IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 49

Civil Appeal No 142 of 2015

Between

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)

… *Appellant*

And

(1) CHAY FOOK YUEN
(In his capacity as joint and several liquidator of MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation))

(2) TAY PUAY CHENG
(In his capacity as joint and several liquidator of MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation))

(3) BOB YAP CHENG GHEE
(In his capacity as joint and several liquidator of MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation))

(4) MF GLOBAL SINGAPORE PTE LIMITED (IN CREDITORS' VOLUNTARY LIQUIDATION)

… *Respondents*

Civil Appeal No 216 of 2015

Between

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)

… *Appellant*

And

(1) MF GLOBAL SINGAPORE PTE LIMITED (IN CREDITORS' VOLUNTARY LIQUIDATION)
(2) CHAY FOOK YUEN
(In his capacity as joint and several liquidator of MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation))
(3) BOB YAP CHENG GHEE
(In his capacity as joint and several liquidator of MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation))
(4) TAY PUAY CHENG
(In his capacity as joint and several liquidator of MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation))

… *Respondents*

In the matter of Originating Summons No 289 of 2013

In the matter of SECTION 310 AND PART X OF THE COMPANIES ACT (CAP. 50)

And

In the matter of MF GLOBAL SINGAPORE PTE LIMITED (IN CREDITORS' VOLUNTARY LIQUIDATION)

Between

(1) MF GLOBAL SINGAPORE PTE LIMITED (IN CREDITORS' VOLUNTARY LIQUIDATION)

(2) CHAY FOOK YUEN
(In his capacity as joint and several liquidator of MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation))

(3) BOB YAP CHENG GHEE
(In his capacity as joint and several liquidator of MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation))

(4) TAY PUAY CHENG
(In his capacity as joint and several liquidator of MF Global Singapore Pte Limited (In Creditors' Voluntary Liquidation))

… *Plaintiffs*

And

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)

… *Defendant*

Civil Appeal No 143 of 2015

Between

VINTAGE BULLION DMCC

… *Appellant*

And

MF GLOBAL SINGAPORE PTE LIMITED (IN CREDITORS' VOLUNTARY LIQUIDATION)

… *Respondent*

Civil Appeal No 217 of 2015

Between

VINTAGE BULLION DMCC

… *Appellant*

And

MF GLOBAL SINGAPORE PTE LIMITED (IN CREDITORS' VOLUNTARY LIQUIDATION)

… *Respondent*

In the matter of Originating Summons No 578 of 2013

In the matter of SECTION 310 OF THE COMPANIES ACT
(CAP. 50)

And

In the matter of MF GLOBAL SINGAPORE PTE LIMITED
(IN CREDITORS' VOLUNTARY LIQUIDATION)

Between

VINTAGE BULLION DMCC

… *Plaintiff*

And

MF GLOBAL SINGAPORE PTE LIMITED (IN CREDITORS' VOLUNTARY LIQUIDATION)

… *Defendant*

JUDGMENT

[Trusts] — [Statutory trusts] — [Commodity Trading Act] — [Securities and Futures Act]
[Trusts] — [Express trusts] — [Certainties]

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Vintage Bullion DMCC (in its own capacity and as representative of the customers of MF Global Singapore Pte Ltd (in creditors' voluntary liquidation))
v
Chay Fook Yuen (in his capacity as joint and several liquidator of MF Global Singapore Pte Ltd (in creditors' voluntary liquidation)) and others
and other appeals

[2016] SGCA 49

Court of Appeal — Civil Appeals Nos 142, 143, 216 and 217 of 2015
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Tay Yong Kwang JA
26 February 2016

2 August 2016 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 These are appeals against the decision of the High Court judge ("the Judge") in *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] 4 SLR 831 ("the Judgment"). There are four appeals in total. The first two, Civil Appeal No 142 of 2015 ("CA 142") and Civil Appeal No 143 of 2015 ("CA 143"), are

appeals on substantive issues. The remaining two, Civil Appeal No 216 of 2015 ("CA 216") and Civil Appeal No 217 of 2015 ("CA 217"), are appeals on the issue of costs. CA 142 and CA 143 turn on whether there is either a *statutory* trust under the Commodity Trading Act (Cap 48A, 2009 Rev Ed) ("the CTA"), the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA") and their Regulations *and/or* an *express* trust, either of which would render the customers concerned *secured (as opposed to unsecured) creditors* now that the company concerned has gone into *liquidation*.

2 Essentially, the appeals concern the treatment of certain sums of money in MF Global Singapore Pte Ltd's ("the Company") bank accounts. These bank accounts are known as the "Customer Segregated Accounts". The sums of moneys reflect certain forms of profits arising from leveraged foreign exchange ("LFX") and leveraged commodity ("Bullion") transactions (collectively, "LFX and Bullion transactions") that the customers had entered into with the Company as direct counterparty to the transactions. The customers assert proprietary claims in relation to these sums of money either by way of a statutory trust and/or an express trust. On the other hand, the Company and its liquidators claim that these sums of money are beneficially owned by the Company because they were not due and payable to the customers on the date the Company went into liquidation and the Company did not have the intention to create a trust over those moneys. If the Company and its liquidators are correct, the customers would stand as unsecured creditors, and would have to prove these unsecured debts in the winding up of the Company. We now turn to the facts before us in the present appeals.

The facts

3 The facts of this case are comprehensively (and helpfully) set out by the Judge in the Judgment. The Company is a commodity broker as defined under s 2 of the CTA and is authorised as the holder of a Capital Markets Services ("CMS") licence to carry out, *inter alia*, LFX trading under the SFA. On 1 November 2011, the Company went into liquidation. The liquidators of the Company ("the Liquidators") and the customers of the Company brought Originating Summons No 289 of 2013 and Originating Summons No 578 of 2013, respectively, under s 310 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") for the court to determine questions arising out of the winding up of the Company.

4 Vintage Bullion DMCC ("Vintage") had, prior to 1 November 2011, entered into LFX and Bullion transactions with the Company. In these appeals, Vintage acts both in its personal capacity and as the representative of 57 other customers of the Company who had similarly entered into LFX and Bullion transactions with the Company as a direct counterparty (collectively referred to as "the Customers"). In the LFX and Bullion transactions, the Customers would buy or sell currencies and commodities, respectively, in a bid to profit from fluctuations in exchange rates or fluctuations in the prices of commodities. Neither the LFX nor the Bullion transactions involved the physical delivery of the currencies or the commodities involved (see the Judgment at [6]). In respect of the LFX and Bullion transactions, a customer concluded the transaction with the Company which acted as principal on its own behalf. This was not always the case for the Company, however, as it did act as the customers' agent in other types of transactions. The Liquidators submit that this distinction is important. They take the position that the

Company only holds customer profits on trust for the customer when it acts as an *agent* for the customer, but not where it acts as *principal* on its own behalf.

5 To facilitate trades in the LFX and Bullion transactions, the Customers would transfer funds to the Company to enable trades to be executed and to maintain open trades by way of "margin" (*ie*, trading by placing a certain percentage of the value of the position concerned with the Company) (see the Judgment at [8]). Each time a customer wished to enter into a trade, an order could be placed with the Company either by calling the Company's desk dealers or by utilising an online platform, so long as a customer had sufficient margin to enter into the transaction. Trading by way of "margin" meant that the customer concerned did not need to advance the full value of an open position to the Company in order to enter into a transaction; he merely needed to pay the required "margin" (a percentage of the value of the position concerned) to establish an open position and the remainder would essentially be "borrowed" from the Company. At all times, the Customers needed to meet both the Initial Margin Requirement and the Maintenance Margin Requirement imposed by the Company. The Initial Margin Requirement referred to the margin required to *enter* into a transaction. This was determined by the volatility of the position concerned, and could be adjusted from time to time. The Maintenance Margin Requirement stipulated the minimum margin required to *maintain* an open position subsequent to the deposit of the initial margins for that open position – essentially, this was "the floor" against which a customer's cash position may fall as a result of unfavourable price movements during the lifespan of a transaction before the customer was required to deposit more margins to prevent involuntary liquidation of his open position or the closing of his open position (also referred to as a "margin call").

6 The moneys that the Customers transferred to the Company to facilitate trades were required, under certain Regulations, to be segregated from the Company's own funds. For example, money *received from a customer* to margin, guarantee or secure contracts in commodity trading had to be segregated from the funds of a commodity broker under regs 21 and 22 of the Commodity Trading Regulations 2001 (Cap 48A, S 578/2001) ("the CTR"). Similarly, money *received on account* of a customer in LFX trading (which could be from the customer himself) had to be segregated from the funds of a CMS licence holder under reg 16 of the Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed) ("the SFR") (collectively referred to as "the Regulations"). The Regulations specified that commodity brokers and CMS licence holders were to account for such moneys in a *separate trust account* and were not to *commingle those moneys with other funds, including their own.* In the present case, the funds transferred *by the Customers to the Company* were deposited into the Company's bank accounts which the Company classified as ***"Customer Segregated Accounts"*** and were largely separate from the Company's own funds. The nature of the LFX and Bullion transactions was such that the funds transferred from the Customers to the Company were not onward-placed with any other party but remained in the Customer Segregated Accounts at all times. The subject of the dispute in the present case, however, does not concern the funds that were transferred from the Customers to the Company *per se* – it is undisputed that such funds were beneficially owned by the Customers. Rather, the dispute concerns the funds set aside by the Company from its own funds which represented the aggregate value of the profits arising *after* the LFX and Bullion transactions had been entered into.

7 During the lifespan of an LFX or Bullion transaction, one of three distinct types of profits may, at various times, arise *if* the movement of the underlying currency or reference bullion favoured the customer. These are: (1) the Unrealised Profits; (2) the Forward Value; and (3) the Ledger Balance. The Company would record the daily LFX and Bullion trade activity for each customer and the respective values of the three different types of profits arising from the trades entered into in individual Daily FX Activity Statements produced by the Company's back-end office operations system. We will now elaborate on each type of profit in turn.

