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Case No: 1371 of 2008

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24th March 2009

Before :

SIR ANDREW PARK

IN THE MATTER OF GLOBAL TRADER EUROPE LIMITED (in liquidation)
And IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

JOANNE MILNER and STEPHEN CORK (liquidators of Global Trader Europe Limited)	<u>Applicants</u>
- and -	
(1) ANDRE CRAWFORD-BRUNT	<u>Respondents</u>
(2) ROSSIB (CYPRUS) LIMITED	
(3) SERGEY SOUKHOLINSKY	
(4) CITY FACILITIES MANAGEMENT LIMITED	

Rebecca Stubbs (instructed by **Kirkland & Ellis International LLP**) for the **Applicants**
Glen Davis (instructed by **Herbert Smith**) for the **First Respondent**
Felicity Toubé and **Adam Al-Attar** (instructed by **Lovells**) for the **Second Respondent**
Javan Herberg (instructed by **Mishcon de Reya**) for the **Third Respondent**
Nicholas Peacock (instructed by **Baker & McKenzie**) for the **Fourth Respondent**

Hearing dates: 3rd to 5th, 8th to 12th December 2008

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
Sir Andrew Park

Sir Andrew Park :

Abbreviations, dramatis personae, etc.

1. These are as follows.

Al-Attar, Mr	Second counsel for the Rossib class.
CASS	Client Assets sourcebook, containing delegated legislation made by the FSA.
CFM	City Facilities Management Ltd; the fourth representative respondent.
CFM class	The class of creditor of Global Trader for which CFM is the representative respondent.
Classification as an intermediate customer notice	See paragraph 27 of this judgment.
Client money rules, the	Rules contained in CASS 4 and CASS 7 regulating aspects of the business of certain companies or 'firms', including Global Trader.
Cork, Mr	Stephen Cork, one of the three liquidators of Global Trader; previously one of the two administrators. The other liquidators are Joanne Milner (who was also previously an administrator) and Stephen Akers. The liquidators are licensed insolvency practitioners. Mr Cork and Joanne Milner are directors of Smith & Williamson Ltd. Mr Akers is a partner in Grant Thornton LLP.
Crawford-Brunt, Mr	Mr Andre Crawford-Brunt, a segregated client of Global Trader; the representative respondent for the Crawford-Brunt class
Crawford-Brunt class	One of the classes of clients of Global Trader; represented in this case by Mr Crawford-Brunt.

Davis, Mr	Glen Davis, counsel for the Crawford-Brunt class
FSA, the	The Financial Services Authority
FSMA 2000	The Financial Services and Markets Act 2000
Global Trader	Global Trader Europe Ltd; company which is the subject matter of this case; in administration from 15 February 2008 until 17 June 2008; in creditors' voluntary liquidation from 17 June 2008.
Herberg, Mr	Javan Herberg, counsel for the Soukholinski class of respondents
Intermediate customers	A classification of customers of Global Trader until 31 October 2007; intermediate customers on that date became professional clients on 1 November 2007.
MiFID	The Market in Financial Instruments Directive (Directive 2004/39/EC); came into effect on 1 November 2007.
MiFID business	After 1 November 2007 this is defined to cover any of the services and activities carried on by a MiFID investment firm; it includes the business activities carried on by Global Trader which are the underlying subject matter of this case.
Peacock, Mr	Nicholas Peacock, counsel for the CFM class.
Private Customers	A classification of customers of Global Trader until 31 October 2007; private customers on that date became retail clients on 1 November 2007.
Professional clients	A classification of Global Trader customers on and after 1 November 2007; see also intermediate customers.

Retail clients	A classification of Global Trader customers on and after 1 November 2007; see also private customers.
Rossib	Rossib (Cyprus) Ltd, representative respondent for the Rossib class.
Rossib class	A class of clients of Global Trader, represented in this case by Rossib
Segregated account	A bank account required by the client money rules to be opened by firms, like Global Trader, to which the rules apply; the money in a segregated account is required by the rules to be held on trust for clients of the firms and to be segregated from money held by them in their own accounts.
Segregated clients	The clients for whom money in segregated accounts is or was at relevant times held on trust.
Soukholinski, Mr	Sergey Soukholinski, representative respondent for the Soukholinski class.
Soukholinski class	A class of clients of Global Trader, represented in this case by Mr Soukholinski.
Stubbs, Miss	Rebecca Stubbs, counsel for the liquidators.
Toube, Miss	Felicity Toube, first counsel for the Rossib class.
TTC Arrangement	Title transfer collateral arrangement, a term and a concept employed in CASS 7 on and after 1 November 2007.

Introduction and Overview

2. Global Trader used to carry on a highly specialised business. If I have understood correctly the company commenced to carry on the business in 2005; that was the year in which it was granted by the Financial Services Authority, the FSA, the permission which by law it needed to carry on a business of the kind which it did. In February 2008 the company became insolvent, and it went into administration on the 15th of the

month. The administrators were two directors of Smith & Willamson Ltd. Efforts by them to find a purchaser for the business, or otherwise to rescue the company as a going concern, were unsuccessful, and on 17 June 2008 the company was placed into creditors' voluntary liquidation. The administrators became the liquidators. They had commenced this application, seeking the guidance of the court on certain questions, in April, proceeding at that time under paragraph 63 of Schedule B1 to the Insolvency Act 1986. The application continues now as one under s.112 of the Act, the section under which liquidators of companies in voluntary liquidation may apply to the court to determine any question arising in the winding up.

