(643,254,368)

[emphasis added in italics and bold italics]

Except for the amounts in question, this section in AFS 2009 is materially similar.

198 Vintage submits that if the directors and auditors of MFGS considered that the moneys segregated to cover the LFX and Bullion customers' Unrealised Profits and Forward Value were MFGS' own, these would have been declared under the "Assets" portion of the balance sheet. Correspondingly, if the directors and auditors believed that the Unrealised Profits and Forward Value of the LFX and Bullion customers were unsecured debts, they would have also declared this under the "Liabilities" portion of the balance sheet, which they did not do. Vintage also relies on the fact that the balance sheet of AFS 2009 and 2010 stated that the segregated funds were "amounts held *in trust* in respect of clients" [emphasis added]. Vintage submits that the only reasonable explanation for failing to account for these items on MFGS' balance sheet and for stating that the amounts were held *in trust* in AFS 2009 and 2010 was because the directors and auditors of MFGS considered that

these moneys belonged to the LFX and Bullion customers.

199 The Liquidators submit that when AFS 2009, 2010 and 2011 are read together with the Seg Fund Statements, the financial statements are consistent with the position that the amounts corresponding to the Unrealised Profits and Forward Value were reflected off-balance sheet as part of MFGS' "notional accounting exercise to ensure sufficiency of liquidity and to ensure an adequate operational float". MFGS had treated all its liabilities to customers as a "global sum without stratification", regardless of whether these amounts were held on trust for each respective class of customers. According to the Liquidators, this "global treatment" meant that the aggregate sum was considered off-balance sheet, with the necessary disclosures made in the financial statements. However, the fact that MFGS did so could not constitute evidence that MFGS considered that the Unrealised Profits and Forward Value were proprietary moneys belonging to the LFX and Bullion customers.

200 While Vintage points out that audited financial statements should reflect the true state of affairs of a company, neither Vintage nor the Liquidators make submissions on any specific accounting conventions as to when assets and liabilities of a company may be held off-balance sheet, and what this might entail. In the circumstances, I proceed on the assumption that the accounting conventions do not dictate any particular conclusion and apply the legal principles accordingly.

201 The essential question to be answered is whether MFGS' conduct in excluding these segregated funds from its balance sheet in AFS 2009, 2010 and 2011 is evidence of an intention to hold the same on *express* trust for the benefit of the LFX and Bullion customers. It may be recalled that in order to show the requisite certainty of intention, it must be shown clearly and strongly that MFGS intended to create *legally enforceable trust duties*, which are fiduciary in nature. In essence, Vintage must show that MFGS intended the LFX and Bullion customers to have *beneficial ownership* of the segregated funds.

202 In *Re English & American Insurance Co Ltd* [1994] 1 BCLC 649, Harman J held that sums received by an insurance company in connection with the insurance coverage provided to the members of the Structural Engineers' Professional Indemnity Association Ltd were held on trust for the association's members even though such funds had been included as part of the company's balance sheet. Clause 4 of the agreement between the parties stated:

> The company agrees that all sums received by the company in respect of specified insurance business and all assets and reserves relating to the specified insurance business shall be segregated from all other income, assets and reserves of the company and shall be applied solely for the purposes of the specified insurance business and similarly all debts and liabilities shall be segregated from the debts and liabilities relating to all other business of the company.

203 Harman J cited the principle set out in *Henry v Hammond* (quoted at [188] above), and held that on that basis, cl 4 of the agreement was a term which equity would classify as creating a trust relationship (at 651). Thus, the subsequent conduct of the company in including the funds on its balance sheet could not prevail against "the clear evidence of the earlier intention and constitution of the fund as a trust fund" (at 653). In other words, how funds are accounted for on the balance sheet is not necessarily conclusive of their legal character.

204 During oral submissions, Mr Thio accepted that the fact that amounts were not reflected on MFGS' balance sheet did not conclusively mean that they were the beneficial property of MFGS' customers, but submitted that it took the parties to "match point", and that the presence of other sources of evidence such as the Seg Fund Statements, MFGS' treatment of the Unrealised Profits and

Forward Value in the Daily FX Activity Statements, and the Liquidators' alleged admissions won the match for Vintage.

205 In my judgment, both the Liquidators and Vintage are right to accept that the fact that sums were held off-balance sheet did not inevitably lead to the conclusion that those moneys were intended to be held on express trust for the LFX and Bullion customers. An equally plausible conclusion is that MFGS segregated its own money in order to ensure sufficient liquidity to meet its contingent and future debt obligations, *viz*, the Unrealised Profits and Forward Value. While MFGS might have, *from an accounting perspective*, considered that it was not free to deal with these segregated moneys which it had set aside as a prudential measure to ensure that funds would be available to satisfy its debt obligations as and when they fell due, it did not necessarily follow that MFGS intended its customers to have a *legally enforceable* beneficial interest in the same, with the accompanying fiduciary obligations on its part.

206 That being said, did this fact nonetheless take parties to "match point"? With respect, I do not think so. In the first instance, I find it significant that the "amounts held in trust in respect of clients", an item which was present in both AFS 2009 and 2010 (see [197] above), was left out of AFS 2011. AFS 2011, being MFGS' most recent financial statement, is the statement most relevant in ascertaining MFGS' intention in respect of the funds Vintage asserts are held by MFGS on express trust for it. The fact that the phrase was left out of AFS 2011 strengthens the Liquidators' case that the fact of segregation did not mean that the amounts are being held on trust.

207 Also, the audited financial statements clearly show that MFGS placed its own assets in the funds it segregated for clients (see Note 11 to AFS 2011, reproduced at [195] above). For the reasons I have given at [184]–[190] above, this is an important fact which militates against any finding of intention on MFGS' part to create a trust over amounts equivalent to the LFX and Bullion customers' Unrealised Profits and Forward Value. Although MFGS did designate certain accounts to be Customer Segregated Accounts, which would go towards showing that MFGS maintained separate bank accounts for the benefit of the LFX and Bullion customers, the fact that MFGS did not keep its own funds *completely separate*, but placed (on Vintage's argument, *at least*) US$29m of cash and cash equivalents within its "Clients' segregated funds" (reflected in AFS 2011) as it was entitled to do under the CTR and SFR (but notably, was not allowed to do under the MTA), is more consistent with an intention to comply with the applicable statutes and regulations, rather than with an intention to hold the amounts as a private law trustee for the LFX and Bullion customers. The audited financial statements are therefore not clear and strong evidence of an intention on MFGS' part to create a trust of the Unrealised Profits and Forward Value for those customers.

(2) The Seg Fund Statements

208 In advancing its case, Vintage also relies heavily on the Seg Fund Statements. First, Vintage points out that MFGS ensured through a daily preparation of the Seg Fund Statement that sufficient moneys were segregated to cover the Unrealised Profits and Forward Value of the LFX and Bullion customers. This point is not disputed by the Liquidators.

209 Second, Vintage submits that the computations being performed on a daily basis through the Seg Fund Statements are the precise computations required by the CTR and SFR, and that this fact strongly suggests that MFGS was ensuring that sufficient funds were segregated to cover the Unrealised Profits and Forward Value because it believed it was required to do so by law, and not for operational reasons as the Liquidators allege. While the exact language used in the CTR and SFR is different, broadly, both reg 22(12) of the CTR and reg 37(1) of the SFR require a commodity broker or CMS licence holder to compute at the close of each business day:

(a) the total amount of money deposited in trust accounts;

(b) the total amount of money required to be deposited in trust accounts; and

(c) the commodity broker's or CMS licence holder's residual interest in the accounts or funds.

210 The discussion will be prefaced by a brief description of the Seg Fund Statement. The Seg Fund Statement was part of a prescribed form which MFGS submitted to MAS on a quarterly basis as part of its obligations as a CMS licence holder under the SF(FM)R (see [16] above). For ease of reference, a sample of MFGS' Seg Fund Statement dated 31 March 2011 is annexed to this judgment at Annex A. There are two sections to the Seg Fund Statements. The first section is titled "Segregation Requirements", with six separate items set out thereunder.