8 As previously noted above at [4], the LFX and Bullion transactions are all speculative contracts that trade on differences. During the initial stage of an LFX or Bullion transaction when a transaction is entered into, the customer is taking a position in the market. At this stage, the customer has an "open position" as indicated in his Daily FX Activity Statement. As long as his position remains open, the customer is still speculating and exposed to movements in the market. His exposure will depend on whether the market is moving in the direction he has betted on or not. If the movement of the underlying currency or reference bullion favours the customer, the customer would have "***Unrealised Profits***" corresponding to the value of the open position for that particular day. On the contrary, if the movement of the market is against the customer's bet, the customer would have "Unrealised Losses". Therefore, although a value is assigned to the Unrealised Profits on a day-to-day basis, this was a purely notional rather than an actual figure − for what could be construed as Unrealised Profits one day would not only almost certainly be subject to variation the next according to the fluctuations in the market, but could very well morph into Unrealised Losses instead (there would then, in effect, be no longer any Unrealised *Profits* to speak of).

9 At the later stage of an LFX or Bullion transaction, the customer would enter into a final trade, thereby "closing" the position, and the Company would correspondingly issue a trade confirmation stating the price of the trade. Once the customer closes his position, he is no longer speculating. He has basically entered into an equal and opposite transaction to cancel the original transaction. At that point, his profits or losses from the transaction are crystallised. Given that the transactions deal with either a currency or a commodity, the customer closes his position by selling an equivalent amount of the same currency or commodity as he had previously bought; or if he had originally sold the currency or commodity which he did not actually have, he closes the transaction by buying an equal amount of the same product. On that date, if the position is closed at a profit to the customer, this would give rise to a sum reflected as the "***Forward Value***" in the "Financial Statement" section of the Daily FX Activity Statement of the customer concerned, calculated with reference to the price of the trade at which the position is closed. The Forward Value thereby crystallises on the date that the position is closed and is a fixed sum which is no longer subject to variation. The trade confirmation issued by the Company when a position is closed would also state a "*Value Date*" which is generally, though not always, two days after the closing of a position. On the Value Date, the sum previously reflected as Forward Value in the Daily FX Activity Statement would be credited to the customer's Ledger Balance. The customer concerned would then be able to request for a withdrawal of a sum amounting to the value of the Ledger Balance as indicated on his Daily FX Activity Statement. The aggregate sum of the Unrealised Profits, Forward Value and Ledger Balance in respect of all the transactions that had been entered into by the customer would be reflected in the "Financial Statement" section of the Daily FX Activity Statement as the customer's "***Total Account Equity***".

10 Turning now to the subject of the dispute in the present appeals, in its ordinary course of business, the Company *segregated from its own funds* a sum of money and placed this sum in the Customer Segregated Accounts to ensure that, at all times, there were *sufficient funds* parked in the Customer Segregated Accounts to cover the *Total Account Equity* of all the customers. Naturally, this included the value of the Forward Value and the Unrealised Profits arising from the LFX and Bullion transactions. Therefore, the Customer Segregated Accounts did not merely include moneys received *from* the customers, but also included these moneys segregated from the Company's own funds sufficient to cover the value of the Total Account Equity of all the customers. Within the Customer Segregated Accounts, the Company did not further segregate the moneys either between customers (*ie*, *into* separate *individual* bank accounts for each customer) or between different types of profits (*ie*, there were no separate bank accounts for Unrealised Profits, Forward Value or Ledger Balance). Therefore, when we speak of "crediting" the sum representing the Forward Value to the Ledger Balance (in the preceding paragraph), there is no actual transfer of moneys, *eg*, from one Company bank account to another Company bank account. The moneys remain in the same Customer Segregated Accounts. The "crediting" of the sum representing the Forward Value to the Ledger Balance is thus merely reflected in the changes made to the amounts in the Forward Value section and the Ledger Balance section of an individual customer's Daily FX Activity Statement on the Value Date.

11 In addition to the Daily FX Activity Statements, the "Seg Fund Statements" are another key piece of documentary evidence referred to by the parties. The Company ensured that *sufficient funds* were parked in the Customer Segregated Accounts through a *daily* preparation of the Seg Fund

Statements. The Seg Fund Statements were part of a prescribed form which the Company submitted to the Monetary Authority of Singapore ("MAS") on a quarterly basis as part of its obligations as a CMS licence holder under the Securities and Futures (Financial and Margin Requirements for Holders of Capital Markets Services Licenses) Regulations (Cap 289, Rg 13, 2004 Rev Ed) (reg 27(1)(*a*), (3)(*a*), (9)(*b*) and (9)(*e*)). The Company was required under reg 22(12) of the CTR and reg 37(1) of the SFR to compute the following information on a daily basis: (a) the total amount of customer funds deposited in segregated accounts on behalf of customers; (b) the total amount of such customer funds required by the respective statutes and the Regulations to be deposited in segregated accounts on behalf of such customers; and (c) the amount of the Company's residual interest in the segregated accounts. Counsel for the respondents, Mr Andre Yeap SC ("Mr Yeap"), initially stated at the hearing before us that he thought that there would be *other* documents (apart from the Seg Fund Statements) which had been prepared in compliance with the statutory obligations to compute such information. He subsequently withdrew the statement made, however, and stated that "he d[id] not know" whether there was other information as to how his clients, the Company, had computed such information. In any event, he accepted that the Seg Fund Statements were the *only* documents that we had *on record* to demonstrate how the Company carried out its obligations to compute such information daily. If there were other documents, the Liquidators were under an obligation to disclose them and, since they had failed to do so, they could not rely on such non-disclosure to their advantage.

12 Turning to the Seg Fund Statements, they demonstrate that the Company would calculate at the close of each business day the "Amount Required to be Segregated" and the "Total Amount [in fact] Segregated". The

Company would compare the two to calculate whether there was an excess or deficiency of funds in segregation. An excess of funds would demonstrate that there were sufficient funds segregated to meet what the Company viewed as its segregation requirements under the respective statutes. To calculate the "Amount Required to be Segregated", the Company would total up the aggregate value of the Unrealised Profits, Forward Value and Ledger Balance of all of the Company's customers on the particular date and deduct the accounts in deficit. The "Amount Required to be Segregated" therefore reflected the *Total Account Equity* (as reflected in the individual Daily FX Activity Statements) of all of the Company's customers on that particular date. What is noteworthy is that the Company did not merely classify "Ledger Balance" under the "Amount Required to be Segregated", but also included customer profits in the form of "Forward Value" and even "Unrealised Profits" when calculating this total amount.

13 The Company would thereafter identify in the Seg Fund Statements the "Total Amount [in fact] Segregated". For the purposes of the present appeals, we are only concerned with the funds deposited in the "Segregated Bank Accounts" as stated in the Seg Fund Statements which the Liquidators accept refer to moneys maintained in the Company's Customer Segregated Accounts. It is undisputed that the aggregate value of the (LFX and Bullion) Customers' Unrealised Profits, Forward Value, and Ledger Balance (as part of the Amount Required to be Segregated) was *in fact* segregated as part of the Total Amount Segregated in the Customer Segregated Accounts. The Liquidators, however, dispute that the amounts segregated to represent the Forward Value and Unrealised Profits arising from the LFX and Bullion transactions were segregated with the *intention* to create a trust over those moneys, or that the statutes have *imposed* a trust over the same.

14 Instead, the Liquidators claim that the sums representing the Forward Value and the Unrealised Profits arising from the LFX and Bullion transactions in the Customer Segregated Accounts constitute a part of the Company's "residual financial interest" in the Customer Segregated Accounts (*ie*, moneys beneficially owned by the Company). Although the Regulations do prohibit the commingling of funds (reg 21(1) of the CTR and reg 16(1)(*c*) of the SFR), reg 21(4) of the CTR and reg 23(1)(*a*) of the SFR each provide that a commodity broker or CMS licence holder can from time to time advance from his own funds *sufficient money* to *prevent* any or all of his customers' accounts from becoming under-margined or under-funded. It is clear that such provisions have been drafted fairly broadly (as was also recognised by the Judge at [244] of the Judgment, albeit for a different point). The Liquidators accept that the sums in the Customer Segregated Accounts representing the value of the *Ledger Balance* were held on trust for the Customers. The key question in these appeals is therefore whether the sums representing *Unrealised Profits* and *Forward Value* segregated by the Company and placed in the Customer Segregated Accounts constituted the residual financial interest of the Company (which were advanced merely to prevent under-margining of the Customers' accounts), ***or*** whether they were moneys segregated in recognition of the *beneficial ownership* of the Customers in these sums.

15 Turning to the present appeals, Vintage had opened an account with the Company on 21 August 2006 and engaged in, *inter alia*, LFX and Bullion transactions through this account. However, Vintage had closed out all of its open positions in its LFX and Bullion transactions prior to the date of the Company's liquidation. Vintage's Daily FX Activity Statement dated 31 October 2011 reflected the following sums (in USD):

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

It is evident that Vintage does not have any Unrealised Profits. Thus, it advances its arguments in respect of the Unrealised Profits as the representative of the 57 other Customers who, at the date of the liquidation of the Company, had not closed out all of their open positions in their LFX and Bullion transactions. The Unrealised Profits and Forward Value in dispute for all the Customers amount to a total of about US$13.4m.

16 After the Company entered into provisional liquidation on 1 November 2011, the Liquidators applied to court by way of Originating Summons No 22 of 2012 for an order that they be authorised to distribute an amount up to US$350m to customers identified by the Liquidators as having proprietary interests in certain funds. On 23 April 2012, Vintage received payment of the sum of about US$5m 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 and it subsequently transpired that the parties did not agree as to how the Unrealised Profits and Forward Value arising out of the LFX and Bullion transactions should be treated as a matter of law. This triggered the applications under s 310 of the Companies Act for the court to determine questions arising out of the winding up of the Company.