3. Global Trader became, and remains, insolvent: its liabilities exceed its assets. Nevertheless there were and still are quite large sums of money in the hands of the liquidators (previously the administrators), and various different classes of persons claim entitlements to receive distributions from the liquidators which would favour the classes to which they belong and correspondingly be disadvantageous to other classes. Four representative respondents have been nominated to represent different classes. The facts are too complicated for me to be able at this stage to encapsulate the nature of the different classes, or in most respects to give an introductory impression of the issues with which I will be concerned in this judgment: to a considerable extent I will have to leave those matters to emerge as the judgment progresses and as I explain the complicated factual background. I can, however, say the following which may serve as a lead-in to the case to a reader who is unfamiliar with the circumstances which have given rise to it. I should however say that, although in the course of this judgment I shall address all of the separate issues which I briefly identify in the next few paragraphs, the order in which they are dealt with in the judgment is not the same as the order in which I mention them in those paragraphs.
4. I will refer to one class as the Crawford-Brunt class. Mr Andre Crawford-Brunt is the representative respondent on behalf of the class. Mr Davis appears on behalf of the class. As I will explain in detail later, Global Trader, when it went into administration, held a little over £2m in a segregated account. It considered that it was holding that money on trust for the members of the Crawford-Brunt class. The members of that class were trust beneficiaries and not unsecured creditors of Global Trader. Further, Global Trader considered that the members of the Crawford-Brunt class were the sole trust beneficiaries of the £2m plus, to the exclusion of members of other classes. The Crawford-Brunt class assert that Global Trader's opinion in that respect was correct. Its case on this is disputed by two other classes which contend that they, as well as the members of the Crawford-Brunt class, are trust beneficiaries of the £2m plus, as I mention in paragraph 8 below. As I will explain later in this judgment, I agree with the Crawford-Brunt class. I refer to this part of the case as 'the £2m plus issue'.
5. There are two other issues in which the Crawford-Brunt class is concerned. (1) One has been referred to on occasions in the course of the hearing as 'the incomplete transfer issue', and I will adopt that term in this judgment. Just before Global Trader went into administration the management of the company had discovered that the segregated account held on trust for the class should have included a further £503,157.55 (in addition to the £2m plus which was already there). Global Trader had instructed the bank to transfer £503,157.55 from one of its (Global Trader's) own

bank accounts to the segregated account. The bank did not comply with the instruction, and Global Trader went into administration. The Crawford-Brunt class contend that I should direct the liquidators now to make the transfer. For the reasons which I will explain I do not agree. In my judgment, although the Crawford-Brunt class are trust beneficiaries of the £2m plus which was and still is actually held in the segregated account, they are unsecured creditors as respects the additional £503,157.55.

(2) The second additional issue in which the Crawford-Brunt class is involved is the 'post-administration closings issue'. The question here is whether the special degree of protection, through being classified as trust beneficiaries rather than as unsecured creditors, which applied to the members of the Crawford-Brunt class continued to apply to credits in their favour which arose after Global Trader went into administration on 15 February 2008. My conclusion will be that, for the reasons which I will explain, it did not.

6. A second class of respondent is represented by Rossib (Cyprus) Ltd. I will refer to this class as the Rossib class. Miss Toube and Mr Al-Attar appear on behalf of the class. A third class of respondent is represented by Mr Sergey Soukholinski. I refer to the class as the Soukholinski class. Mr Herberg appears on behalf of it. In my view there is scarcely any difference between the Rossib and Soukholinski classes. The principal arguments advanced on behalf of the Soukholinski class are the same as those advanced on behalf of the Rossib class. Mr Herberg and Miss Toube each support the other's submissions, and I did not detect any respect in which either counsel submitted that anything said by the other was wrong. The Rossib and Soukholinski classes raise two issues.
7. First, at the time when the administration commenced Global Trader was not holding any money in segregated accounts for the members of the Rossib and Soukholinski classes. They contend that Global Trader should have been doing that, and argue that all or most of the funds now held by the liquidators in bank accounts which to outward appearances contain Global Trader's own money should be directed to be held on trust for themselves (that is for Rossib and the other members of its class, and for Mr Soukholinski and the other members of his class). I will refer to the issues raised by this contention as 'the Rossib and Soukholinski classes' main claim.' It should be distinguished from 'the £2m plus issue' (as to which see paragraph 4 above and paragraph 8 below). By their main claim the two classes advance a proprietary claim to the funds. I do not accept their argument. It is likely that the claims of the Rossib and Soukholinski classes will rank simply as claims of unsecured creditors. I formulate that sentence in somewhat cautious terms because there is a possibility, which I think is likely to turn out to be theoretical rather than real, that the members of the two classes could succeed in a proprietary claim (as opposed to a claim as unsecured creditors) if they could establish a right to trace trust moneys into funds which the liquidators are holding in Global Trader's own bank accounts, not in segregated accounts.
8. Second, as well as their main claim the Rossib and Soukholinski classes advance a fall-back argument to the effect that they are at least entitled to share with the members of the Crawford-Brunt class in the £2m plus held in the segregated account. This is 'the £2m plus issue' to which I alluded in paragraph 4 above. I am afraid that I do not agree with the Rossib and Soukholinski classes on this argument either.