211 A number of items in the first section of the Seg Fund Statement are important and should be explained. First, item 1 of the Seg Fund Statement sets out the "Net Ledger Balances in Accounts of Customers". According to Mr Yap, this item was calculated based on an aggregate of the Ledger Balance C/F under the accounts of MFGS' customers at the particular date. Item 2, which set out "Securities (at fair value) Belonging to Customers", did not apply to MFGS and no sums were reflected under that heading in the ordinary course. Item 3 set out the "Net Unrealised Profit/(Loss) in Open Contracts". Mr Yap explains that MFGS took into account the aggregate Unrealised Profits and Forward Value of the LFX and Bullion transactions in calculating item 3. Item 4 sets out the "Net Equity of Customers", being a sum of the first three items.

212 Item 5 then sets out the "Deficit Accounts", being the aggregate of accounts of customers that were in deficit. The heading of item 6 under the first section of the Seg Fund Statement states "Amount Required to be Segregated". The amount reflected under this item is the sum of the funds represented under items 4 (which in turn is the sum of items 1, 2, 3) and 5. Mr Yap also deposed in his eighth affidavit that the amount under item 6 is consistent with the aggregate of the Total Account Equity under the accounts of MFGS' customers as at that particular date. By way of reminder, the Total Account Equity is the aggregate sum of the Unrealised Profits, Forward Value and Ledger Balance C/F as reflected in the "Financial Statement" section of the Daily FX Activity Statement. Insofar as the "Net Unrealised Profit/(Loss) in Open Contracts" (*ie*, item 3), which covers the LFX and Bullion customers' Unrealised Profits and Forward Value, is used in the calculation of the "Amount Required to be Segregated" under item 6, the first section of the Seg Fund Statement *appears* to require MFGS to segregate moneys to cover the LFX and Bullion customers' Unrealised Profits and Forward Value.

213 However, it is important to recognise that the Seg Fund Statement, which is prepared under the SF(FM)R, is a financial reporting device. It does not (and cannot) prescribe what is to be held by MFGS on statutory trust for its customers. What is required to be segregated is governed by the CTA and CTR (in the case of Bullion transactions) and the SFA and SFR (in the case of LFX transactions). I have dealt with this at length above (see [72]–[165]). The words used in the first section of the Seg Fund Statement, therefore, should not be taken to change or alter the scope and operation of the statutory trust which is imposed by the applicable statutes and the CTR and SFR. Thus, the fact that the words "amount *required to be* segregated" are used in item 6 of the Seg Fund Statement cannot, *ipso facto*, lead to the conclusion that the funds stated here by MFGS *must* be held by MFGS on statutory trust for the LFX and Bullion customers, if such funds do not fall within the scope of the statutory trusts under the CTR or SFR.

214 The second section is titled "Location of Segregated Funds". This section sets out where the "Amounts Required to be Segregated" (*ie*, item 6) are in fact located. These include deposits in

segregated bank accounts (see item 8) and receivables from margin deposits with clearing houses and other parties (see items 10 and 12). The total amount of the sums segregated is then reflected under item 15. A CMS licence holder is then required to reflect the difference between the total amount segregated (item 15) and the amount required to be segregated (item 6) under item 16 as "Excess/(Deficiency) Funds in Segregation". A positive number indicates that the CMS licence holder has segregated more funds than it was, *by the first section of the Seg Fund Statement*, required to segregate. A negative number indicates that the CMS licence holder is, *by the first section of the Seg Fund Statement*, required to segregate more funds that it has in fact segregated.

215 A perusal of the Seg Fund Statement reveals that item 16 ("Excess/(Deficiency) Funds in Segregation") is *not* equivalent to MFGS' "residual financial interest" in its *Customer Segregated Accounts*, contrary to Vintage's contention. One should note that item 15 does *not* represent the total amount of cash segregated on behalf of MFGS' customers in bank accounts, as it includes both net equities with futures brokers and other receivables. The excess or deficiency (as the case may be) in item 16 can thus be attributed to a number of factors, which includes, *inter alia*, (i) MFGS advancing its own moneys to the Customer Segregated Accounts under item 8, (ii) an excess or deficiency of receivables under items 10 and 12, (iii) an excess or deficiency of net equities from futures brokers under item 11, or (iv) a combination of the above. It is therefore entirely possible for MFGS to have advanced more of its own funds into the Customer Segregated Accounts than the amount that is reflected under item 16. Thus, the amount reflected under item 16 is not the same as the amount of MFGS' *own moneys* which it had advanced to its Customer Segregated Accounts as it was permitted to do under the CTR and SFR. Hence, Vintage is wrong to assert that the computations performed by MFGS through the Seg Fund Statement are the "precise computations required by the relevant legislations/regulations" (see [209] above) since it is not evident from the face of the Seg Fund Statements whether item 16 records MFGS's "residual financial interest" in the Customer Segregated Accounts.

216 The LFX and Bullion Report states that the Seg Fund Statement was prepared by MFGS as part of its "internal risk management procedure" to ensure that a sufficient buffer was maintained in the Customer Segregated Accounts to prevent inadvertent cross-margining (*ie*, the process by which excess funds of one customer is used to satisfy another customer's obligation). In line with this, the Liquidators submit that the Seg Fund Statement was merely a *pro forma* statement (*ie*, a financial statement which is prepared on an "as if" basis). Mr Yeap submits that MFGS managed its risk by ensuring that it had sufficient funds to pay off all its liabilities (including contingent and future debts) in the putative situation where these liabilities all crystallised at the same time. To that end, MFGS always ensured that there would be a positive figure at item 16 of the Seg Fund Statement.

217 In my judgment, MFGS' preparation of the Seg Fund Statement on a daily basis is not clear and unambiguous evidence that MFGS intended to hold money equivalent to the Unrealised Profits and Forward Value on an express trust for the LFX and Bullion customers. In Mr Yeap's words, there were "too many permutations" and many things that were in "constant flux" for anything to be ascertained with precision. I agree. The Seg Fund Statement does not clearly distinguish which funds are MFGS' own funds, from the funds MFGS holds on trust (if any). The Seg Fund Statement is merely an accounting and financial reporting device which MAS required CMS licence holders to prepare as part of its regulatory framework. In and of itself, the Seg Fund Statement could not confer more rights on the customers of CMS licence holders than were prescribed by the applicable statutes and regulations. By the same token, the Seg Fund Statement itself is not an express declaration of trust on MFGS' part.

(3) The Daily FX Activity Statements

218 Vintage also points to three other aspects of how MFGS allowed Vintage to deal with its Unrealised Profits and Forward Value, to show that MFGS treated the Unrealised Profits and Forward Value as Vintage's moneys. As evidenced in the Daily FX Activity Statements, these were that MFGS:

(a) allowed withdrawal of funds by Vintage which exceeded the Ledger Balance C/F;

(b) did not charge interest on the sums withdrawn which exceeded the Ledger Balance C/F, but only charged interest when a customer incurred a Margin Deficiency; and

(c) factored in the Unrealised Profits and Forward Value when calculating Vintage's Margin Excess or Margin Deficiency.

219 It is clear from the documentary evidence and Daily FX Activity Statements that MFGS took into account the Unrealised Profits and Forward Value in accounting for a customer's margin requirements. MFGS would only issue a margin call if a customer's Total Account Equity fell below the necessary margins. No margin call would be issued even if the Ledger Balance C/F was in negative territory if there were sufficient Unrealised Profits and Forward Value to cover the margin requirements. In the same vein, MFGS allowed withdrawal of funds by Vintage which exceeded the Ledger Balance C/F and did not charge interest on those excess withdrawals. Also, MFGS only charged interest when a customer incurred a Margin Deficiency (*ie*, where the sums in a customer's Total Account Equity fell below the necessary margins which MFGS required a customer to maintain). The question I have to answer is whether these facts show that MFGS held the Total Account Equity (or at least the Forward Value and Ledger Balance C/F) on trust for the LFX and Bullion customers.