The decision in the court below

17 The Judge found in favour of the Company on the substantive issues (*ie*, that there was neither a statutory trust imposed on the Unrealised Profits nor the Forward Value arising out of the LFX and Bullion transactions (collectively, "the Sums"), nor an express trust over the Sums). At the outset, the Judge characterised the Company's obligations owed to the Customers in respect of the Unrealised Profits and Forward Value as choses in action, with the former being a contingent debt obligation – contingent on the transaction being closed out, and the latter being a certain future debt obligation (as a form of prospective liability) in which the obligation to pay had arisen but need not be *performed* until the Value Date (see the Judgment at [48] and [49]). In contrast, the Judge characterised the Ledger Balance as a certain present debt as a customer could require the Company to effect immediate payment of the sum representing the Ledger Balance standing to his credit in his account with the Company (see the Judgment at [50]). The Judge observed that, *absent* any statutorily imposed or expressly declared trust, even the Ledger Balance merely represented a *chose in action* which the customer could enforce by calling on the Company for payment (see the Judgment at [53]).

18 In so far as the statutory trust issue was concerned, the Judge found that, although the words "statutory trust" were not used in regs 21 and 22 of the CTR or reg 16 of the SFR, by effectively stipulating that moneys falling within the ambit of the provisions belonged beneficially to the customer, the *effect* of the provisions was, *in substance*, to create or impose a statutory trust over the moneys concerned and "disallow a commodity broker or CMS license holder from using such moneys beneficially in the course of its business, which is the fundamental feature of a trust" (see the Judgment at [78] and

[155]). The Judge interpreted reg 21(1)(*a*) of the CTR in line with Parliament's intent to protect customers' funds and found that the statutory trust arises on the *receipt* or *accrual* of the money, securities or property, and not upon the segregation of the funds (see the Judgment at [101]). However, the Judge found that there was no statutory trust imposed on the Sums (*ie*, the moneys segregated to cover the Company's obligations in respect of the Sums) under the CTR or the SFR. The Sums were not "accruing to" the Customers under the CTR because the Unrealised Profits were merely contingent debt obligations that did not oblige the Company to hold any money for a customer in relation to them (see the Judgment at [121]), and the Forward Value was not due and payable prior to the Value Date and hence could not be said to have "come home" to the customer (see the Judgment at [122]). In addition, the Sums could not be considered to be money the Company had "received on account of its customer" under the ambit of the statutory trust imposed by the SFR for two reasons: first, the Sums were choses in action against the Company which vested in the Customers at all times and there was no underlying money that the Company could receive from or for its customer in either instance (see the Judgment at [158]), and, second, the moneys had not been placed by the Company into the "Customer Segregated Accounts" *to the credit of each customer's respective account*; rather, they formed the Company's "residual financial interest" (see the Judgment at [159]).

19 On the alternative argument that had been advanced – that the Company held the Sums on express trust for the Customers – the Judge rejected the argument on the basis that it had not been proved that the Company had sufficient certainty of intention to hold the moneys segregated to meet its Unrealised Profits and Forward Value obligations on trust. The

Judge was of the view that the mixing of alleged trust funds between "beneficiaries" and with the "trustee's" own funds was, in the absence of an express declaration of trust, likely to negative a finding of an intention to create a trust (see the Judgment at [190]). Therefore, the fact that the Company commingled its own funds with what Vintage alleged were funds held on express trust militated against a finding that the Company intended to hold moneys equivalent to the Sums on express trust for the Customers (see the Judgment at [188]). The Judge made the following findings in relation to various pieces of evidence that the Customers relied on to argue that the Company intended to hold the Sums on trust for the Customers:

> (a) The audited financial statements merely showed that the Company might, from an *accounting perspective*, have considered that it was not free to deal with the Sums that it had set aside as a prudential measure to satisfy all potential debt obligations as and when they fell due, and it did not necessarily follow that the Company intended to confer on the Customers a *legally enforceable* beneficial interest in the Sums, with the accompanying fiduciary obligations that would follow (see the Judgment at [205]). The Judge concluded that the Company's actions were 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 Customers (see the Judgment at [207]).
>
> (b) The Seg Fund Statement was merely an accounting and financial reporting device which the MAS required CMS licence holders like the Company to prepare as part of its regulatory framework. The Seg Fund Statements did not clearly distinguish which funds were the Company's own funds from that which the Company

held on trust for the Customers (if any) and therefore could not be an express declaration of trust (see the Judgment at [217]).

(c) The fact that the Company factored in the value of the Unrealised Profits and Forward Value to calculate a customer's margin excess or deficiency was but a reasonable practice and consistent with commercial reality, and did not mean that Vintage was entitled to *actual money* (see the Judgment at [222] and [223]). The advances made by the Company to Vintage which exceeded Vintage's Ledger Balance on 5 and 6 May 2011 were more in line with an administrative and commercial decision by the Company 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 a few days (see the Judgment at [226]), rather than an indication that the Company intended to hold the Sums on trust for Vintage or the Customers.

(d) The alleged admissions by the Liquidators and the former directors of the Company that the Sums were held on trust for the Customers contained inconsistencies, and taken together, the alleged admissions were neither clear nor strong evidence that the Company had an intention to the hold the Sums on trust (see the Judgment at [238]). Similarly, the documents demonstrated an intention to comply with the applicable laws and regulations but not an intention to hold the moneys as an express trustee (see the Judgment at [240]).

(e) It did not appear to be commercially sensible that the Company could have intended to hold moneys on trust for the benefit of the Customers in anticipation of meeting its contingent or future debt

obligations which it owed as principal to them (see the Judgment at [242]).

20 In so far as the cut-off date that would be used to determine the amounts paid and credited into the Customers' Ledger Balance was concerned, the Judge decided that the Customers' proprietary claim only extended to sums that had been paid and credited to the Ledger Balance *before* the Company appointed provisional liquidators on 1 November 2011 (see the Judgment at [265]). Given that the Forward Value with a Value Date of 1 November 2011 would ordinarily be paid at the close of business on that same date, the Judge found that the Ledger Balance at the time the Company appointed its provisional liquidators would not have included the Forward Value with a Value Date of 1 November 2011 (see the Judgment at [281]). Finally, the Judge found that there was no intention to hold the moneys constituting "margin excess" on trust for the Customers (see the Judgment at [288]).

21 On the issue of costs, the Judge ordered that the Liquidators' fees, costs and disbursements (inclusive of legal costs and expenses) of and incidental to the Originating Summonses were to be paid out of the liquidation estate of the Company and were not to be borne by the Customers. The Judge found that it was necessary for the Liquidators to bring the application under s 310 of the Companies Act for the due administration of the winding up of the Company and that Vintage's participation in the proceedings had assisted in the proper determination of the questions. Therefore, the Judge was of the view that the Liquidators' costs should not be borne by Vintage. Similarly, the Judge ordered that Vintage's legal costs and disbursements incurred in respect of the Originating Summonses were to be paid by Vintage and 51 of the Customers on a *pari passu* and rateable basis based on the quantum of their

respective LFX and/or Bullion claims for profit. Six customers that the Judge had found had expressly accepted that they had unsecured claims and had decided not to object were excluded from having to bear Vintage's costs. The Judge was of the view that, though Vintage's participation in the proceedings did provide assistance, it was also meant to advance the commercial interests of the Customers by staking a claim on the disputed amounts. The Judge thus ordered that Vintage's costs should be shared amongst the Customers whose commercial interests had been advanced, save for the six customers who had decided specifically not to object.

The issues

22 Three issues arise for our decision in the present appeals:

(a) The *first* is whether a *statutory* trust is imposed on the Sums ("Issue 1").

(b) The *second* is whether an *express* trust has been created in respect of the Sums ("Issue 2").

(c) The *third* relates to the issue of *costs* as noted above ("Issue 3").

23 As a preliminary point, the Liquidators submit that it is not possible for a trust to arise over the Sums because the Customers' interests in them are merely choses in action. In other words, the customer merely has a contractual right to the Sums, whether as a contingent debt obligation or a certain future debt obligation that is owed to him by the Company. The Liquidators have thus characterised the subject matter of the trust as choses in action, which can only be enforced by the Customers against the Company, and not the *moneys* that represent the value of the Sums and have been largely segregated by the

Company from its own funds. To establish a trust over "actual moneys", the Liquidators submit that the Customers first need to prove that the legal and beneficial right to sue for contingent and future debts have vested in the Company *and* that a contingent or future "right to a receivable" can be converted to a "trust over the receivable" and thereafter a "trust over *actual moneys*". All these conversions, the Liquidators submit, have not been proved by Vintage and in fact, are impossible to achieve. It would also not make practical sense to speak of the Company as the obligor-trustee holding these choses in action on trust for the Customers, the obligee-beneficiary, because in the event that the obligation is not performed, the obligor-trustee would then have to sue itself in order to enforce the chose.

24 With respect, we are of the view that this argument is misconceived and misses the question at the heart of the case that is to be determined here (and in that sense we would differ from the Judge's recognition that there was force in the argument as she noted at [58] of the Judgment). The question, in our view, is not whether there can be a trust over a chose in action. In fact, there is no question that the Customers directly hold the choses in action both legally and beneficially as they clearly possess the direct right to sue for the debt in their own names and need not sue via the Company. It would make no sense to view the chose in action as being held on trust by the Company for the Customers. Instead, the question is whether the Company holds the *subject matter* of the chose in action on trust, either by way of statute or by way of an express trust. The subject matter of the chose in action in respect of which the alleged trust arises has never been, and does not consist in, the choses in action themselves but, rather, the physical moneys in the Customer Segregated Accounts sufficient to cover the aggregate value of the Unrealised Profits and Forward Value arising out of the LFX and Bullion transactions. The

Liquidators' argument as to the Company's inability to hold a trust over choses in action is therefore inapplicable to the present case and only adds confusion to the analysis. We thus do not find it necessary to dwell any further on this.