9. The fourth and last class of respondent, the CFM class, is represented by City Facilities Management Ltd, for which company Mr Peacock appears. The class consists of general trade creditors of Global Trader, not claiming any form of trust protection or other justification for priority over other creditors. The CFM class opposes the arguments of the Rossib and Soukholinski classes' main claim, the claim that the members of those classes are entitled to some form of proprietary interest in the general funds held by the liquidators. I agree with the CFM class on this particularly important part of the case.
10. The CFM class also opposes the arguments of the Crawford-Brunt class (i) under the incomplete transfer issue (see paragraph 5(1) above) that I should direct the liquidators to transfer £503,157.55 to the segregated account, and (ii) under the post-administration closings issue (see paragraph 5(2) above) that the protection which the members of the Crawford-Brunt class obtained through being trust beneficiaries of funds held by Global Trader rather than unsecured creditors continued after the date when Global Trader went into administration. I agree with the CFM class on both of these issues also.
11. There is another issue which has been referred to in the course of the hearing as 'the further shortfalls issue'. This issue is so complicated that it would be pointless for me to attempt to encapsulate it here. By the stage in the judgment when I reach it I hope that the nature of it will emerge fairly clearly, and that I will be able to deal with it quite shortly.
12. Having identified the counsel who appeared for the four classes of respondents, I should record that Miss Stubbs appeared for the liquidators. She assumed the substantial task of describing the factual and legal background and identifying for me what the major contentious issues were going to be. She adopted a neutral position on those issues, leaving the arguments to be advanced by counsel who represented the classes which were affected by them. Miss Stubbs' guidance was invaluable, and I am most grateful to her. At the end of the hearing she identified a few lesser topics which she requested me to deal with. I will do that at the end of this judgment.

The structure of this judgment.

13. This judgment is inevitably going to be long and complicated. Before I can analyse the several issues with which I have to deal and do my best to give decisions upon them, I will have to describe the nature of Global Trader's business and the manner in which it was conducted. Furthermore, it is not just a matter of examining Global Trader's own trading documentation and records. The business was subject to regulation by the Financial Services Authority, the FSA. There was a considerable body of delegated legislation enacted by the FSA which had legal effect. Some aspects of the relationship between Global Trader and its clients were governed by regulations made by the FSA, and I shall have to describe and comment on some of the regulations in some detail. That will have to be done before I can turn to the issues which I have to decide.
14. There was one set of FSA regulations in force until 1 November 2007 and a different set of FSA regulations in force on and after that date. All or virtually all of the clients whose affairs are affected by this judgment became clients of Global Trader before 1 November 2007 and remained clients until Global Trader went into administration on

15 February 2008, so the treatment of their relationship with Global Trader and of transactions which took place during the relationship is governed partly by the earlier regulatory provisions and partly by the later ones.

15. A further source of complication is that there are some aspects of the way in which Global Trader proceeded which it believed were in accordance with the regulations but which some of the classes of respondents say was not. I will need to consider whether it is right that the regulations were not complied with. In some respects I think that they were not, and I will explain why. But I also need to consider whether any non-compliance makes any difference to the various issues which arise.
16. The result of all the matters which I have mentioned in the last few paragraphs is that I (and a reader of this judgment) will have to spend quite a lot of time and cover a lot of material before I turn to the various issues which I have briefly identified in the Introduction and Overview at the beginning of the judgment. When I get to the stage of addressing the issues one by one they will not come up in precisely the same order as that in which I have briefly introduced them in the Introduction and Overview, but I try to make clear, by headings to various sections of the judgment, what are the issues which I am addressing at the stages through which the judgment proceeds.

The nature of Global Trader's business; the categories of clients; some relevant aspects of how the business was carried on

17. Global Trader was commonly described as a broker. It carried on business with persons whom it described as clients and who wished to enter into either or both of two kinds of financial transaction, referred to as contracts for differences and spread bet trades. The terms 'broker' and 'client' were regularly used, but in the context of Global Trader's business they did not carry their more usual meanings of one person, the broker, acting on behalf of another, the client, and arranging for the client to enter into a transaction with a third party. Usually a person described as a broker is an agent of some sort for the client. In the present case, however, Global Trader was not an agent for its 'clients'. If a client wanted to enter into, say, a contract for differences he concluded the contract with Global Trader: Global Trader was not the client's agent; it was itself the counterparty to the contract. (In the foregoing sentence I referred to the client as 'he'. The client could of course have been a 'she' or, if a company, an 'it', but generally in this judgment I shall use 'he', 'him' and 'his' when referring to clients.)
18. There are a great many complicated features of this case which I will have to describe as this judgment progresses, but fortunately they do not include a detailed account of precisely what contracts for differences and spread bet trades involve. I mention in passing, although nothing turns on it so far as this case is concerned, that, although spread bet trades are species of gambling contracts, they are legally enforceable by reason of s.412 of FSMA 2000. Both contracts for differences and spread bet trades are species of derivative instruments by which clients can speculate on events such as the movement in the price of a share or changes in the level of a financial index.
19. The contracts which Global Trader entered into with clients could involve high levels of financial risk, and the operations of companies such as Global Trader which provide facilities for such contracts are subject to considerable statutory regulation. Much of the regulation is directed towards client protection, but it is encouraged by

Community legislation not to be so prescriptive as to frustrate the operations of the markets towards which it is directed. The regulatory authority is the FSA. The trading relationship between Global Trader and its clients was established by a combination of the company's standard terms of trading and the requirements imposed by FSA regulations.