220 The Liquidators explain that although Vintage did withdraw from its account moneys exceeding its Ledger Balance C/F, this withdrawal was not in respect of any proprietary moneys owned by Vintage. Rather, Mr Yeap explains that any withdrawn sum which exceeded the Ledger Balance C/F was an "advance" made by MFGS by way of early payment of MFGS' obligations which would otherwise only be payable on Value Date. To support this point, the Liquidators point out that the "withdrawn" amount was applied only against the Ledger Balance C/F so as to bring the Ledger Balance C/F into negative territory, and was not applied against the Forward Value or Unrealised Profits.

221 Mr Thio disputes Mr Yeap's "advance" theory. He submits that if such a sum was truly an advance or early payment made by MFGS to Vintage, it was not commercially sensible for MFGS to have neglected to charge interest on the same, given that the deficiency in the Ledger Balance C/F on these occasions ran in the millions, and points out that MFGS charged interest whenever its customers' margins were in deficit even though the deficit might not have been large. Mr Thio also submits that while MFGS is allowed under the CTR and SFR to make payment of sums to customers (see reg 21(3)(*a*) of the CTR and reg 21(*a*) or (*d*) of the SFR), it is not permitted to advance or lend moneys. Thus, Mr Thio submits that only two possibilities existed: either the Total Account Equity of the LFX and Bullion customers is held on trust, or at least the Forward Value and Ledger Balance C/F are held on trust by MFGS for its customers (as the numbers also supported the latter interpretation).

222 I do not think that the above facts lead inexorably to the conclusion that MFGS held the Unrealised Profits and Forward Value on trust for the LFX and Bullion customers. For one, the fact that MFGS factored in the Unrealised Profits and Forward Value in calculating a customer's margin excess or deficiency was but a reasonable practice. A margin requirement is in essence security required by MFGS for keeping a certain position open. The Unrealised Profits and Forward Value, being choses in action an LFX or Bullion customer has against MFGS, were values which MFGS could properly take into account in deciding whether a customer's margin was sufficient.

223 Indeed, it seems to me consistent with commercial reality *not* to require a customer to put in further funds with MFGS just because his or her Ledger Balance C/F fell below the margin requirements if the customer possessed choses in action against MFGS, *viz*, the Unrealised Profits or Forward Value, the value of which exceeded the margin requirements. Moreover, the fact that MFGS took this into account did not mean that Vintage was entitled to *actual money*.

224 In support of its argument that it was free to deal with its Unrealised Profits and Forward Value, Vintage refers me only to two specific Daily FX Activity Statements which document Vintage's withdrawals of amounts exceeding its Ledger Balance C/F, being the Daily FX Activity Statements of 5 May 2011 and 6 May 2011. I find it pertinent that although the sums withdrawn exceeded the Ledger Balance C/F, this excess was adequately covered by the Forward Value, which consisted of sums with Value Dates of 9 May 2011 and 10 May 2011 respectively. This is consistent with the Liquidators' submissions that the withdrawal was an advance by MFGS to Vintage by way of early payment of MFGS's payment obligations vis-à-vis the Forward Value, a crystallised future debt, which would otherwise have been paid only on the relevant Value Date. It would have been clear to MFGS when making the advance on 5 and 6 May 2011 that although the advance exceeded the available funds in the Ledger Balance C/F, any shortfall in the Ledger Balance C/F would shortly be repaid on 9 and 10 May 2011 when the Forward Value became due and payable and paid into the Ledger Balance.

225 In this regard, whilst the Daily FX Activity Statements of 9 and 10 May 2011 have not been produced in evidence, it is clear from Vintage's May 2011 interest breakdown statement which Mr Yap produced in his fourteenth affidavit filed in OS 289 that by 10 May 2011, the Ledger Balance C/F was no longer negative. Another key fact is that the withdrawal was (as evidenced by the Daily FX Activity Statements) applied only against the Ledger Balance C/F and *not* against the Unrealised Profits or Forward Value. This showed that when Vintage withdrew funds in excess of the Ledger Balance C/F, it incurred a debt obligation to MFGS. If the sums covering the Unrealised Profits and Forward Value had in truth been held on trust by MFGS for Vintage, these payments made on 5 and 6 May 2011 by MFGS to Vintage which were in excess of Vintage's Ledger Balance C/F would have been a payment of moneys made to its rightful beneficial owner, and no debt obligation would have been incurred by Vintage to MFGS. This is additional corroboration of the position that an LFX or Bullion customer did not have the unfettered ability to deal with the Unrealised Profits and Forward Value.

226 In my view, the Daily FX Activity Statements do not show that MFGS intended to hold the Unrealised Profits and Forward Value or any equivalent moneys on trust for Vintage or its other LFX or Bullion customers. The advances made by MFGS to Vintage which exceeded Vintage's Ledger Balance C/F on 5 and 6 May 2011 were more in line with an administrative and commercial decision by MFGS to advance funds to an important and high-value customer like Vintage with the knowledge that it would be repaid from the Forward Value in the matter of a few days. This may also explain why interest was not charged against the negative Ledger Balance C/F.

227 I am also of the opinion that the CTR and SFR do not prohibit the making of such advances. Since the CTR and SFR do not require MFGS to hold moneys equivalent to the Unrealised Profits and Forward Value on trust for the LFX and Bullion customers, to the extent that MFGS placed moneys in its Customer Segregated Accounts to cover these obligations, this was MFGS' "residual financial interest" that it is entitled to withdraw under reg 21(3)(*d*) of the CTR and reg 21(*e*) of the SFR as long as the withdrawal does not result in a customer's account becoming under-margined or under-funded. Regulation 23(3) of the SFR also expressly allows money belonging to a CMS licence holder to be used to pay its customer.

(4) Alleged admissions by the Liquidators and former directors of MFGS

228 Vintage submits that the Liquidators and former directors of MFGS have previously taken the position that MFGS treated the Unrealised Profits and Forward Value as being held on trust for the LFX and Bullion customers. This can be seen from, *inter alia*:

(a) statements made by Mr Rajendra Bhambhani, the Managing Director of MFGS ("Mr Bhambhani"), that MFGS had always treated the accrued profits of its customers as segregated moneys;

(b) statements made by Mr Yap and other documentary evidence that showed that MFGS treated US$477m worth of funds (which presumably included the amounts segregated to cover Unrealised Profits and Forward Value) as being held on trust for customers;

(c) the treatment of the Unrealised Profits and Forward Value in the Daily FX Activity Statements; and

(d) statements made by Mr Yap that "excess margins" were held on trust for customers.

229 I have dealt with the treatment of the Unrealised Profits and Forward Value in the Daily FX Activity Statements above (see [218]–[227]) and will not reprise what has been said, except to repeat that I am not persuaded by Vintage's reliance on the Daily FX Activity Statements. I will deal with the "excess margins" point below at [284]–[289] when addressing the Margin Excess issue. Hence, in this section, I will only discuss items (a) and (b) mentioned above.

230 In oral submissions, Vintage did not pursue the fact that statements had been made by Mr Bhambhani and other former directors/officers of MFGS to Vintage. In any event, Mr Vinod Puranmal Bansal ("Mr Vinod") who filed an affidavit on behalf of Vintage attesting to this fact, did not provide any objective or documentary evidence proving the fact that these statements were in fact made. While not casting doubt on the veracity Mr Vinod's evidence, the lack of documentary basis for these assertions means that they must be treated with caution. I therefore do not derive much assistance from Mr Vinod's evidence in this regard.

231 A stronger basis for Vintage's arguments, which it understandably relies on to greater effect, is documentary evidence which allegedly shows that MFGS and the Liquidators considered that US$477m (a sum which included the value of the Unrealised Profits and Forward Value) were "Customer's Funds" which were held on trust by MFGS for the LFX and Bullion customers. Such documentary evidence include, *inter alia*:

(a) Mr Yap's first affidavit filed in support of OS 22;

(b) a statement of affairs certified by one of MFGS' directors on 9 December 2011 ("the Statement of Affairs");

(c) the Seg Fund Statement dated 31 October 2011; and

(d) a presentation at a creditor's meeting dated 28 May 2012 prepared by the Liquidators ("the Presentation").