25 Let us now turn to the respective parties' arguments.

The respective parties' arguments

26 ***Vintage's*** submissions on the main issues that we have identified (and which were also made on behalf of the other Customers) are as follows:

(a) The words "accruing to" and "received on account of" in the Regulations should be interpreted in a manner consistent with the interpretation adopted in other cases in the context of other legislative provisions to mean that which a customer is *legally entitled to* (and *not* what is "due and payable"). Vintage submits that in the present case the Customers become legally entitled to the Forward Value upon the closing out of their open positions, and it is merely that actual payment or re-classification of the Forward Value as Ledger Balance which happens on a later date – the Value Date. Given that the LFX and Bullion transactions were marked to market daily, Vintage further submits that the gains and losses arising out of the transactions are "realised" or "established" on a daily basis even before the position has been closed, and that the Unrealised Profits are thus "accruing to" or have been "received on account of" the Customers. Vintage alleges that the Customers' legal entitlement to the value of the Unrealised Profits is supported by the fact that the Company permitted the Customers to use the value of the Unrealised Profits as margins towards their outstanding open trade positions. Finally, Vintage

submits that a purposive and textual interpretation of the Regulations would lead to the same conclusion that the Sums fall within the ambit of the statutory trust for the following reasons:

(i) There is nothing in the Regulations to suggest that Parliament intended to create a distinction between Forward Value and Ledger Balance such that the sums representing each of them would be treated differently in relation to a statutory trust. The Regulations merely distinguish between Unrealised and Realised Profits (see reg 25(1) of the CTR).

(ii) If it is only the Ledger Balance that is protected under a statutory trust, it would be possible for commodity brokers and CMS licence holders to contractually bypass the customer protections contained in the Regulations through the use of extended Value Dates (*eg*, a Value Date of 30 days after the position has been closed by a customer).

(iii) There is nothing to suggest that Parliament intended a different level of protection where a commodity broker or CMS licence holder acts as an agent as opposed to when it is acting as a principal. The Judge's decision leads to the conclusion that a statutory trust arises over the Unrealised Profits and Forward Value of customers to whom the Company acts as their agent, but does not arise when the Company acts as principal.

(b) In any event, Vintage submits that an express trust over the Sums was created. In particular, the Company's intention to create an

express trust over the Sums can be inferred from the Company's conduct in the following circumstances:

(i) The Company ensured, on a daily basis, that sufficient assets were segregated in the Customer Segregated Accounts to cover the Sums.

(ii) The Company computed its residual interest in the segregated assets on a daily basis through the Seg Fund Statements and the remaining assets which were not declared as residual interest (including the Sums) were thereby treated as belonging to the Customers.

(iii) The Company did not declare the Sums in its audited financial statements as its own assets and even used the phrase "held in trust" to describe the assets in its audited financial statements of 2009 and 2010.

(iv) The Company had, in its ordinary course of business, allowed Vintage to withdraw amounts exceeding its Ledger Balance, and no interest had been charged on such withdrawals.

(v) In a presentation by the Liquidators to the creditors of the Company post-liquidation, the amount of "Total Liabilities" of the Company as of 31 October 2011 corresponded with the "Amount Required to be Segregated" in the Seg Fund Statement dated the same. It could thus be inferred that the sum segregated to represent the value of the Unrealised Profits and Forward Value of the Customers pertaining to the LFX and Bullion transactions was recognised as part of the "Total

Liabilities" of the Company upon liquidation, and was not part of the Company's own funds.

(c) On the issue of costs, Vintage submits that its costs should be paid out of the liquidation estate of the Company because the proceedings before the High Court were not adversarial in nature and Vintage, as the representative defendant in the proceedings, had assisted the court in the proper determination of the questions in both Originating Summonses. Alternatively, Vintage submits that its costs should be borne by all of the Customers including the six customers that were excluded from the costs order on a *pari passu* and rateable basis based on the quantum of their respective claims. Finally, Vintage submits that it should, like the Liquidators, be entitled to costs on an indemnity basis given that both the Liquidators and Vintage had assisted the court in equal measure in the determination of the questions.

27 The ***Liquidators'*** submissions on the main issues that we have identified are as follows:

(a) A statutory trust does not arise over the Sums because they were not placed *to the credit* of each customer's respective account and therefore cannot be said to be "accruing to" or "received on account" of the Customers. The daily Seg Fund Statements were merely intended to ensure that the Company had sufficient assets to meet all of its liabilities and was not a declaration that the "*Amount Required to be Segregated*" as indicated on the Seg Fund Statement, which included the "Total Account Equity" of the customers (and in turn included the aggregate of the Unrealised Profits and Forward Value), was to be held

on trust for all of the Company's customers. Finally, the Judge's interpretation of the statutory segregation and trust obligations does not result in uneven protection for customers because the statutory protection for every customer merely seeks to preserve the moneys and assets that belong to them, no more and no less, and is hence equal for all customers.

(b) On the totality of the evidence, including the commercial context in which the transactions were conducted, there was no certainty of intention that the Company had intended to divest itself of all beneficial interest in the Sums, or to create legally enforceable fiduciary trust duties in respect of the Sums, for the following reasons:

(i) First, the Company's proprietary rights to its own funds, which had been commingled in the customers' trust account, were expressly preserved under statute (see s 30(4) of the CTA and reg 24 of the SFR).

(ii) Second, the Company could use and spend its own moneys which had been commingled in the Customer Segregated Accounts as it saw fit.

(iii) Third, it made no commercial sense for the Company to hold its own moneys on trust for the benefit of the Customers when the Customers only had, at best, a right to be paid the Forward Value when the same became due and payable on the Value Date, and the Unrealised Profits were mere contingent debts.

(iv) Fourth, the evidence, even taking Vintage's case at its highest, merely demonstrated an intention to act prudently by

providing for an "operational float" in the Customer Segregated Accounts and to comply with the applicable laws to which the Company was subject. This did not amount to an intention to create a trust in favour of the Customers or a fiduciary obligation. The Liquidators accept that the Sums were reflected off-balance sheet in the audited financial statements of 2009 and 2010, but point out that the specific exclusion of the phrase "amounts held in trust in respect of clients" in the audited financial statement of 2011 in respect of the Sums necessarily implies that the Company no longer considered such amounts as being held on trust for the Customers in 2011. Even if it were to be accepted that the Company allowed Vintage to withdraw funds exceeding its Ledger Balance, the Liquidators submit that this was not in recognition of beneficial ownership of the funds being vested in Vintage, but that the withdrawal of funds was merely an "advance" of funds to Vintage having regard to the amount of Forward Value falling due to Vintage shortly. Importantly, the withdrawals were only applied against the Ledger Balance and not against the Forward Value or Unrealised Profits.

(c) On the issue of costs, the Liquidators submit that the Judge's decision should be upheld as she had correctly applied the general costs principle that costs ought to follow the event in this case, and hence the Liquidators, as the successful party, should not bear Vintage's costs as the unsuccessful party. The Liquidators are of the view that the proceedings in the lower court resembled adversarial proceedings between competing claimants because, irrespective of the fact that they were technically applications brought under s 310 of the

Companies Act, the proceedings involved the determination of ownership claims between two rival parties which would otherwise have been the subject of contested proceedings. Further, Vintage's conduct had precipitated and protracted the determination of the nature of the claims relating to profits arising out of the LFX and Bullion transactions, especially in abandoning the claim in respect of the Hedge Profits only at the eleventh hour, and thus it should not be allowed to claim its costs on an indemnity basis. Finally, Vintage should not be allowed to recover its costs from the Company's liquidation estate on an indemnity basis because this would result in an unfair situation wherein an unsuccessful representative defendant is not merely insulated from adverse costs orders, but is also reimbursed by the successful party in respect of its own costs.

Our decision

Issue 1: Whether a statutory trust is imposed on the Sums

Introduction

28 As already noted, Issue 1 is whether a *statutory* trust is imposed on the Sums, and if the issue is answered in the affirmative, it would lead to the conclusion that the Company had held the aforementioned sums on trust for the Customers. This raises, in turn, three sub-issues:

(a) Firstly, whether the *legislative purpose* underlying regs 21 and 22 of the CTR and regs 15 and 16 of the SFR is to impose a *statutory trust* on moneys which are "accruing to" the customers or which have been "received on account of" the customers (here, the Customers in the present appeals) ("Sub-issue 1.1").

(b) Second, assuming that the answer to the preceding sub-issue is that a statutory trust was intended to be imposed by the Legislature, whether the Sums can be considered to be "*accruing* to" or have been "received on account of" the Customers within the meaning of reg 21(1)(*a*) of the CTR ("reg 21(1)(*a*)") and reg 16(1)(*a*) of the SFR ("reg 16(1)(*a*)") ("Sub-issue 1.2").

(c) Third, whether the Company had in fact acted in accordance with the statutory requirements under the CTR and the SFR so as to result in a statutory trust being imposed on the Sums ("Sub-issue 1.3").

29 Let us now turn to consider each sub-issue *seriatim*.

Sub-issue 1.1: Whether the legislative purpose of the statutory provisions is to impose a statutory trust on moneys accruing to or received on account of the customers

30 It appeared to be common ground between the parties that the statutes (and the corresponding Regulations) were designed or drafted with the intention to create a statutory trust. In particular, this position seemed to be accepted by counsel for the Liquidators, Mr Yeap, at the hearing before us. Mr Yeap's argument, however, was that, on the facts of the present case, the statutory trust does not arise because the Sums were not "accruing" to the Customers. Notwithstanding that the aforementioned appeared to be common ground between the parties, we think that it is, nevertheless, important to consider the preliminary question as to whether our Parliament had intended to impose a statutory trust in this context, given that a statutory trust is relatively uncommon and ultimately turns on the particular legislative intent. In our view, the moneys that had "accru[ed] to" or been "received on account of" the

customers were intended to be the subject of a *statutory trust*. Two (closely related) points may be made in this regard.