20. As this judgment progresses I will have to go into a lot of detail about that relationship. I believe that it may be helpful if at this stage I describe, in general terms and without reference to detailed contractual or regulatory provisions, how a trading relationship between Global Trader and a client in fact proceeded. I should, however, add the observation that some of the arguments which I shall consider at later stages in the judgment include arguments that, although Global Trader thought that it was conducting the relationship in accordance with the statutory regulations, in some respects it was not.
- i) If the client did not already have an account with Global Trader, he applied to the company to have one. This was not an account analogous to a bank account. Rather it was the sort of running account which operates between regular trading counterparties and which records by how much they are respectively in credit or in debit with each other from time to time. If Global Trader agreed that the client could have an account with it the client might immediately have made a deposit with Global Trader to open the account. I am not sure whether the making of a deposit of some amount, so that, if an account existed, it would have a credit balance in it, was a requirement of Global Trader or not, but, even if it was not, I imagine that many clients would in practice have made a deposit. However, I would not expect clients to have maintained large balances at times when such balances were not required to support open positions (as to which see the next two subparagraphs). The reason why not is that Global Trader did not pay interest to clients on credit balances.
 - ii) Before Global Trader would enter into an actual contract with a client it needed to ensure that it had received from the client a sufficient sum by way of 'margin'. One of Global Trader's sets of standard trading conditions defined 'margin' as 'Funds or other collateral as security for payment of any losses the Client may incur'. Another set of standard conditions stated: ' "Margin" is the expression used to describe the additional funds required to be deposited in your Account in order to support your open positions.' If the client's account with Global Trader was already in credit, the credit would satisfy some or all of the margin which Global Trader would require. To the extent that the client did not have a large enough existing credit balance with Global Trader the client would have to make a further payment to the company. Whenever Global Trader received margin payments from the client it credited the amounts of them to the client's running account. What Global Trader did with the money received from clients in those circumstances, and what the FSA regulations permitted or required it to do, are important issues in this case, and I will turn to them later.
 - iii) When the client wished to open a trade between himself and Global Trader, a trading contract (whether a contract for difference or a spread bet trade) was

entered into. Clients were able to place contracts with Global Trader by email, and I believe that that was the usual way in which contracts were in fact made.

- iv) As long as the contract remained in existence, the client was said to have an open position. The value, positive or negative, of the open position would fluctuate with changes in the value of whatever it was which provided the basis for the transaction. That could, for example, be the quoted value of a particular share, or it could be movements in an index of some description. Many other examples could no doubt be given.
- v) If the value of the client's position deteriorated significantly, Global Trader might take the view that the amount of margin which the client had provided could become insufficient. In that case Global Trader could, and in practice normally would, make a 'margin call', requiring the client to pay to it a further amount by way of margin as a condition of the client continuing to maintain the position as an open position.
- vi) When the client wished to realise the profit or loss on his open position, he gave notice (typically by electronic communication) that he was 'closing' the position. Normally it was the client who closed the position, but, if I have understood correctly, Global Trader had the right to close a position and would be likely to do so if the client was not complying with a margin call.
- vii) When a position was closed a profit or loss arose to the client. If it was a profit Global Trader credited the amount of it to the client's running account between himself and Global Trader. Unless the amount of the credit in the client's account was required by way of margin to support open positions under other trading contracts between him and Global Trader, the client could draw on his account and require the company to pay the balance of it (or part of the balance) to himself or to a third party as he might direct. (I think that a client, when closing a position at a profit to himself, could request Global Trader to pay any profit arising direct to himself instead of first crediting it to his account, but the impression I have gained is that that was unusual: the routine was that profits to clients from the closing of positions were credited to their running accounts with Global Trader, and cash receipts from Global Trader took the form of drawings on the accounts.)
- viii) If, when an open position of a client was closed, a loss arose to the client, normally Global Trader would debit the loss to the client's running account with itself. If all had gone according to plan the balance in the client's running account would be sufficiently in credit to cover the full amount of the loss, and Global Trader would not call upon the client to provide further money in order pay the full amount of his (the client's) loss and its (Global Trader's) profit. That was because of the margining system. The amounts of margins (either initial margins by themselves or the initial margins plus additional margin calls made by Global Trader and complied with by the clients) ought at all times to have been sufficient for the clients' credit balances with Global Trader to have been large enough to cover their prospective losses on any open positions.
- ix) If a client closed all open positions which he had, he might leave his account in existence with a view to entering into other trades in future. If there was a

credit balance in his account (which there usually would be), the client could call on Global Trader to pay the balance to him. Alternatively he could leave it, or part of it, in place with a view to it being instantly available as margin should he wish to open a new position under a future trade. However, as I have noted in subparagraph (i) above, the client did not earn interest on any credit balance which he had in his running account with Global Trader.