232 I have reproduced the order made by the court in OS 22 at [23] above. In that order, the court authorised the then-provisional liquidators to distribute "the segregated and proprietary funds of customers as may be accountable by MFGS to its customers … in the control of the Provisional Liquidators … an amount of up to US$350million". In support of the OS 22 application, Mr Yap filed an

affidavit ("Mr Yap's OS 22 affidavit") where he stated the following:

> 18. ***In accordance with the provisions of the SFA and its related regulations … and the terms and conditions of the MTA (specifically, clause 15 of the MTA)*** , the funds received by MFGS from its customers (including any excess margins) were to be held on trust for such customers by MFGS. *Funds provided by a customer were held for that customer in trust accounts, and … segregated from MFGS' own funds or assets, i.e. the Customer's Funds.* …
>
> 19. These funds held in trust accounts were commingled as between the customers, as permitted under Regulation 16(4) of the [SFR] and clause 15.1 of the MTA, and were utilised by MFGS for purposes of funding the margins and settlement of its customers' respective positions. To this end, MFGS maintained various customer segregated accounts with both local and offshore financial institutions, as well as counter-parties, correspondent brokers, and clearing members, both in Singapore and abroad. As at 31st October 2011 and based on the books and records of MFGS, *the aggregate Customer's Funds held by MFGS amounted to about US$477 million* (based on the then prevailing marked-to-market values). [emphasis added in italics and in bold italics]

233 The inference from Mr Yap's above statement is that a sum of US$477m was held on trust for MFGS' customers. The Seg Fund Statement dated 31 October 2011 in turn sets out the "Amount required to be segregated" under item 6 as a sum of US$476,767,804. One would recall that in calculating item 6, MFGS took into account the Total Account Equity, which would include the Unrealised Profits and Forward Value (see above at [212]). This exact figure of US$476,767,804 is also set out in the Statement of Affairs as the "Balances owing partly secured creditors". In the Presentation in May 2012 made to the creditors of MFGS by the Liquidators, the sum of US$476,768,000 was stated to be available for "*partly secured creditors*", and also stated to be the value of *segregated funds* (as opposed to MFGS' own funds) owing to creditors and customers.

234 As the sum of US$477m largely corresponds to the sum of US$476,767,804 in the 31 October 2011 Seg Fund Statement, Vintage contends that this must mean that MFGS intended to hold, and always held, the Unrealised Profits and Forward Value on trust for the LFX and Bullion customers. Vintage complains that given that there was amongst other things (i) no qualification in OS 22 that the Unrealised Profits and Forward Value were not held on trust for the LFX and Bullion customers; and (ii) no qualification that any portion of the US$477m was not held on trust for the LFX and Bullion customers, coupled with the position taken by the Liquidators at the Presentation that the US$477m was segregated funds and not MFGS' own funds, the Liquidators in now submitting that the Unrealised Profits and Forward Value are *not* held on trust, have resiled from their previous position.

235 Much of the evidence Vintage relies on (for, *eg*, the Presentation, the Statement of Affairs and Mr Yap's OS 22 affidavit) occurred post-liquidation. To the extent that Vintage suggests that these pieces of evidence showed that the Liquidators treated the Unrealised Profits and Forward Value as being held on trust, and by so doing created an express trust post-liquidation, this would be in direct contravention of the winding-up regime in Singapore (see s 300 of the Companies Act). Against the argument that these pieces of evidence show that MFGS always considered itself as holding the Unrealised Profits and Forward Value on trust, a number of other comments may be made.

236 First, the Presentation and the Statement of Affairs reflect the sum of approximately US$477m as liabilities owed to "partly secured creditors". This may give rise to two meanings. On the one hand, it may mean that the sum reflects *only* the secured claims of these "partly secured creditors". On the other hand, it may also be read to mean that the sum is made up of *all* the claims of the "partly secured creditors", some of which were unsecured claims. The presence of such ambiguity in the Presentation and Statement of Affairs counts against a finding of clear and strong evidence of an

intention on MFGS' part to hold these sums on trust for its customers. It is therefore possible that *not all* of the US$477m was held on trust for MFGS' customers.

237 Second, an examination of the contents of Mr Yap's OS 22 affidavit clearly negatives Vintage's submission that there was no qualification therein. In respect of the LFX and Bullion customers, Mr Yap set out at para 64 to 67 of his OS 22 affidavit a number of pertinent points, some of which are reproduced here:

> 64. … MFGS acted as principal to customers who traded in LFX and bullion, and margins placed by such customers and realised profits (actually paid by MFGS in respect of such LFX and bullion transactions) would be paid into MFGS' customer segregated accounts (i.e. would be and are compromised in the Available Customers' Funds). *However, LFX and bullion customers may also have unrealised profits and losses and/or realised profits* ***which were not paid*** *into MFGS' customer segregated accounts*.
>
> …
>
> 67. *Any* ***realised profits not yet paid*** *by MFGS and not comprised in the Available Customers' Funds, and any estimated* ***unrealised profits*** *(if applicable)* ***would not*** *be taken into account under the proposed Interim Distribution as such monies are* ***not*** *comprised in the Available Customers' Funds.* Such monies would instead constitute an unsecured debt provable in the winding-up of MFGS … [emphasis added in italics and bold italics]

238 It is true that on the face of it, there appears to be inconsistencies between Mr Yap's evidence at paras 18 and 19 of his OS 22 affidavit, and these later qualifications made in paras 64 to 67. However, these inconsistencies show that Mr Yap's alleged admissions in OS 22 are neither clear nor strong evidence that MFGS had an intention to hold moneys equivalent to the Unrealised Profits and Forward Value on trust for the LFX and Bullion customers.

239 Mr Yeap accepted at the hearing that the Liquidators relied on the Seg Fund Statement in coming to the sum of US$477m, but disputes that this created or evinced a trust. The comments I have made above with respect to the Seg Fund Statement apply equally here (see [217] above). In summary, item 6 of the Seg Fund Statement ("Amount Required to be Segregated") cannot prescribe what the applicable statutes require MFGS to segregate. It also does not enable one to identify MFGS' true "residual financial interest" in the Customer Segregated Accounts. To the extent the Liquidators have relied on the Seg Fund Statement in arriving at the sum of US$477m, it is possible that they have erred or proceeded on the wrong understanding of the legal principles. Thus, insofar as Mr Yap deposed in his affidavit that the "aggregate Customer's Funds held by MFGS amounted to about US$477 million", I accept Mr Yeap's submissions that this statement *must be read in the whole context of Mr Yap's OS 22 affidavit*, which expressly states that "unrealised profits and losses and/or realised profits not paid into MFGS' customer segregated accounts" would not be comprised in the "Available Customers' Funds". This same position was also communicated to Vintage and MFGS' other customers in a letter dated 11 January 2012 from the Liquidators. In my judgment, Mr Yap did not express the view that MFGS held sums equivalent to the Unrealised Profits and Forward Value on trust for the LFX and Bullion customers.

240 In any event, it is clear from Mr Yap's OS 22 affidavit that MFGS held the "Available Customers' Funds" on trust in order to comply with the provisions of the SFA and its related regulations (see the quote reproduced at [232] above). To me, as with the Seg Fund Statement and MFGS' audited financial statements, the most that can be said is that these documents demonstrate an intention on MFGS' part to *comply with the applicable laws and regulations*, which is not the same as an intention

to hold the moneys as an *express trustee*. Hence, I am of the view that for the reasons given above, these alleged admissions of the Liquidators do *not* show that MFGS intended to hold moneys equivalent to the Unrealised Profits and Forward Value on express trust for its customers.