31 The first point is that the *very language* of regs 21(1) and 22 of the CTR and reg 16 of the SFR buttresses the argument that the Singapore Legislature intended to impose a statutory trust on moneys falling within the ambit of the Regulations, the material parts of which read as follows:

> **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.
>
> …
>
> **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*.
>
> …
>
> [emphasis in bold in original; emphasis added in italics and bold italics]

32 In our view, the language of the Regulations as reproduced above is clear. The Legislature intended that the customers concerned have ***proprietary rights*** over the relevant money, securities or property. This is reflected in, for example, the use of the word "*trust*" when describing the account that the money "accruing to the customer" or "received on account of its customer" is to be deposited in (under reg 21(1)(*b*) of the CTR and reg 16(1)(*b*) of the SFR), and in the requirement that the money is to be treated as "*belonging to that customer*" (in reg 21(1)(*a*), reg 22(1) of the CTR and reg 16(1)(*a*)), connoting ownership. The Regulations also contain clear prohibition against commingling – "shall not commingle" such funds with the Company's own funds – so that the customer's moneys will be *segregated* and *separately accounted for*, presumably to ensure that they are not dissipated and remain identifiable. In contrast, the broker's interest is expressly limited to merely having a "residual financial interest" in the customer's trust account.

Section 30(3) of the CTA further restricts the Company's manner of dealing with money, securities or property received from a customer and held in a separate trust account; these assets 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.

33 We are therefore of the view that the Singapore Legislature did intend that there be a *statutory* trust over money, securities or property "accruing to" or "received on [the customer's] account" with the purpose of safeguarding the customer's funds in, *inter alia*, the event of a liquidation. This leads to the second point which, as already mentioned, is closely related to the first.

34 Second, we are satisfied that the purpose of the relevant statutes and Regulations is sufficiently broad to encompass the safeguarding of customers' funds in, *inter alia,* the event of a liquidation. We note, in this respect, that the Judgment (at [78]–[83]), which, whilst locating a statutory trust, deals with the legislative purpose on a more general level that appears to accord with the more basic protection of the customer concerned against fraud. A possible argument could therefore be made in this regard to assert that the legislative purpose of the statutes and Regulations was only to cover blatant defalcations as well as fraud by financial institutions *vis-à-vis* their respective customers. Such an argument, which we find to be counterintuitive and unlikely, can be dealt with quickly. For one, this argument is unsupported by the language of the statute and the Regulations (as noted above at [31]−[33]). Further, such an argument is unsupported by the speeches made at the time of the enactment of

the relevant provisions. The relevant provisions in this appeal, *viz*, s 30 of the CTA and regs 21 and 22 of the CTR, find their genesis in s 30 of the Commodity Futures Act 1992 (Act 17 of 1992) ("the CFA") and regs 22 and 23 of the Commodity Futures Regulations (Cap 48A, Rg 1, 1993 Rev Ed), respectively. As stated during the Second Reading of the Bill, the relevant provision of the CFA was enacted to address broader concerns than mere fraud (see *Singapore Parliamentary Debates, Official Report* (20 March 1992) vol 59 at col 1347 (*per* BG Lee Hsien Loong, Minister for Trade and Industry)):

> (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*.
>
> [emphasis added]

Even though there may have been some concern about the rise of "bucket shops" in 2001 that had engaged in fraudulent conduct, the enactment of the provisions which we are concerned with in the present appeal *pre-date* those concerns. The predecessor to the SFA, which concerned the regulation of LFX trading (one of the types of transaction we are concerned with in the present appeal), was the Futures Trading Act (Cap 116, 1996 Rev Ed) ("the Futures Trading Act"); in particular, s 37 sets out the obligations of brokers in a manner similar to that under reg 16 of the SFR. Similar to the CFA, the underlying purpose and object of s 37 of the Futures Trading Act was broader than protecting customers from blatant fraud, and was explained in Parliament as "[preventing] brokers from making use of their clients' funds for *any other purpose* than for the benefit of the clients themselves" [emphasis added] (see *Singapore Parliamentary Reports, Official Report* (31 March 1986) vol 47 at cols 1435-1436 (*per* Dr Hu Tsu Tau, Minister for Finance)). It is also

noteworthy that the Bill contained provisions with prohibitions against fraudulent practices that were *separate* from provisions governing the conduct of business and the segregation of customers' funds, thus demonstrating that the latter had *not* been enacted *merely* to address concerns about fraudulent practices.

35 All this suggests, in our view, that the Singapore Legislature intended to afford the customers concerned the assurance that commodity brokers and CMS licence holders would be *prevented* from using money, securities or property "accruing to" them or which have been "received on [their] account" for *any other purpose* than to benefit the client – Parliament's objective was not limited to preventing defalcations. Such protection is achieved by way of a *statutory trust*, which safeguards the customer's funds in, *inter alia,* the event of a liquidation. Indeed, if only the minimal purpose were intended by the Singapore Legislature (*viz*, only protection against fraud), this could have been achieved with *far less detailed* statutory as well as regulatory provisions than those which currently exist. The Customers, in the present appeals, therefore need only prove that the Sums fall within the ambit of the language of the Regulations, and that the Company had acted in accordance with the Regulations, to satisfy the court that a statutory trust had arisen over the Sums. We now turn to consider whether the Sums fall within the ambit of the statutory trust as established by the Regulations.

Sub-issue 1.2: Whether the Sums fall within the ambit of the statutory language of the provisions imposing a statutory trust under the CTR or the SFR

36 As already noted earlier in this judgment (at [17] and [18]), the Judge had held that the Sums did *not* "accru[e] to" the Customers within the meaning of reg 21(1)(*a*) of the CTR and did not constitute money "received on

account" of the Customers within the meaning of reg 16(1)(*a*) of the SFR. To recapitulate, in relation to the CTR, the Judge had held that Unrealised Profits were contingent debt obligations that the Company was not obliged to hold money for a customer in respect of. In so far as the Forward Value was concerned, the Judge had held that, as a customer had no right to receive actual money from the Company prior to the Value Date, no money had "come home" to the customer at that particular point in time. In so far as the SFR was concerned, the Judge had held that the moneys had not been placed by the Company into the Customer Segregated Accounts *to the credit of each customer's respective account*; rather, they constituted the Company's "residual financial interest". It should be reiterated that it was common ground between the parties that sums in the Ledger Balance *did* "accru[e] to" the Customers and constituted "moneys received on account of" the Customers. On the Value Date, the Company (as payee on its customers' behalf) *receives* payment of the Forward Value from the Company (as principal-payor) into the Customers' Ledger Balances *on account* of the Customers *and* this was accompanied by the segregation of equivalent funds in the Customer Segregated Accounts. Whilst we agree with the Judge with regard to the Unrealised Profits, we would respectfully *differ* from her conclusion with regard to the *Forward Value*. Let us elaborate.

37 We commence with a *general* point first – and it relates to when sums can be said to be "*accruing* to" a customer within the meaning of reg 21(1)(*a*) or have been "received on account of" a customer within the meaning of reg 16(1)(*a*). In this regard, we are of the view that sums "accru[e] to" a customer or are "received on account of" a customer within the meaning of the respective Regulations when the customer concerned is ***legally entitled*** to the sum in question. This is buttressed by the decisions which were canvassed

before us (as well as in the hearing below) that have interpreted the word "***accrue***" in various legal contexts − to which we will now turn.

38 In the context of income tax law, s 10(1) of the Income Tax Act (Cap 134, 2014 Rev Ed) provides that income tax is payable upon "the income of any person *accruing in* or derived from Singapore …" [emphasis added]. This has been interpreted to mean that income tax is payable upon the income of any person "legally entitled" to the income. In *Pinetree Resort Pte Ltd v Comptroller of Income Tax* [2000] 3 SLR(R) 136 ("*Pinetree Resort*"), this court considered the issue of whether an "initiation deposit", paid by a member of Pinetree Club upon being admitted to membership, could be regarded as having accrued to the Club. Though the court was primarily concerned in that case about whether the "initiation deposit" could be regarded *as income*, in interpreting the meaning of the term "accrue", the court distinguished between the concepts of moneys "to which any person has become entitled" and moneys which are "due and payable", and was of the view that entitlement was a more suitable meaning in the context of transactions in this day and age (at [23]).

39 The abovementioned proposition in *Pinetree Resort* was endorsed in the Singapore High Court decision of *ABD Pte Ltd v Comptroller of Income Tax* [2010] 3 SLR 609 ("*ABD Pte Ltd*"). This case was noted by the Judge (at [112] of the Judgment), where she observed that whether income had "accru[ed]" depended on whether the taxpayer was "legally entitled" to the entrance fees in the case. The issue in *ABD Pte Ltd* was whether the appellant ("the taxpayer-club") had earned the entrance fees (as income) at the time the members were admitted into membership or whether the entrance fees were earned, instead, over the course of the term of the memberships (*ie*, 30 years). This was determined based on when the taxpayer-club could be considered to

be *"legally entitled"* to the entrance fees as income that had *"accrued"*. On the facts of *ABD Pte Ltd*, the taxpayer-club became legally entitled to the entrance fees once a member was admitted to membership (at [20]). The only obligation of the taxpayer-club upon receipt of the entrance fees was merely to admit the payer of the entrance fees to membership; once the approval for the membership application had been given, the taxpayer-club was legally entitled to the whole of the entrance fees, and the entrance fees paid to the taxpayer-club could fairly be said to have *"come home" to the taxpayer-club* (at [29]).

40 The Judge had noted (at [112] of the Judgment), in analysing and thereafter appearing to distinguish *ABD Pte Ltd* from the present case, that the taxpayer-club in *ABD Pte Ltd* "had already *received* the entrance fees from its members before the question as to whether income had accrued arose" [emphasis in original]. However, the fact that the entrance fees had already been received was in a sense immaterial to the issue to be determined in that case. There was no question that the entrance fees had been (literally) received by the taxpayer-club, but the question nevertheless arose as to when the taxpayer-club could properly have been said to be legally entitled to the entrance fees such that it had "accrued". Thus, the very fact that the entrance fees had been paid in *ABD Pte Ltd* did *not necessarily* lead to the conclusion that the entrance fees had "accrued" to the taxpayer-club. The whole inquiry as to when legal entitlement had arisen was relevant precisely because whether a taxpayer is "legally entitled" to certain sums is a *separate and distinct* inquiry from whether the sums have, in fact, been received. Just as the question arises in a case where the moneys have been received by the other party (which was the situation in *ABD Pte Ltd*), even in a case where the moneys have *not* been physically received, it still falls to be determined whether a legal entitlement to the moneys concerned has arisen, and this does

not necessarily foreclose the possibility that the sums have already accrued to the party concerned. What was critical to the interpretation of the word "accrue" in *ABD Pte Ltd* was not the fact that the entrance fees had already been received, but when and at what point in time *a legal entitlement* to those fees could *properly be said to have arisen*.