21. There are two detailed points which I can conveniently add to the general description which I have given in the foregoing subparagraphs. First, when Global Trader entered into a contract for difference or a spread bet trade with a client, it was its practice to hedge its exposure by entering into a matching transaction with a prime broker. Thus, if Global Trader was going to suffer a loss on an existing trade between itself and a client, it would expect in principle to make a profit of more or less the same amount on its matching contract with the prime broker. Second, however, the existence of matching contracts meant that it was important that margin payments received by Global Trader from its clients were sufficient to cover any losses which the clients might come to owe to Global Trader upon the closing of their positions. A letter exhibited to one of the witness statements of Mr Cork, one of the liquidators, indicates, if I understand correctly, that the event which rendered Global Trader insolvent arose in the following way. A client's open position on its contract with Global Trader deteriorated severely: Global Trader's corresponding position on the matching contract with a prime broker deteriorated in the same way; Global Trader called for a large further margin payment to be made by the client; the client was unable to comply; the prime broker itself made a further margin call upon Global Trader, or closed out Global Trader's open position with it in such a way that Global Trader owed a large sum to it. Because Global Trader's client could not pay the margin call which Global Trader had made upon him, and also could not pay to Global Trader the loss sustained by him when his contract with Global Trader was closed, Global Trader could not pay the amount which it owed to the prime broker. In the result Global Trader was insolvent. The administration and the subsequent liquidation were the consequences. I do not think that what I have just described makes any difference to the issues which I have to decide, but it is a significant part of the background, and for that reason I have mentioned it.
22. I now move on to describe one aspect of how Global Trader conducted its business which I omitted in the subparagraphs of paragraph 20 above. In those subparagraphs I referred to circumstances in which a client might pay amounts of money to Global Trader. The main one was when a sum was payable to provide margin. What could Global Trader do with the money, and what did it in fact do? I should say now that there are important arguments before me to the effect that in some respects what Global Trader did was not in accordance with the FSA regulations, but at this stage in my judgment I simply describe what Global Trader actually did. Later I will have to examine the relevant regulations (referred to as 'the client money rules') in some detail and to form conclusions about whether there were any departures from them and, if so, whether the departures make any difference now.
23. Global Trader considered that, under the regulations, there was a distinction between two categories of clients. A complication here is that, because of a change in the regulatory provisions which took effect on 1 November 2007, the terms used to designate the categories changed. Before 1 November 2007 one of the categories

covered clients designated as 'private customers', and the other category covered clients designated as 'intermediate customers'. From 1 November 2007 the designations changed to, respectively, 'retail clients' and 'professional clients'. The new regulations involved far more than changes of terminology, as I will explain later. But at this stage in my judgment, and for the purpose of what I am describing now, I can equate pre-1 November 2007 private customers with retail clients on and after that date, and pre-1 November 2007 intermediate customers with professional clients on and after the same date.

24. When Global Trader received payments (mainly margin payments) from private customers (before 1 November 2007) and from retail clients (on or after 1 November 2007) it considered that it was required by the FSA regulations to treat the money as trust money, to segregate it from its own money, and to keep it in one or more segregated accounts which were in its name but which were held on trust for the private or retail clients from whom the payments were received. From time to time in this judgment (as mentioned already in the Abbreviations, dramatis personae, etc at the beginning) I refer to the clients for whom money was held by Global Trader in segregated accounts as 'segregated clients'. Global Trader could only take money out of the segregated accounts and treat it as its own in circumstances where that was appropriate for liabilities which arose out of its trading relationship with the segregated clients. In particular, if a position was closed on terms whereby a segregated client suffered a loss which he was liable to pay to Global Trader, Global Trader could transfer an amount equal to the loss from the segregated account to a bank account of its own. Apart from that or other comparable circumstances (for example I believe that in the case of spread bet trades the contracts provided for fees to be paid by the client to Global Trader, and those fees could properly be taken out of the segregated account), Global Trader could not use the segregated moneys for its more general purposes, such as paying margin payments itself on hedging contracts concluded by it with prime brokers, or meeting the general running costs of its business. There is no suggestion that this approach of Global Trader to monies which it received from segregated clients was incorrect.
25. Turning to money which Global Trader received from intermediate customers (before 1 November 2007) or from professional clients (on and after 1 November 2007), Global Trader considered that it was not obliged to segregate such money and hold it in separate accounts on trust for the clients. Global Trader did of course add amounts equal to the money so received to the balances standing to the credit of the clients in the running accounts between itself and them. But it believed that it was entitled to take the money into its own bank accounts and to use it to meet its own expenditure, including expenditure on the sort of matters which I described in the foregoing paragraph (paying its own margin calls to prime brokers or meeting the general running costs of the business). That is what Global Trader did. It is strongly argued on behalf of the Rossib and Soukholinski classes that Global Trader was wrong about this, and that on a proper understanding of the FSA regulations and its own documentation it should have caused the amounts received from intermediate customers and from professional clients to be held in trust in segregated accounts in the same manner as it correctly adopted in the case of amounts received from private customers and retail clients. (For completeness I should qualify what I have just said in this respect. The argument that sums received from clients designated as professional clients from 1 November 2007 onwards should have been held on trust in

a segregated account is only advanced in the case of professional clients who had been intermediate customers until that date, and is not advanced in the case of a new professional client who had not been a client of Global Trader before 1 November 2007.)