Conclusion on the Express Trust issue

241 Before concluding, the case of *Sogo Department Stores* should be considered in further detail. In that case, the Court of Appeal was also faced with the issue as to whether the certainty of intention to create a trust was present. The facts of the case are as follows: Sogo, a departmental store, had agreed to sell Hinckley's products under a concessionaire agreement. Under the concessionaire agreement, the products belonged to Hinckley, and when these products were sold, the proceeds were collected by Sogo's cashiers and banked into Sogo's general account along with the sale proceeds of all the other goods in Sogo's store. Sogo subsequently entered judicial management, and Hinckley claimed that Sogo held the sale proceeds of its products on trust for it, on the basis that Sogo had received the moneys as Hinckley's agent. After surveying the law on this issue, the Court of Appeal held (at [40]):

> What is essential to bear in mind is that this was a business arrangement, initially for a period of three years. The parties would have realised that it would involve the sale of a huge number of … goods. *It would be wholly unrealistic to suggest that the parties expected a trust to arise in relation to the sum received in respect of each item of goods. The commercial context would militate against any such imputation or inference of a trust*. Furthermore, at the same time, there were many concessionaries operating within the department store. … [emphasis added]

242 The comments made by the Court of Appeal are apposite to the present situation. As a general observation, it does not seem likely that MFGS would have set aside its own moneys and held them on trust in order to satisfy obligations owed to the LFX and Bullion customers in respect of the Unrealised Profits and Forward Value, even though neither was due and payable then. It appears to run against commercial logic that MFGS could have intended to hold moneys on trust for the benefit of the LFX and Bullion customers in anticipation of meeting its contingent or future debt obligations, which it owed as principal to them. For one, the quantum of the Unrealised Profits fluctuated on a daily basis, and could even turn into losses instead. As for Forward Value, this is by *definition* a sum to be paid in the future. In the absence of express agreement (as compared to *Mac-Jordan*, where the agreement contemplated the setting-up of a trust account in respect of the retention moneys), it does not appear to me commercially sensible for MFGS to have satisfied this future debt obligation earlier by creating a trust over its value.

243 It is a constant theme in Vintage's submissions that MFGS was not permitted by the CTR or SFR to put in funds into the Customer Segregated Accounts for "operational convenience" or for "internal risk management". Vintage harks back to reg 21(4) of the CTR and reg 23(1)(*a*) of the SFR to emphasise the point that MFGS was only allowed to put its own funds into the Customer Segregated Accounts in order to prevent its customers' accounts from becoming under-margined or under-funded.

244 Against this, it should be noted that reg 21(4) of the CTR and reg 23(1)(*a*) of the SFR are drafted fairly widely. These two regulations allow a CMS licence holder or commodity broker to advance "sufficient money" from its own funds "to prevent any or all of his customers' trust accounts from becoming under-margined" (reg 21(4) of the CTR), or "to prevent the customer's trust account from being under-margined or under-funded" (reg 23(1)(*a*) of the SFR). As the proverbial saying goes, prevention is better than cure. The provisions under the CTR and SFR permit prevention, but they do not compel cure. What is "sufficient" depends on the facts and circumstances. A prudent and

cautious CMS licence holder or commodity broker might advance a great deal more funds, including amounts that would cover the Unrealised Profits and Forward Value, so as to ensure that under-margining of any of its customers' accounts would *never* occur. In this regard, it should be recalled that MFGS took into account the Total Account Equity (which would include the Unrealised Profits and Forward Value) in calculating a customer's margin requirements (see [14(j)] above). As MFGS allowed the customer to use the value of the chose owed by MFGS to him or her to engage in further trades, it may have been prudent for MFGS, within the framework of the CTR and SFR, to inject its own funds to cover the Unrealised Profits and Forward Value. In my view, such conduct would not be inconsistent with the CTR and SFR. Finally, *even if* MFGS was in breach of reg 21(4) of the CTR and reg 23(1)(*a*) of the SFR, the fact that MFGS placed *more* of its *own moneys* into the Customer Segregated Accounts than it was allowed to would not, of itself, give the LFX and Bullion customers a proprietary interest in those funds.

245 I have also gone through the documentary and other pieces of evidence which Vintage relies on in seeking to prove that MFGS intended to hold moneys equivalent to the Unrealised Profits and Forward Value on trust for its customers. In respect of each category of evidence, I have found that they do not constitute clear and strong evidence that MFGS intended to hold moneys equivalent to the Unrealised Profits and Forward Value on trust for its customers. Even considering all the categories of evidence together, I am also of the view that they do not present a compelling picture that MFGS intended to hold moneys equivalent to the Unrealised Profits and Forward Value on trust for its customers.

246 With this finding, there is no need for me to consider whether the alleged trust satisfied the requisite certainty of subject matter and certainty of objects. There is also no longer any need for me to consider whether the court should exercise its equitable jurisdiction to set aside the alleged trust for mistake.

247 Nonetheless, as Vintage has made submissions on the certainty of subject matter, I will briefly address this element. I find difficulty with this element, and am doubtful that Vintage could have proved that the alleged trust had the requisite certainty of subject matter, even if MFGS' intention to hold the Unrealised Profits and Forward Value on trust was proven. In the main, the presence of commingling between customers' funds and MFGS' own funds in the Customer Segregated Account and the fact that the quantum of Unrealised Profits fluctuated on a daily basis are factors which appear to negate the certainty of subject matter. However, I will not delve further into this issue.

248 Finally, in conclusion on the Express Trust issue, I would mention that it appears to me that MFGS has conducted itself judiciously and in a commercially sound manner. However, in the absence of an express declaration of trust, mere judicious conduct consistent with commercially sound decisions does not amount to clear, strong evidence of an intention to create a trust.

Conclusion on the Proprietary Claim Issue

249 For the reasons given above, I hold that the LFX and Bullion customers do not have a proprietary entitlement to the sums standing in the Customer Segregated Accounts that may be broadly attributable to the value of the Unrealised Profits and Forward Value whether by way of statutory or express trust. Instead, the LFX and Bullion customers have choses in action against MFGS for the value of the Unrealised Profits and Forward Value, and must prove the claims as unsecured creditors in the winding up of MFGS.

The Value Date issue

Parties' submissions

Parties' submissions

250 Vintage argues in the alternative that even if it does not have a proprietary entitlement to the Unrealised Profits and Forward Value, it has a proprietary entitlement to the sum of US$10,793,862.06 reflected as its Ledger Balance C/F of the Daily FX Activity Statement dated 1 November 2011, instead of the US$4,711,459.18 in the Ledger Balance C/F of its Daily FX Activity Statement dated 31 October 2011. The difference arises because a sum of US$6,082,324.50 reflected as Forward Value in the Daily FX Activity Statement dated 31 October 2011 carried a Value Date of 1 November 2011 and a further US$78.38 was to be credited to Vintage's Ledger Balance C/F on 1 November 2011 as well.

251 Essentially, this dispute relates to the time at which settlement between MFGS and its customers occurred or should have occurred. This is material to determining the appropriate quantum of Vintage's Ledger Balance C/F to which Vintage may properly claim a proprietary entitlement.

252 To elaborate, the Liquidators' submissions are that an LFX or Bullion customer's proprietary interest in the Ledger Balance C/F must be determined with reference to what has actually been *paid* into his or her account before the commencement of MFGS' winding up on 1 November 2011. MFGS only paid moneys due to customers to the Ledger Balance at the close of business every business day, and MFGS ran a 24-hour dealing and service desk with a notional close of business pegged to New York time. Based on these facts, MFGS' notional close of business on 1 November 2011 would have in actual fact been 5.00am on 2 November 2011 in Singapore and settlement of a customer's Forward Value with a Value Date of 1 November 2011 would have occurred at 5.00am on 2November 2011 in Singapore time as well. As a consequence, MFGS did not, and could not have, paid the Forward Value with a Value Date of 1 November 2011 as this would have violated the *pari passu* principle, given that the payment would have been made to customers from MFGS' own funds *after the commencement of winding up*. The last payment made by MFGS to the account and credit of the LFX and Bullion customers was therefore made on 5.00am on 1 November 2011 (Singapore time), and evidenced in the Daily FX Activity Statement dated 31 October 2011.