41 In our view, the other legal contexts considered by the Judge do not detract from our reasoning as set out above. In the context of garnishee proceedings, O 49 r 1(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("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]. The decisions draw the necessary distinction between contingent debts on the one hand and debts which are *presently existing though payable in the future* on the other, of which only the latter are captured within the meaning of the phrase "any debt due or accruing due" (see, for example, the Malaysian Court of Appeal decision of *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353 (reversed, *Capital Insurance Bhd v Cheong Heng Loong Goldsmiths (KL) Sdn Bhd* [2005] 6 MLJ 593 (but not, apparently, on this point)) and the Singapore High Court decision of *Lim Boon Kwee (trading as B K Lim & Co) v Impexital SRL (Sembawang Multiplex Joint Venture, garnishee)* [1998] 1 SLR(R) 757 at [15]).

42 In the context of the accrual of causes of action, the Judge referred (at [115] of the Judgment) to *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal* [2014] 2 SLR 318 ("*Fairview Developments*") and appeared to have placed some weight on the distinction made therein between the architect's *entitlement to payment* and the *accrual* of the architect's *cause of action.* This court held in *Fairview Developments* (at [87]) that, whereas an

architect's entitlement to payment *accrues* upon the completion of various stages, no right and corresponding cause of action to sue upon such a right *accrues* unless and until the relevant invoice(s) has been issued, as it is only upon the issuance of such invoices that the debt becomes "due and payable". However, in our view, the accrual of a *cause of action* is, with respect, *not* completely analogous to the accrual of moneys to the customers of commodity brokers. In fact, what bears greater similarity, if we were in fact to analogise, is the architect's *entitlement to payment* with the Customers' legal entitlement to the Sums. After all, what we are concerned with in the present case is not the accrual of the customer's right to sue the Company for payment of the Forward Value (after the Value Date), assuming it has not been credited to the customer, but, rather, the Customers' *entitlement* to the Sums (representing the Unrealised Profits and Forward Value). The architect's entitlement to payment in *Fairview Developments* arises upon the completion of the different stages and is *not* dependent on when the debt is "due and payable". Drawing an analogy with the present facts, this would mean that the present case similarly turns on whether the Customers have completed what they need to do such that it can be said that they are entitled to the Sums in the Customer Segregated Accounts. It does not turn on whether the Sums are due and payable. This point will be examined in the subsequent paragraphs.

43 Turning now to the meaning of the words "money received on account of its customer" under the SFR, we agree with the Judge that, given that the purpose of these provisions is to protect the customer's funds, the meaning of "received" must not be read so narrowly so as to require a separate counterparty (see the Judgment at [162]). Therefore, payment received from the Company (as principal-payor) by the Company (as payee on its customers' behalf) can be considered to be money *received* "on account of" its customers

and may be subject to the statutory trust (see the Judgment at [163]). We are similarly of the view that the plain and ordinary meaning of the words "on account of" would mean that a statutory trust under the SFR arises over any money a CMS licence holder receives *for* its customer or on its customer's *behalf*. Further, at any time *prior* to the customer being *legally entitled* to the sums in question, the Company could not be said to have received such sums *on the customer's behalf*. After all, if no one else was entitled to the sums in question, the Company would simply be receiving it for itself. Therefore, the key question to be answered, similar to that under the CTR, is whether the Customers can be said to be *legally entitled to* the Sums.

44 It follows that the sum in question *cannot* be *a notional or uncertain one*, for it is both logical and commonsensical that, *ex hypothesi*, there can be *no legal entitlement* to a sum that is *notional or uncertain*. It also follows, in our view, that the customer concerned must be able to state that he or she is *legally entitled* to the sum concerned inasmuch as there are *no competing claims or any other legal impediments that would put the customer's legal right to the sum concerned in question*. With these general principles in mind, let us turn to the Sums themselves.

45 In so far as the ***Unrealised Profits*** are concerned, we agree with the Judge that these constituted contingent debt obligations (see the Judgment at [48]). It is important to reiterate (as we have noted above at [8]) that the LFX and Bullion transactions are speculative contracts that trade on differences. As long as the customer's position remains open, the customer is still speculating and exposed to movements in the market. Unrealised Profits are indeed "unrealised" simply because the underlying transaction has *not* yet been *closed* – with the result that the profits referred to are merely *notional* figures that will *become actual* figures (or, more accurately, profits) only *upon closure of*

the underlying transaction itself. Until such closure (of the underlying transaction) occurs, the profits to the customer concerned *cannot* be *crystallised or finalised*, and are nothing more than a hypothetical position of what *would* be the profit (or loss) if the position *had been* closed out. The tracking of such hypothetical positions by the Company allows it to assess whether the margining requirements to maintain an open position (the maintenance margin) has been met by the customer. If the losses accumulate, there may then be a need to call for more margins (as noted above at [5]). The Unrealised Profits are therefore nothing more than an accounting entry (recorded by the Company primarily for the purposes of tracking margin requirements) because at that stage, the customer is still speculating and it is impossible to tell if he would eventually make a loss or a profit. It is clear that, in those circumstances, those profits (*viz*, the Unrealised Profits) *cannot* be said to have "*accrued* to" or been "received on account of" the customer concerned (or, in this appeal, the Customers). It will be recalled that we had stated in the preceding paragraph that the sum concerned *cannot* be a *notional or uncertain one* – this is *precisely* what *Unrealised Profits in fact are*.

46 However, in so far as the ***Forward Value*** is concerned, the situation is quite different. The key difference (from Unrealised Profits) is that the sums that represent the Forward Value – unlike those relating to Unrealised Profits – are based or premised on an *underlying transaction that has* ***already been closed or concluded***. This is a point of the first importance for the simple reason that the legal obligation to the customer and the sum that represents the Forward Value would – again, *unlike* those relating to Unrealised Profits – have, in fact, ***crystallised or been finalised***. In so far as there are no legal impediments which may put the customer's legal right to the sum concerned in question (*eg*, the sum representing the Forward Value has not been eroded by

crystallised losses, or the customer has not occasioned some breach of contract), it is clear that, in those circumstances, the sums that represent the Forward Value *can* be said to have "*accrued* to" or been "received *on account of"* the customer concerned (or, in this appeal, the Customers). It should also be noted that the Customers' legal entitlement to the sums that represent the Forward Value in the present case is both *clear and unquestionable*. The *only* qualification to this is that the Customers have no right to withdraw the Forward Value *until the Value Date has arrived*. However, unlike the Judge, we are of the view that the sums that represent the Forward Value do indeed "accru[e] to" the Customers notwithstanding the fact that the Value Date has not yet arrived. This is because, as just stated, the Customers had ***already*** *become legally entitled* to the sums that represent the Forward Value, ***notwithstanding*** *the fact that they could not withdraw the sums until the Value Date had arrived*. With respect, the Judge ***conflated*** the concept of "accrual" with that of "payment". "Accrual" within the meaning of the Regulations means that which the customer concerned is *legally entitled* to and is distinct from the concept of "payment" (as we have noted above at [37]). These are quite different concepts and, in the present context, the former precedes the latter but does not cease to lose its legal quality (of legal entitlement or "accrual") simply because the Customers cannot (physically) draw down on or receive the sums that represent the Forward Value until the Value Date has arrived.

47 The transferring of the Forward Value into the Ledger Balance on the Value Date is, in our view, more of a formality rather than a *separate and distinct* type of transaction. As has been observed in *ABD Pte Ltd* (at [28]), "the stage at which the 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", and, in the context of the present case, we are satisfied that the Customers, by closing out the transactions concerned at a profit, have done all that was required of them to earn the profits that arose from the transaction. It would also not accord with Parliamentary intent (centring on the protection of customers beyond merely protecting customers from fraud, with the consequent imposition of a statutory trust on sums accruing to customers) to merely confine statutory protection to moneys which customers have been paid, and exclude moneys that they are entitled to but have not been paid. That, in our view, would not amount to a sufficient level of protection and would also permit companies similar to the Company in the present case to accord an inadequate standard of protection to customers through the use of contractual mechanisms which defer or delay the timing of payment of sums which the customers were in effect already legally entitled to.

48 In summary, as the ***Unrealised Profits*** have *not* "accru[ed] to" or been "received on account of" the Customers, they cannot be subject to the statutory trust under the Regulations and, consequently, the Customers have no *proprietary* right to the Unrealised Profits. Hence, their claims to the Unrealised Profits in the context of the winding up of the Company must fail *in limine*. In contrast, however, the sums represented in the ***Forward Value*** *have* "accru[ed] to" and have been "received on account of" the Customers for the reasons set out above and therefore, *prima facie*, a statutory trust has arisen in favour of the Customers as beneficiaries. Assuming that the Company had acted in accordance with the provisions under the CTR and the SFR, in the event of liquidation, this statutory trust would give the Customers a *proprietary right* to the sums that represent the Forward Value. We will now turn to examine the final requirement of whether the Company had *in fact* acted in accordance with the statutory requirements.

Sub-issue 1.3: Whether the Company had in fact acted in accordance with the statutory requirements under the CTR and the SFR so as to result in a statutory trust being imposed on the Sums

49 Finally, we turn to consider whether the Company had in fact acted in accordance with the statutory requirements to segregate moneys that have accrued to or been received on account of the Customers (which we have determined to include sums representing the Forward Value, but not the Unrealised Profits) in its ordinary course of business. The Regulations clearly require the segregation of moneys received from or on account of a customer or accruing to a customer. Such moneys are to be held in a separate trust account, designated or evidenced as such. As will be recalled, the Judge had decided that a statutory trust arises upon the mere *receipt* of moneys received from or received on account of customers, or upon the mere *accrual* of moneys to customers, without more. In other words, according to the Judge's interpretation, the statutory trust appears to be fixed on to the moneys by operation of law *immediately* upon the statutory obligations on the would-be settlor kicking in (*ie*, on the receipt *or* accrual of moneys) and arises *before* segregation has occurred. To this end, the Judge expressly stated that the obligations to segregate the funds under the SFR and the CTR "do not create the trust, but are obligations which *flow from the imposition of the statutory trust* over certain property" [emphasis added] (see the Judgment at [101]).