Classifications of clients

26. At this stage I think that it is convenient for me to say a little more about the classifications of clients. Before 1 November 2007 the division of clients into classifications was required by regulations contained in the FSA's Conduct of Business Sourcebook, sometimes referred to as COBs. There were in fact three classes: market counterparties, intermediate customers and private customers. Market counterparties are irrelevant so far as this case is concerned, and I will not need say much more about them. There was a long list from (a) to (k) of various kinds of person who would be intermediate customers. Any customer who was not a market counterparty or an intermediate customer was a private customer. An important item in the list of persons who would be intermediate customers was:

“(k) a client when he is classified as an intermediate customer in accordance with COB 4.1.9R (expert private customer classified as intermediate customer)”

I will not reproduce COB 4.1.9R in full. It covered a client in the case of whom the firm (here Global Trader) had taken reasonable care to determine that the client had ‘sufficient experience and understanding to be classified as an intermediate customer’. The rule also required that written warnings should have been given to the client and that it should be possible to demonstrate that the client had given an informed consent to being treated as an intermediate customer. I ought perhaps to add that some clients of Global Trader who were intermediate customers before 1 November 2007 may have obtained that classification, not by virtue of subparagraph (k) (quoted earlier in this paragraph), but by virtue of coming within one of the other subparagraphs in the list. Nothing turns on this. The general policy was that intermediate customers were clients with sufficient experience to require a lesser degree of regulatory protection than private customers.

27. In the pre-1 November 2007 period, when a potential client applied to Global Trader to open an account with it, the application form requested information about the client's experience in financial markets and transactions, and in some cases this resulted in Global Trader completing and supplying to the client a ‘Classification as an Intermediate Customer Notice’. This included the following:

“On the basis of information that you supply to us we feel that you have sufficient experience and understanding of investment business and are classifying you as an ‘intermediate customer’ for the purposes of the Conduct of Business Sourcebook (‘COBS’) rules of the Financial Services Authority (‘FSA’)”

The notice proceeded to say that, in consequence of the categorisation of the client as an intermediate customer, certain ‘protections afforded to ‘private customers’ under the rules of the FSA will not apply’. The notice identified some protections in COBS to which it was referring, and then said this:

“In addition, your protection may be limited or modified as set out below:

...

Client Money: our terms of business state that money held by us on your behalf is not held subject to the FSA’s client money rules.”

This part of the form ended with: ‘I have read and understood the ‘Classification as an Intermediate Customer Notice’ and the ‘Risk Warning Notice’ enclosed and I consent to being treated as in intermediate customer.’ If the client wished to be an intermediate customer (it seems that, notwithstanding the lower degree of regulatory protection, there could be some advantages– see paragraph 31 below), he signed the form accordingly.

28. I return to the part of the Notice which said: ‘our terms of business state that money held by us on your behalf is not held subject to the FSA’s client money rules.’ That seems clear enough, but a problem is that, when one looks at Global Trader’s standard terms of business, they did not quite say what the notice said that they said. The standard terms, which of course all intermediate clients had and by which they were in principle bound, said the following:

“[In clause 2.2]: In compliance with the rules of the FSA, the Client will be classified as an ‘Intermediate Customer’. Therefore monies will be held on a non-segregated basis. Any monies received from the Client will not be treated as ‘Client Money’ subject to the FSA’s Client Money Rules.

[In clause 26]

26.1 Any money received from the Client shall be held by GT in a non-segregated account unless otherwise specified or required by the FSA Client Money Rules.”

29. I have some comments to make on the passages which I have just quoted from the Classification as an Intermediate Customer Notice and from the standard conditions of trading. It is clear from the notice and from clause 2.2 of the conditions that Global Trader believed that, if a client was classified as an intermediate customer, that automatically meant that money received by Global Trader from him (especially margin money) was not client money and did not have to be held in a segregated account. Therefore, so Global Trader believed, margin money received by it from intermediate customers (like the members of the Rossib and Soukholinski classes) could be taken into its own bank accounts and used for its own general purposes. An important first stage in the arguments for the Rossib and Soukholinski classes is that that belief on the part of Global Trader was wrong. Similarly, when clause 26.1 of the terms of business said that money received from a client (meaning in this instance an intermediate customer), would be held by Global Trader in a non-segregated account, but added ‘unless otherwise specified or required by the FSA Client Money Rules’, Global Trader obviously assumed that nothing was otherwise specified or required by FSA rules. But the Rossib and Soukholinski classes argue that, so far as they were

concerned, the rules did specify or require that money received by Global Trader from them was to be held otherwise than in a non-segregated account.

30. After I have examined the FSA's client money rules I will say more about the arguments by the Rossib and Soukholinski classes to which I have just referred. To anticipate, I will say that I agree with the arguments so far as they go, but for other reasons I do not think that they are sufficient to lead to the ultimate conclusions which those two classes desire.
31. The matters which I have discussed in the last few paragraphs concern the consequences of a pre-1 November 2007 client having been classified as an intermediate customer rather than as a private customer. Before I move on to other aspects of the case there is one other comment which I desire to make about the classification. Nothing much turns on it, but it relates to a feature of the case which might otherwise seem puzzling, and I think that it may be useful for me briefly to allude to the point. Global Trader was at pains to warn prospective new customers that if they became intermediate customers they would lose several protections. A new client could not be made an intermediate customer without his consent: he had to sign the form agreeing to it. So why should any prospective client have preferred to be an intermediate customer rather than a private customer? There was one clear reason in the particular case of Global Trader, and there may have been a second one. The clear reason is that Global Trader had to be authorised by the FSA before it could carry on the kind of business which it did, and (a fact which I have not mentioned before) a limitation which the FSA attached to Global Trader's authority was that it could enter into contracts for differences only with market counterparties and intermediate customers. Thus the only contracts which it could make with private customers were spread bet trades. To put the point another way, a prospective client who wanted to be able to enter into contracts for differences with Global Trader (whether or not he also wanted to be able to enter into spread bet trades) needed to be an intermediate customer. The second reason which may have existed is touched on briefly in a witness statement of Mr Cork:

“Also non-segregated clients generally received better rates than the segregated clients, although there was no formal pricing policy.” [Para 29 of Mr Cork's first witness statement]

32. On 1 November 2007 several sets of new FSA regulations took effect. I will say more about them when I come to consider the rules about client money. Hitherto, however, I have been focusing on client classifications, and for completeness I should refer to the new regulations about that topic. Clients who became clients for the first time on or after that date (and who were not 'eligible counterparties', the new term corresponding to 'market counterparties' in the previous regulations) were classified as professional clients or retail clients. Retail clients were clients who were not professional clients. There was a long description of which clients would rank as professional clients. It was not the same as the description in the previous regulations of 'intermediate customers', but there was some similarity. I need not go into this, because no issues arise in this case about new clients, of any class, who became clients of Global Trader for the first time on or after 1 November 2007.
33. More important are the transitional regulations. So far as this case is concerned their effect was that existing intermediate customers became professional clients, and

existing private customers became retail clients. I have already mentioned this in paragraph 23 above. There is no issue about this automatic change in designation, but some of the most important questions which I have to decide concern the treatment, when Global Trader went into administration on 15 February 2007, of clients who had been intermediate customers of Global Trader before 1 November 2007 and who were, to use the currently fashionable expression, ‘grandfathered’ into becoming professional clients on that date.

The client money rules; pre-1 November 2007

34. I should preface what I say about the content of these rules by recording that they were made by the FSA under powers contained in FSMA 2000, especially in ss.138(1) and 139(1):

“138(1) The Authority may make such rules applying to authorised persons –

(a) with respect to the carrying on by them of regulated activities ...

as appear to it to be necessary or expedient for protecting the interests of consumers.

...

139(1) Rules relating to the handling of money held by an authorised person in specified circumstances (“clients’ money”) may –

(a) make provision which results in that clients’ money being held on trust in accordance with the rules;

(b) treat two or more accounts as a single account for specified purposes (which may include the distribution of money held in the accounts);

...”

I ought to record that Global Trader was an ‘authorised person’. I have already mentioned (in paragraph 31 above) that one limitation of its authority was that it could enter into contracts for differences only with intermediate customers, not with private customers.

35. Rules made by the FSA under the foregoing powers are delegated legislation, but they exhibit some formal differences from conventional statutory instruments. They are usually contained in parts of the FSA’s Handbook. ‘Handbook’ is a somewhat misleading expression, since in this instance the so-called handbook is not a small volume giving summaries of various matters. It is, I understand (although I am certainly not familiar with most aspects of it), a massive publication. One part of it is the Conduct of Business sourcebook (COBS), to which I have already referred in connection with the classification of clients. Another part of it, which is of central importance in this case, is the Client Assets sourcebook, referred to as CASS. CASS

(like other parts of the Handbook) is divided into several sections or chapters. The section which contained the client money rules before 1 November 2007 was CASS 4. As respects 'MiFID business' (see the Abbreviations, Dramatis Personae, etc in paragraph 1 above), which included the business carried on by Global Trader, CASS4 was replaced by CASS 7 on 1 November 2007. CASS 4 was, and CASS 7 is, a long section or chapter containing many sub-sections, sub-sub-sections and paragraphs. (The printout of CASS 4 which was provided for me contains 27 pages, and the printout of CASS 7 contains 38.) Individual provisions within CASS 4 and CASS 7 (as with other sections of the delegated legislation made by the FSA) are mostly designated as R provisions or G provisions. R means that the provision is a rule; G means that it is in the nature of guidance, rather than itself constituting a rule. Thus for example CASS 4.3.1 was a rule, and is conventionally referred to as CASS 4.3.1R; CASS 4.3.2 was guidance, and is conventionally referred to as CASS 4.3.2G. (For completeness I mention that some other provisions of the FSA regulations may be designated as E provisions. E denotes evidential, but nothing turns on any E provision in this case.)

36. I will now reproduce certain of the provisions of CASS 4 which appear to me to be particularly relevant to questions which I have to decide, and I will comment on them from time to time as I proceed.

i) *CASS 4.1.1 R This section (the client money rules) applies to a firm that receives or holds money from, or on behalf of, a client in the course of, or in connection with:*

(1) its designated investment business ...

Comments. The rule distinguished between two situations: (1) where a firm (e.g. Global Trader) received money from a client; (2) where a firm held money on behalf of a client. If a client paid margin money to Global Trader the firm received money from the client. If the client closed an open position and an amount thereupon became payable to him by Global Trader, then (a) a contractual debt arose; (b) Global Trader did not receive money from him; and (c) Global Trader did not thereupon commence to hold money on his behalf. Proposition (c) is important, and is disputed by Miss Toubé and Mr Herberg on behalf of the Rossib and Soukholinski classes, but in my judgment it is plainly correct. If Global Trader paid an amount equal to the contractual debt into a segregated account which it was holding on trust for the client, then it did at that point commence to hold the money on behalf of the client. Global Trader never did that in the case of contractual debts owed by it to members of the Rossib or Soukholinski classes.

ii) *CASS 4.1.8G The 'opt out' provisions provide a firm with the option of allowing an intermediate customer or market counterparty to choose whether their money is subject to the client money rules ...*