253 Mr Yap provided the following illustration and explanation on affidavit:

> The fact is that, based on the Liquidators' inquiry, MFGS' [close of business] on a particular day is at 5.00 pm (New York time) of that same calendar day (i.e. at 5.00 am (Singapore time) the following calendar day). By way of illustration, a trade entered into at 3.00 am (Singapore time) 31 October 2011 (i.e. 3.00 pm (New York time) 30 October 2011) would have been recorded with having a trade date of 30 October 2011.

In a similar vein, Mr Yap also stated that a Daily FX Activity Statement dated a particular day would only have been prepared and issued after MFGS' close of business of that particular day (which was based on New York time). Hence, Mr Yap deposes that:

> … the statements of accounts dated 1 November 2011 were automatically generated and issued ***after*** MFGS' [close of business] on 1 November 2011 (i.e. the next calendar day, 2 November 2011, and ***after*** the appointment of provisional liquidators on 1 November 2011). [emphasis in bold italics in original]

254 In essence, the Liquidators say that a Daily FX Activity Statement reflecting a date of "X" would cover trades and transactions which occurred between 5.00am on "X" (Singapore time) and 5.00am on "X + 1" (Singapore time) ("MFGS' Business Cycle").

255 Further, the Liquidators say that MFGS made payment of the Forward Value to the LFX and Bullion customers from its "residual financial interest" within the Customer Segregated Accounts. The

evidence given by the Liquidators on the payment made by MFGS on the Value Date is that:

> … [P]rior to 1 November 2011, available cash balances maintained in MFGS' accounts with UBS and DB, being MFGS' House Funds, would from time to time on an ad-hoc basis be subject to 'cash sweeps'. Such monies were transferred to, and were deposited in MFGS' "*customer segregated bank accounts*" not as payment to customers but as addition to the then "*residual financial interest*" of MFGS in the "*customer segregated bank accounts*" of MFGS. It was from that "*residual financial interest*" of MFGS that specific payments would be made as and when relevant to customers in discharge of MFGS' **debt** obligation(s) to customers for their bi-lateral principal-to-principal transactions pursuant to MFGS' express right to do so under the relevant legislation. … [emphasis in original]

256 Vintage's position is that it has a proprietary claim over the quantum of its Ledger Balance C/F set out in the Daily FX Activity Statement issued by MFGS dated 1 November 2011. First, Vintage cites a number of authorities to contend that the date at which MFGS went into liquidation (*ie*, 1 November 2011) should be used as the date to determine Vintage's proprietary entitlement. Second, Vintage refers to certain documents which, on its argument, show that MFGS credited the Forward Value to Vintage's account on 1 November 2011. Third, Vintage contends that the Liquidators have not adduced evidence to support their assertion that the Forward Value would be converted to Ledger Balance C/F only at the close of business in New York on 1 November 2011 (*ie*, 5.00am on 2 November 2011 in Singapore). The clauses in the MTA, particularly the definition of "Value Date" and "Business Day", are against the Liquidators' position. Lastly, Vintage submits that even if MFGS did not in fact credit the Forward Value to Vintage's Ledger Balance C/F on 1 November 2011 (Singapore time), MFGS *should* have done so, and accordingly, this court should hold that Vintage has a proprietary interest in the money that *should* have been paid to Vintage's Ledger Balance C/F.

Relevance of commencement of provisional liquidation on the LFX and Bullion customers' proprietary claim

257 I deal first with Vintage's submission that the date on which voluntary liquidation commences is the most appropriate date to determine a party's proprietary entitlement. Vintage relies on *Re Lehman Brothers Finance Asia Pte Ltd (in creditors' voluntary liquidation)* [2013] 1 SLR 64 ("*Re Lehman Brothers Finance Asia*") and on authorities from New South Wales and the United Kingdom for this proposition. I do not derive much assistance from this submission as Vintage's argument fails to take into account *how* a statutory trust arises over a customer's Ledger Balance C/F.

258 It should be recalled that in the context of MFGS' relationship as principal counterparty to the LFX and Bullion customers, it is only after MFGS has made payment to a customer by crediting funds to the Ledger Balance C/F that funds fall within the ambit of the statutory trusts under the CTR and SFR (see [128] above in respect of the Bullion transactions and [163]–[164] in respect of the LFX transactions).

259 However, once MFGS commenced winding up, it is mandated by s 300 of the Companies Act to apply its assets *pari passu* in satisfaction of all liabilities. Under s 300 of the Companies Act, the distribution of the property of the company should be made as follows:

> **Distribution of property of company**
>
> **300.** Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied pari passu in satisfaction of its liabilities, and, subject to that application, shall, unless the articles otherwise provide, be distributed among the

members according to their rights and interests in the company.

260 When MFGS was placed into provisional liquidation on 1 November 2011, this was the date on which it commenced voluntary winding up under s 291(6)(*a*) of the Companies Act. MFGS was thus not able to discharge any unsecured debt obligation owed to the LFX and Bullion customers that became due and payable on or after the commencement of MFGS' winding up on 1 November 2011 in priority to other unsecured debts.

261 Where MFGS acts as agent for its customers in respect of transactions executed on an exchange, the receivables due from these exchanges are held on trust for its customers. Hence, any sums received from the exchange after MFGS entered into provisional liquidation will *not* form part of MFGS' assets, but will be received on trust for the respective customers. However, where MFGS acts a principal counterparty against its customers, such as in the LFX and Bullion transactions, the same does not apply. In these instances, MFGS does not hold the choses in action on trust for its customers. Any payment in discharge of these unsecured debt obligations ahead of payments to other unsecured creditors made after the commencement of liquidation would constitute a disposition of MFGS' own assets and violate s 300 of the Companies Act.

262 Therefore, for funds to be caught by the ambit of the statutory trusts imposed by the CTR and SFR, they must be paid to an LFX or Bullion customer through the crediting of the Ledger Balance C/F before the commencement of MFGS' winding up.

263 It is therefore insufficient for Vintage to assert that the date on which MFGS went into liquidation should be used to determine Vintage's proprietary entitlement. Further, the authorities Vintage relies on are not particularly useful. *Re Lehman Brothers Finance Asia* dealt with the date at which foreign currency debts should be converted to Singapore dollars under r 181 of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed). This is not in dispute in this case. The other authorities cited by Vintage, *Re MF Global Australia*, *Re Global Trader Europe Ltd (in liq) (No 2)* [2009] EWHC 699 (Ch) and *In the matter of MF Global UK Limited (in special administration)* [2013] EWHC 92 (Ch) were also of little assistance as they concerned the interpretation of jurisdiction-specific provisions (*ie*, the Corporations Act 2001 (Cth) and Corporations Regulations 2001 (Cth) and Chapter 7 and 7A of the Client Asset Sourcebook of the United Kingdom Financial Services Authority Handbook).

When payment of the Forward Value occurred or should have occurred on the Value Date

264 Flowing from the above, and as stated above at [251], the crux of the issue is when the payment of the Forward Value with a Value Date of 1 November 2011 occurred or should have occurred, and whether this occurred or should have occurred prior to the commencement of MFGS' winding up on 1 November 2011.

265 In my judgment, MFGS did not pay, and was not *required* to pay, the Forward Value with a Value Date of 1 November 2011 before MFGS was placed into provision liquidation on 1 November 2011. Vintage and the LFX and Bullion customers thus only have a proprietary entitlement to what is represented as the Ledger Balance C/F on the Daily FX Activity Statement dated 31 October 2011. I now explain my reasons for so holding.

266 At the outset, I observe that the MTA does not clearly set out when the real-time settlement of the Forward Value between MFGS and the LFX and Bullion customers was contractually required to occur on a particular Value Date. Vintage relies on the definition of "Value Date" and "Business Day" in the MTA to contend that settlement of Forward Value should have occurred on the specified calendar date with reference to Singapore time. Value Date is defined in the MTA as "the *date* on which the

respective obligations of the parties to a foreign exchange or [over-the-counter] transaction are to be performed". However, the MTA does not explicitly state that this "*date*" in the definition of Value Date should be determined with respect to Singapore time, instead of New York or London time. Business Day is defined in the MTA as "any day on which MFGS is open for business in Singapore". This definition does not refer either to MFGS' operational hours, or the time fixed for MFGS' close of business or the settlement of positions.