50 However, the Judge also appeared to acknowledge that, for the customer to assert proprietary rights in the moneys, *segregation* is often a *necessary tool* to ensure that the property is *identifiable* and to ensure that the customers' rights are adequately protected (see the Judgment at [129]). The Judge proceeded to elaborate, as follows:

> 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. [emphasis in italics in original; emphasis added in bold italics]

51 It is thus necessary to consider whether the Company in the present case had *in fact* acted in accordance with the statutory requirements to segregate the Sums (more specifically, in the light of what we have decided above, the sums representing the Forward Value). In our view, the Company had in fact done so by placing such sums in the Customer Segregated Accounts such that the Customers would be able to assert proprietary rights to those funds against the Company in the context of liquidation. The Seg Fund Statements demonstrate that the Customer Segregated Accounts were separately accounted for and were separately located from the other funds.

52 At this juncture, we note that a necessary implication of our finding that the Unrealised Profits had not "accrued to" or been "received on account of" the Customers within the meaning of the Regulations is that the Company would have "commingled" some of its *own funds* in the Customer Segregated Accounts by depositing sums equivalent to the value of the Unrealised Profits in the said accounts. In our view, however, this *does not* render the Company in breach of the segregation requirement in the Regulations. The Regulations expressly allow (as noted above at [14]) the Company to have a residual financial interest in a customer's trust account and from time to time advance from its own funds *sufficient money* to prevent any or all of its customers' trust accounts from becoming under-margined. As the Judge had observed (at [244] of the Judgment), the Regulations are drafted "fairly widely". Under the

Regulations, the Company is not merely permitted to advance funds to address under-margining or under-funding that has already occurred, but can do so as a *preventive* measure in respect of *all* of the customers' trust accounts. In the present case, the funds advanced from the Company's own funds into the Customer Segregated Accounts were advanced for the purpose of preventing under-margining or under-funding of the customer accounts. This was (correctly, in our view) not disputed. The dispute with regard to the Company's intentions merely related to whether, in addition to such an intention to prevent under-margining, the Company had an intention to create an express trust over the sums in the Customer Segregated Accounts in favour of the Customers. It is sufficient for the purposes of the present inquiry to find that the Company's funds (including those representing the Unrealised Profits) were advanced into the Customer Segregated Accounts with the intention of preventing under-margining of the Customers' accounts. This would mean that its conduct in "commingling" its own funds in the Customer Segregated Accounts was not inconsistent with the Regulations. We are satisfied that the Company had *in fact* acted in accordance with the statutory requirements to segregate moneys representing the Forward Value arising from the LFX and Bullion transactions in a separate trust account, namely, the Customer Segregated Accounts.

53 Before concluding this issue, we take this opportunity to make a few observations about the Judge's analysis of the *nature* of the statutory trust that is imposed by the CTR and SFR. From the analysis in the Judgment (as noted above at [49] and [50]), the Judge appeared to draw a distinction between the statutory trust that arises upon the receipt or accrual of moneys and prior to segregation (which may not give a proprietary outcome), and the statutory trust which is imposed after segregation (which does confer upon the

Customers proprietary rights). That begs, however, the following question: what is the nature of a statutory trust which has arisen but which does not give the beneficiaries any proprietary or beneficial interest in the trust property? This had not been examined in the Judgment, but we find it useful to digress briefly to consider what might be the nature of the statutory trust which would arise if it were to arise *automatically* upon the receipt or accrual of moneys.

54 It is not disputed that the method of analysis for a statutory trust is slightly different from the method of analysis of an express trust; a statutory trust does not necessarily bear all the indicia which characterises a common law trust (see the House of Lords decision of *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167 at 178, which was cited with approval in the Singapore High Court decision of *Power Knight Pte Ltd v Natural Fuel Pte Ltd (in compulsory liquidation) and others* [2010] 3 SLR 82 ("*Power Knight*") at [50]). Therefore, whilst a statutory trust can be coincident with an express trust, this need not always be the case. However, both trusts ultimately concern the same question of whether the legal and beneficial ownership of the assets can properly be considered to be held separately.

55 In *Power Knight*, Judith Prakash J expounded on the nature of a statutory trust which arises upon the presentation of a winding up petition of a company, and which comes into existence "for" the unsecured creditors of a company. In her observations, the learned judge stated that the "statutory trust" which arises on the winding up of the company is a purpose trust, with the beneficial interest "in suspense" (at [51]). The statutory trust does not confer on creditors beneficial co-ownership, or, indeed, a proprietary interest of any kind, but their rights are limited to invoking the protection of the court to ensure that the liquidator fulfils his statutory duties (at [48], citing Roy Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 3rd Ed,

2005) at para 3-08). Therefore, upon the presentation of a winding up petition, although a statutory trust arises, this does not confer upon the unsecured creditors beneficial interests in the company's assets because they "have only a hope of obtaining such interests" (at [51]). By way of analogy, it could be argued that the statutory trust that arises upon receipt or accrual of moneys is a purpose trust, and merely gives the Customers the right to invoke the protection of the court to ensure that the Company fulfils his statutory duties, failing which, the customer may either have a separate claim for breach of trust or breach of statutory provisions (see the Judgment at [129]). Unless and until the Company acts in accordance with the statutes and the Regulations to *segregate* the moneys from its own funds, the Customers may not be able to assert any *proprietary* rights over the trust property as such.

56 On the other hand, a possible *alternative* interpretation of the Regulations could be that the statutory trust does *not* automatically arise upon the receipt or accrual of moneys (not even as a purpose trust), but only arises *after* the would-be settlor has segregated the moneys in accordance with the statutory obligations in the Regulations (*ie*, in a segregated client account and he has not commingled the moneys with his own funds except for any residual financial interest he may have). In the latter scenario, the statutory trust that arises would confer on the customer a right *in rem* over the trust property as well as the status of a secured creditor in the event of liquidation in relation to the trust property. Pursuant to such an interpretation, the proprietary result of moneys actually being held on trust for a customer is *effected* by the would-be settlor having *in fact* acted in accordance with the statutory obligations to segregate. In our view, this understanding of the statutory trust should be preferred. This is supported by the *language* of the Regulations which, on a plain and ordinary reading, merely appear to set out *statutory obligations* on a

would-be settlor (the Company in this case) to segregate the moneys received from and accruing to the Customers into a trust account.

57 Having said that, we reiterate that the segregation requirement is qualified by the express permission given to the Company to advance its funds into the trust account from time to time to prevent the Customers' accounts from being under-margined. This was done by the Company in this case in compliance with the statutory requirements. A possible concern that customers may have under such an interpretation may relate to the sufficiency of the level of protection afforded to customers under the Regulations given that the statutory obligation to segregate is interpreted, in effect, as a pre-requisite to the imposition of a statutory trust over the moneys. However, such concerns have been addressed within the Regulations by way of the enactment of reg 34 of the CTR and reg 55 of the SFR which penalise non-compliance with statutory obligations to segregate by the imposition of criminal sanctions. These criminal sanctions do act, in our view, as a sufficient deterrent against non-segregation by commodity brokers and CMS licence holders and may be relied on to support an argument that the Legislature may have *intended* to address non-compliance with segregation requirements through the use of such sanctions rather than by way of remedies for breach of trust.

58 However, in this case, we do not need to decide this particular issue in a definitive manner because, in our judgment, the Company had in fact acted in accordance with the statutory requirements of segregating the Sums into a separate trust account. Therefore, on whichever construction of *when* the statutory trust arises – whether automatically or only upon segregation by the would-be settlor – the Customers would be able to claim proprietary interest in the moneys set aside to cover the Forward Value in the Customer Segregated Accounts in liquidation as a secured creditor because a statutory trust has

arisen over this sum that has accrued to or been received on account of the Customers upon the closing out of the open positions.

59 We therefore allow the appeals in CA 142 and CA 143 in part in relation to the sum segregated in the Customer Segregated Accounts to cover the Forward Value arising out of the LFX and Bullion transactions for the Customers on the basis that a statutory trust has been imposed on the said sum.

Issue 2: Whether the Sums are subject to an express trust

60 Given that we have found that a statutory trust under the Regulations has been imposed on the sum representing the Forward Value in the Customer Segregated Accounts, we do not find it necessary to discuss whether the same funds are subject to an express trust. We will thus confine our discussion on Issue 2 to whether the sum representing the Unrealised Profits is subject to an express trust. This can be dealt with quite briefly.

61 Counsel for Vintage, Mr Thio Shen Yi SC ("Mr Thio"), submitted at the hearing before us that the Company had in effect *by its conduct* made a declaration of trust over the sum representing the Unrealised Profits by computing the gains and losses in relation to the Unrealised Profits daily, and thereafter setting aside and segregating the funds. In our view, however, the concepts of segregation and trust need to be clearly distinguished. The mere segregation of money into separate bank accounts does not equate to the creation of a trust and is not sufficient to establish a proprietary interest in those funds in anyone other than the account holder (and see the UK Supreme Court decision of *In the matter of Lehman Brothers International (Europe) (In Administration) and In the matter of the Insolvency Act 1986* [2012] UKSC 6 at [2]). Put simply, segregation is a necessary but not a sufficient condition to

give rise to an express trust over the Sums in favour of the Customers. What is further required is to establish that the Company had the requisite certainty of intention for the funds to be held on trust (in this case, the sum representing the Unrealised Profits) *and* that the same funds satisfied the requirement of certainty of subject matter.