267 The Liquidators produced a report published by the Singapore Foreign Exchange Market Committee titled "The Singapore Guide to Conduct and Market Practices for Treasury Activities" (November 2010 Ed) ("the Guide") to show that the timing of MFGS' close of business was in line with market practice. The relevant portions of the Guide read:

> **1. MARKET TRADING HOURS**
>
> 1.1 Foreign exchange trades, whether direct or via a broker, transacted prior to 5.00 AM Sydney time, are done in conditions that are not considered to be normal market-conditions or market hours. Thus the official range in currency markets will be set from 5.00 AM Sydney time on Monday morning, all year round.
>
> 1.2 The *recognized closing time for the currency markets will be 5.00 PM Friday New York time, all year round*.
>
> …
>
> **3. VALUE DATES**
>
> 3.1 Quotations for foreign exchange are value spot, which is defined as two business days from the date of transaction.
>
> 3.2 *Misunderstandings can arise over the definition of "value date" and "business day"*, given the observance of different holidays in various financial centres. In quoting prices, market participants are therefore *strongly urged to make clear to their counterparties the precise dates for settlement of transactions*.
>
> [emphasis added]

268 I note that the Guide states that the currency markets open at 5.00am Sydney time on Monday mornings, and closes at 5.00pm New York time on Friday evenings, all year round. The Guide does not state that the industry practice is for brokers to peg their *daily* close of business to New York time, regardless of the jurisdiction in which they operate. In fact, the Guide encourages brokers to "make clear to their counterparties the precise dates for the settlement of transactions". It is regrettable that the contract between MFGS and its customers did not do so.

269 No evidence has been led by Vintage to show that the facts set out by the Liquidators, inasmuch as they relate to the time of MFGS' close of business, were wrong or based on false assumptions. Instead, I find that the evidence is consistent with the position that MFGS' close of business was pegged to New York time and that the Daily FX Activity Statement was dated according to MFGS' Business Cycle (see [254] above).

270 The Guide makes it clear that the currency markets close at 5.00pm New York time every Friday evening. Trades could thus have been carried out by MFGS' customers until 5.00am every

Saturday morning (in Singapore time). In this regard, I find it significant that MFGS did not produce Daily FX Activity Statements for Saturday and Sunday of the week. For example, although Vintage produced its Daily FX Activity Statements dated 17, 26, 27, 28 and 31 October 2011, as well as 1 November 2011, no statements were produced in evidence for 29 and 30 October 2011 which was a Saturday and Sunday respectively. Mr Vinod also stated in his ninth affidavit that no Daily FX Activity Statements were issued by MFGS on the weekends.

271 In my opinion, the fact that MFGS did not issue statements on the weekends is evidence which is consistent with the position that MFGS' close of business was pegged to New York time. Hence, a trade carried out at 3.00pm New York time on a Friday afternoon (date: "Y") being 3.00am on a Saturday morning (date: "Y + 1") in Singapore time, would have been reflected on the Daily FX Activity Statement dated "Y" and not on a Daily FX Activity Statement dated "Y + 1", since the latter statement would not have been issued in MFGS' ordinary course of business. This would also be consistent with the industry practice stated in the Guide. The date stated in the Daily FX Activity Statement must thus be read with reference to MFGS' Business Cycle (see [254] above), and not strictly in accordance with Singapore time.

272 In the course of the hearing before me, Vintage did not challenge the Liquidators' position that the daily settlement prices for open positions were marked to the market at MFGS' close of business on that particular day (*ie*, 5.00pm New York time on the same calendar day). Given that the daily settlement prices for open positions were reflected on the Daily FX Activity Statements, it would also follow that the Daily FX Activity Statements were only produced after MFGS' close of business. This is also the Liquidators' position (see [253] above).

273 Thus, it has been established that at least two events occurred at or after MFGS' close of business respectively. First, at MFGS' close of business, any open positions would be marked to the market, and a customer's Unrealised Profits or Unrealised Losses would be calculated accordingly. Second, after this was done, the Daily FX Activity Statements would be produced and sent to customers.

274 While the above shows the time at which daily settlement prices for open positions were calculated and Daily FX Activity Statements produced, does it go so far as to show that the Forward Value was only paid to customers at MFGS' close of business? There has been scant evidence as to the time at which this was made.

275 There is some force in Vintage's argument that as a matter of obligations between the parties under the MTA, it *should have* been able to withdraw the Forward Value with a Value Date of 1 November 2011 on 1 November 2011 (Singapore time) since the value of these funds, in any event, were already in the Customer Segregated Accounts. Vintage in fact sought to withdraw US$6m on 31 October 2011 and a further US$5.5m on 1 November 2011. Also, even though the close of MFGS' business on 31 October 2011 was notionally fixed at 5.00am on 1 November 2011 (Singapore time), MFGS could still have paid the Forward Value due on 1 November 2011 any time after 5.00am on 1 November 2011 in Singapore time – prior to MFGS' entry into provision liquidation – and need not have paid it only at 5.00am on 2 November 2011 (*ie*, MFGS' notional close of business for 1 November 2011).

276 However, in my judgment, two points stand in the way of Vintage's argument. First, there is no evidence that the Forward Value with a Value Date of 1 November 2011 *was in fact paid and credited* to Vintage's Ledger Balance C/F before the commencement of MFGS' winding up. In this regard, Vintage's reliance on the Daily FX Activity Statement dated 1 November 2011 as evidence that MFGS had made payment of the Forward Value due to Vintage's Ledger Balance C/F is not persuasive. If it is

accepted (which I do) that the Daily FX Activity Statement was only produced after MFGS' close of business on 1 November 2011, the mere fact that the Daily FX Activity Statement dated 1 November 2011 was produced does not show that the Forward Value was credited *before MFGS entered provisional liquidation*.

277 Second, it is significant that the daily settlement prices were marked to market at MFGS' close of business (a fact which Vintage has not disputed). In my view, given the many customers and product lines which MFGS dealt with on a daily basis, a system for clearing and settlement and the reconciliation of accounts had to be put in place. I am persuaded that in the ordinary course of business, settlement and reconciliation of marked-to-market positions occurred at MFGS' close of business.

278 As a matter of operational efficacy, I find it more likely than not that settlement and reconciliation of *all accounts* (and not just the marked-to-market positions) would have occurred at the same time. This lends support to the argument that MFGS would, in its ordinary course of business, only have credited the Forward Value to the Ledger Balance C/F, and made payment of the equivalent value of funds into or within the Customer Segregated Accounts, at its close of business. It was therefore not able to make payment of the Forward Value that would ordinarily have been paid on its close of business on 1 November 2011, as MFGS had already been placed in provisional liquidation. I would also observe that if MFGS had departed from its ordinary practice and made payment to its customers before it went into provisional liquidation, this might be considered an unfair preference within s 99 of the Bankruptcy Act, liable to be unwound under s 329 of the Companies Act.

279 Finally, I note that this position is not inconsistent with the terms of the MTA. As stated above at [266], the provisions of the MTA do not set out in great detail MFGS' mechanism for settlement. What is clear is that MFGS must perform its obligations under foreign exchange or over-the-counter transactions (*ie*, the LFX and Bullion transactions) on the Value Date, which is defined as the *date* on which MFGS is to perform its obligations.

280 Given that a Value Date for any particular transaction is only reflected in the Daily FX Activity Statements and not in any other contractual documents, the "date" on which MFGS is to perform its obligations should be read consistently with the Daily FX Activity Statements. The Daily FX Activity Statements were in turn, dated according to MFGS' Business Cycle (see [254] above). Thus, the "date" on which MFGS is to perform its obligations (*ie*, the Value Date) must also take reference from this business cycle. In this regard, there is no mention in the MTA of the *time* at which the obligation is to be performed on a particular Value Date. The MTA should thus be interpreted to permit MFGS' payment obligation to be performed only at the close of business on a particular Value Date. Therefore, on this ground, I do not accept Vintage's submission that even if MFGS did not in fact credit the Forward Value to Vintage's Ledger Balance C/F on 1 November 2011 (Singapore time), contractually, MFGS *should* have done so.

281 In the circumstances, there was therefore no other evidence or basis on which I could have found that the Forward Value with a Value Date of 1 November 2011 was in fact paid and credited, or should have been paid and credited, into Vintage's (and the LFX and Bullion customers') Ledger Balance C/F before MFGS was placed into provisional liquidation. For the reasons given above, I find on the basis of the evidence that it is more likely than not that MFGS ordinarily made payment of the Forward Value at its close of business on the applicable Value Date. As a consequence, the Forward Value with a Value Date of 1 November 2011 had not yet been paid and credited to the LFX and Bullion customers' Ledger Balance C/F before the provisional liquidators were appointed and as a result, is not caught by the ambit of the statutory trusts imposed by the CTA and SFA and their

attendant regulations. This is also in accordance with the terms of the MTA.

Conclusion on the Value Date issue

282 By the above, Vintage cannot assert a proprietary right to the US$10,793,862.06 reflected under its Ledger Balance C/F in its Daily FX Activity Statement dated 1 November 2011. Vintage is only beneficially entitled to US$4,711,459.18 reflected under its Ledger Balance C/F in its Daily FX Activity Statement dated 31 October 2011.

283 For completeness, I should highlight that this is not a case where MFGS has failed to pay what it was required to pay before it entered into provisional liquidation. There may well be cases where a commodity broker or CMS licence holder fails to pay or credit a customer's Ledger Balance C/F when it was clearly contractually required to do so. In such a hypothetical situation, on the interpretation preferred in this judgment, money *should have* either "accrued to" the customer (under reg 21(1)(*a*) of the CTR), or been "received on account of" the customer (under reg 16(1)(*a*) of the SFR). Whether as Vintage argues, the court would hold that a customer has a proprietary interest in the money that *should* have been paid is not a point that I have determined.

The Margin Excess issue

284 Finally, Vintage also argues that it has a proprietary interest in what is reflected as Margin Excess on its Daily FX Activity Statement dated 31 October 2011. Vintage makes this contention on the basis that the Liquidators, in particular Mr Yap, had unequivocally admitted on affidavit in OS 22 that MFGS had treated "excess margins" as moneys held on trust by MFGS for its customers. Vintage relies on para 18 and 53 of Mr Yap's first affidavit filed in OS 22. Paragraph 18 of Mr Yap's OS 22 affidavit has been set out above (see [232]) and para 53 is reproduced here:

> 53. As highlighted earlier in this affidavit, in accordance with the provisions of the SFA and its related regulations (including, in particular, provisions of the [SFR]) and the terms and conditions of the MTA (including, in particular, clause 15 of the MTA), the funds *received* by MFGS *from* customers (*including any excess margins*) were to be and are held on trust for such customers by MFGS … [emphasis added]

Vintage also refers me to Mr Yap's first affidavit filed in OS 289, where he repeated the points set out above.

285 From what Mr Yap has deposed in his affidavit set out above, it cannot be doubted that the Liquidators take the position that "excess margins" are held on trust for customers pursuant to the applicable statutes and regulations, as well as cl A15 of the MTA. The critical question is therefore the definition of "excess margins".

286 Vintage submits that "excess margins" are equivalent to the Margin Excess as reflected in its Daily FX Activity Statements. As I have explained above at [14(j)], the Margin Excess is calculated by deducting the Initial Margin Requirement from a customer's Total Account Equity. Since the Liquidators have affirmed on affidavit that a customer's "excess margins" are held on trust for a customer, Vintage posits that it is entitled to the sum reflected as Margin Excess on its Daily FX Activity Statement dated 31 October 2011, being US$11,547,454.49.

287 However, as the Liquidators point out, Mr Yap has stated in the same breath in his OS 22 affidavit that these "excess margins" are included in the funds *received* by MFGS *from* customers. Plainly, the Unrealised Profits and Forward Value, being contingent and future debt obligations owed

by MFGS to its customers, are not funds "*received* by MFGS *from* customers".

288 With respect therefore, I find that the link that Vintage seeks to be drawn between "excess margins" as stated by Mr Yap, and the Margin Excess in the Daily FX Activity Statements a highly tenuous one and is not clear and strong evidence of MFGS' intention to create a trust over the Margin Excess.

289 To the extent that Vintage seeks to argue that Mr Yap's statements in his OS 22 affidavit amount to an express declaration of trust, the remarks I have made in relation to Vintage's submissions on the effect of the Liquidators' conduct (being conduct occurring after the commencement of winding up) at [235] above apply here in equal measure. I therefore do not accept that these statements made by Mr Yap in his affidavits show that Vintage is entitled to the sums reflected as Margin Excess in its Daily FX Statement dated 31 October 2011.

Conclusion

290 Due to the nature of the claims and the issues before me, this judgment has inevitably been a long one. Here, I set out a summary of my findings:

(a) The Bullion transactions are governed by the CTA and CTR, notwithstanding MFGS' capacity as principal counterparty. The CTA and CTR impose a statutory trust over "money … accruing to a customer" (pursuant to reg 21(1)(*a*) of the CTR). A statutory trust arises over a Bullion customer's Ledger Balance C/F, but not the money segregated to cover MFGS' Unrealised Profits or Forward Value obligations, as the latter is not "money … accruing to a customer".

(b) In respect of the LFX transactions, the SFA and SFR impose a statutory trust over "money on account of" a customer (pursuant to reg 16(1)(*a*) of the SFR). A statutory trust arises over an LFX customer's Ledger Balance C/F, but not money segregated to cover MFGS' Unrealised Profits or Forward Value obligations, as the latter is not "money received on account of" a customer.

(c) MFGS did not intend for the moneys segregated to meet its Unrealised Profits and Forward Value obligations to be held on express trust for the LFX and Bullion customers.

(d) The LFX and Bullion customers only have a proprietary claim, pursuant to the statutory trusts under the CTA, CTR, SFA and SFR, to the sums actually paid and credited to the Ledger Balance C/F before MFGS appointed provisional liquidators on 1 November 2011. As MFGS only paid its customers at its close of business which was pegged to the close of business in New York, the last relevant payment made was evidenced in the LFX and Bullion customers' Daily FX Activity Statements dated 31 October 2011, and Vintage and the LFX and Bullion customers only have a proprietary claim to sums reflected as Ledger Balance C/F therein.

(e) MFGS did not hold, and did not intend to hold, the Margin Excess on trust for the LFX and Bullion customers.

291 By the foregoing, I find in favour of the Liquidators on the substantive issues. I will hear parties on costs.

Annex A

SEGREGATION REQUIREMENTS AND LOCATION OF SEGREGATED FUNDS

31/03/2011		
Segregation Requirements		US$
1.	Net Ledger Balances in Accounts of Customers	704,738,439
2.	Securities (at fair value) Belonging to Customers	-
3.	Net Unrealised Profit/(Loss) in Open Contracts	(1,366,800)
4.	Net Equity of Customers (Sum of Items 1, 2, and 3)	703,371,639
5.	Add Deficit Accounts	825,235
6.	Amount Required to be Segregated (Sum of 4 and 5)	704,196,874
Location of Segregated Funds		
7.	Segregated Cash on Hand	-
8.	Deposited in Segregated Bank Accounts	372,035,466
9.	Segregated Securities Deposited by Customers	-
10.	Receivables from and Margin Deposits with Clearing House	82,902,494
11.	Net Equities with Futures Brokers	256,718,606
12.	Receivables from and Margin Deposits with Other Parties	21,582,935
13.	Investments in Securities or Other Instruments	-
14.	Others (please specify)	-
15.	Total Amount Segregated (Sum of Items 7 to 14)	733,239,501
16.	Excess/(Deficiency) Funds in Segregation (Items 15 minus Item 6)	29,042,627