62 To this end, we are *not* persuaded that the sum representing the Unrealised Profits can be the subject matter of an express trust *even if* the court was satisfied that the Company had the requisite intention to create a trust. As will be recalled, the nature of the Unrealised Profits was that they would *fluctuate* from day to day depending on the market rates (see above at [8]). In a sense, the Customers' interest in the Unrealised Profits is entirely notional because, by the time the transaction is closed out, the market might very well have turned against the customer and there might no longer be any profits to speak of. Mr Thio proposed that we do not look solely at the sum representing the Unrealised Profits and, instead, consider the Total Account Equity of the Customers as a whole and arrive at the conclusion that this global figure is subject to an express trust. But, in our view, that was not an adequate answer. The real question to be determined in relation to the issue of an express trust over the Unrealised Profits was whether the Customers had a *beneficial and secured interest* in the Unrealised Profits that could be asserted even in the event of liquidation. If Vintage was to assert that it did, this would mean that even if the Unrealised Profits became Unrealised Losses upon the closing out of a particular transaction, an LFX or Bullion customer would still be able to assert that same value of the Unrealised Profits against the Company. In our view, that would be illogical given that the marked-to-market assessment was a purely notional assessment of what *would have been* the gain or the loss if the contract had been closed out, and it is difficult to

fathom how a proprietary interest can arise over something that is nothing more than an accounting device. We are thus satisfied that there is *no* certainty in subject matter in relation to the Unrealised Profits, and an express trust cannot arise over the sums.

63 In any event, we find insufficient reason to disagree with the Judge's findings that the Company did not have the requisite certainty of intention to hold both the sums representing the Forward Value and the Unrealised Profits on trust for the Customers (as we have noted above at [19]). Such a finding is consistent with the commercial context in which the transactions occurred given that generally the courts have been reluctant to introduce the intricacies and doctrines of trusts into ordinary commercial affairs (*per* Bramwell LJ in the English Court of Appeal decision of *New Zealand and Australian Land Co. v Watson* (1881) 7 QBD 374 at 382, and followed in the English Divisional Court decision of *Henry v Hammond* [1913] 2 KB 515 at 521; see also the decision of this court in *Hinckley Singapore Trading Pte Ltd v Sogo Department Store (S) Pte Ltd (under judicial management)* [2001] 3 SLR(R) 119 at [40]).

Issue 3: Whether Vintage's costs should be paid out of the liquidation estate

64 In light of our decision to allow the appeals on the substantive issues in part, we are also of the view that the Judge's costs order should be set aside. We find it useful to first clarify the principles which formed the basis for the Judge's costs order as we understand them to be. We agree with Vintage that the Liquidators have incorrectly characterised the basis of the Judge's costs order as the principle that costs should follow the event. A costs order made according to the principle that costs should follow the event would mean that the "winning" party is able to claim its costs from the "losing" party. As will

be recalled, however, the Judge did not award the Liquidators their costs in the proceedings, but ordered that their costs were to be paid out of the liquidation estate, and further ordered that Vintage and 51 other customers should bear Vintage's own legal costs and expenses (see above at [21]). The basis of the Judge's costs order is therefore more accurately described as an order that each party bears its own costs in the proceedings. This implicitly recognises that the proceedings are not completely identical to the usual adversarial proceedings that are brought before the court, thereby justifying a different costs order from that which would have been ordered based on the principle that costs should follow the event.

65 Turning to the present appeals with regard to the issue of costs, the question to be determined in the light of our decision to allow the appeal on Issue 1 above in part is whether Vintage should now be entitled to its costs in a manner consistent with adversarial proceedings before the court, or whether the Judge's costs order should be maintained. The Liquidators submit that even if Vintage succeeds in the substantive appeals (as they have done in this case, at least in part), Vintage's costs should not be borne out of the liquidation estate but should be met out of the disputed subject matter, *ie*, the sums in the Customer Segregated Accounts that have been segregated in respect of the profits arising from the LFX and Bullion transactions. To this end, the Liquidators rely on the costs orders in *Re MF Global UK Limited (In Administration)* [2013] EWHC 92 (Ch) ("*MF Global (UK)*") and *Re MF Global Australia Limited (in liquidation) (No 2)* [2012] NSWSC 1426 ("*MF Global (Aus)*") to argue that courts in similar proceedings concerning the determination of the nature and treatment of various profits had ordered costs to be paid out of the subject matter of the proceedings and not the liquidation estate. We are, for the following reasons, of the view that the cases

just referred to are not applicable to the present case and there is therefore no reason or justification to deprive Vintage of its costs incurred in these proceedings:

(a) As just mentioned, the cases cited by the Liquidators can be distinguished from the current appeals and are therefore of little (if any) persuasive value because the nature of the proceedings in those cases differed inasmuch as they were concerned with the administration of *trust funds* rather than the broader issue relating to the administration of the liquidation estate.

(i) In *MF Global (UK)*, the question before the court was confined to determining the appropriate valuation methodology to be used in valuing a client's open positions on trades made with MF Global (UK) for the purposes of distributing the pool of money held for the clients according to *the value of an individual client's entitlement* to the pool. The opposing positions in the dispute were thereby taken by two respondents who were joined to represent two corresponding groups of clients who would gain from the adoption of one or the other of the alternative valuation bases. The dispute was not between the company and the clients. Given that it was undisputed that the ownership of the pool of money belonged to the clients and that the company held it on trust, the question was confined to how the *trust funds* should be administered. It did not concern the broader administration of the liquidation estate. Thus, it is understandable why the court would order that each respondent's costs were to be paid out of the client money pool – the trust funds.

(ii) Similarly, in *Re MF Global Australia Limited (in liquidation) (No 2)* [2012] NSWSC 994, the case pursuant to which the costs order in *MF Global (Aus)* was made, the court was not concerned with determining the *ownership of the assets* but, rather, issues relating to the administration of the *trust* (*eg*, the manner of pooling the assets, the methodology to be used for the calculation of the entitlement of the clients and the relevant date to be used in such calculations, *etc*), the costs of which were properly to be borne by the trust funds. The court therefore ordered in *MF Global (Aus)* that both the costs of the liquidators and the client representatives (and other relevant parties involved) were to be paid out of the Client Segregated Accounts and the Recoveries, which were not disputed to be trust moneys.

(iii) In contrast, in the present case, the nature of the proceedings involved rival claims in respect of the ownership of the moneys between the company and its customers, and was therefore not confined to the administration of the *trust fund*, but related to the broader administration of the *liquidation estate*. Further, the manner in which the liquidators or administrators in those cases had approached the matter can be distinguished from the present case. The proceedings in the lower court were, in the main, arguably precipitated by the Liquidators' actions in refusing to recognise the Customers' legal entitlement to the sum set aside to cover the Forward Value arising from the LFX and Bullion transactions. The Company should therefore not be allowed to deprive Vintage of their costs in the action, given that it has now been held that the

sum representing the Forward Value is held on trust for the Customers.

(b) Further, even if we were to assume that the Liquidators had adopted a neutral position in the matter, in the light of the complexity and novelty of the issues involved, we agree with the Judge that it may have been necessary for the Liquidators to commence OS 289 of 2013 for the *due administration of the winding up of the Company*. In such applications, it is not uncommon for a representative defendant like Vintage to be appointed to advance the claims of the customers and thereby assist in the administration of the liquidation estate, with the result that the costs incurred should be borne by the liquidation estate. In fact, in the present case, it was found that Vintage had *assisted* in the proper determination of the questions under s 310 of the Companies Act by its participation in the proceedings, and it should therefore be awarded its costs which had been incurred through participating in the proceedings.

(c) In any event, we are of the view that the proceedings were not dissimilar to adversarial proceedings because the Liquidators and Vintage had adopted completely opposing positions in this case relating to whether the Sums formed either part of the liquidation estate or part of the trust funds. The principle that costs should follow the event would therefore rightfully apply in this scenario to allow Vintage to be able to claim its costs from the liquidation estate.

66 We therefore order that Vintage's costs of the proceedings below should be paid out of the liquidation estate on a standard basis and allow the appeals in CA 216 and CA 217 against the Judge's costs order. We do not

accept Vintage's argument that it is entitled to costs on an indemnity basis merely because it is a representative defendant which has assisted the court in the determination of questions in an application brought under s 310 of the Companies Act. Vintage has only cited *MF Global (Aus)* in support of such a proposition, the facts of which have been distinguished by us in the preceding sub-paragraphs, and we do not find the case to be persuasive on this issue. Vintage has not cited any provision in our statutes or Rules of Court which provides sufficient justification for its costs to be awarded on an indemnity basis. Section 311 of the Companies Act however, does provide that "[a]ll proper costs, charges and expenses of and *incidental to* the winding up including the remuneration of the liquidator shall be payable out of the assets of the company in priority to all other claims" [emphasis added]. An argument could perhaps be made, in principle, that Vintage's costs in a s 310 application and the subsequent appeal from the application could be viewed as incidental to the winding up of the Company. Vintage, however, had not made such an argument. There is also no provision in the Rules of Court which provides that a representative defendant like Vintage is entitled to costs on an indemnity basis; O 59 r 30 of the Rules of Court merely provides that costs payable to a *trustee* out of a trust fund shall be taxed on an indemnity basis, assuming that they were not incurred contrary to the duty of the trustee. We are therefore of the view that Vintage has not sufficiently proven that it is entitled to costs on an indemnity basis, and we find it appropriate to award costs on the ordinary standard basis.

Conclusion

67 For the reasons set out above, we allow the appeal in CA 142 and CA 143 in part and allow the appeal in CA 216 and CA 217. Having regard to

all the circumstances, Vintage is entitled to 70% of its costs both here and below. There will be the usual consequential orders.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Tay Yong Kwang Judge of Appeal

Thio Shen Yi SC, Kelvin Koh, Reshma Nair (TSMP Law Corporation), Lionel Leo, Muhammad Nizam and Michelle Tan (WongPartnership LLP) for the appellant;
Andre Yeap SC, Danny Ong, Sheila Ng and Ong Kar Wei (Rajah & Tann Singapore LLP) for the respondents.