CASS 4.1.9R ... money is not client money when a firm ... holds that money on behalf of, or receives it from, a market counterparty or an intermediate customer ... and the firm has obtained written acknowledgment from the market counterparty or intermediate customer that

- (1) *the money will not be subject to the protections conferred by the client money rules;*
- (2) *as a consequence, this money will not be segregated from the money of the firm in accordance with the client money rules and will be used by the firm in the course of its own business; and*
- (3) *the market counterparty or intermediate customer will rank only as a general creditor of the firm.*

Comments: If, as undoubtedly was the case, Global Trader wanted money received from intermediate customers (like Rossib and Mr Soukholinski) not to be client money subject to the client money rules of CASS 4, the way to achieve that result was to use the opt-out procedure in CASS 4.1.9R. Global Trader seems not to have realised that it needed to do that. At any rate it did not do it. The intermediate customers did sign the acknowledgments on their application forms which I have quoted in paragraph 27 above, but that stopped short of written acknowledgment of the three matters required by the rule.

- iii) *CASS 4.1.19R Money is not client money when it becomes properly due and payable to the firm for its own account.*

CASS 4.1.21G Money held as client money becomes due and payable to the firm for the firm's own account, for example, because the firm acted as principal in the contract ... The circumstances in which it is due and payable will depend on the contractual arrangement between the firm and the client ...

Comments: The only significant situations in which this could apply were, as it seems to me: (1) where a client's position was closed and a debt became payable by him to the firm; if the client had money in a segregated client account, the amount of his debt was due and payable and the firm could take it out of the segregated account; (2) if a fee of some sort was payable by the client to the firm (something which was provided for in the trading conditions for spread bet trades but not in those for contracts for differences). The point being made is the same as that to which I referred in paragraph 24 above.

- iv) **CASS 4.2 Statutory trust**

CASS 4.2.3R A firm ... receives and holds client money as trustee ... on the following terms

- (1) *for the purposes of and on the terms of the client money rules and the client money distribution rules;*
- (2) *subject to (3), for the clients for whom that money is held, according to their respective interests in it;*
- (3) *on failure of the firm, for the payment of the costs properly attributable to the distribution of the client money in accordance with (2); and*

- (4) *after all valid claims and costs under (2) and (3) have been met, for the firm itself.*

Comments: this was the provision which imposed the statutory trust on client money when CASS 4 was in force. The Rossib and Soukholinski classes say that, because Global Trader and the clients in those two classes did not succeed in opting out of the client money rules through CASS 4.1.9R, the statutory trust imposed by this CASS 4.2.3R applied to the money (in particular margin money) paid by them to Global Trader. I agree with that if one considers the matter simply at the time when payments were received from intermediate clients by Global Trader; but I will explain later why that is not enough to win the case for the Rossib and Soukholinski classes. Those classes further say that CASS 4.2.3R imposed a trust also in the situation where a client's position was closed so that a profit accrued to him. I do not in any event agree with that, for the reason which is explained in paragraph 36(i) above and to which I will return later, namely that what happened was that a contractual debt became owed by Global Trader to the client, not that any identifiable money became held by Global Trader on behalf of the client.

v) **CASS 4.3 Segregation and operation of client money accounts**

CASS 4.3.2G The purpose of the client money rules is to ensure that, unless otherwise permitted, client money is kept separate from the firm's own money. Segregation, in the event of a firm's failure, is important for the effective operation of the statutory trust that is created to protect client money. The aim is to clarify the difference between client money and general creditors' entitlements in the event of failure of the firm.

CASS 4.3.3R A firm must, except to the extent permitted by the client money rules, hold client money separate from the firm's money.

CASS 4.3.6R If it is prudent to do so to ensure that client money is protected, a firm may pay into a client bank account money of its own, and that money will then become client money for the purposes of the client money rules and the client money distribution rules.

CASS 4.3.8R A firm must segregate client money it receives using either:

- (1) the approach detailed in CASS 4.3.10R (the normal approach) ...*

CASS 4.3.10R If a firm receives and segregates client money, unless it adopts the alternative approach, it must ... either

- (1) pay it as soon as possible, and in any event not later than the next business day after receipt, into a client bank account; or*
- (2) pay it out in accordance with CASS 4.3.99R.*

CASS 4.3.24R If a firm is liable to pay money to a client, it must as soon as possible, and no later than one business day after the money is due and payable:

*(1) pay it into a client bank account, in accordance with CASS 4.3.10R(1);
or*

(2) pay it to, or to the order of, the client.

Comments: I shall have some observations to make about these provisions later, but for the moment in most respects I leave them to speak for themselves. I do, however, observe that, if a firm (like Global Trader) became liable to pay some money to a segregated client or otherwise thought it appropriate that it should pay some money to the client, it should have made a payment into the client bank account or to the client direct. If it made a payment into the client bank account, then in my firm opinion, at that point, but not before, the amount so paid became client money and was money held by the firm on behalf of the segregated client. Before that point there was at most only a contractual debt.

vi) ***Client money calculation***

CASS 4.3.65G The purpose of the client money calculation is:

(1) for the normal approach, to act as a check that the amount of client money that is segregated at banks .. is sufficient to meet the firm's obligations to the clients on a daily basis.

CASS 4.3.66R Each business day, a firm that adopts the normal approach in accordance with CASS 4.3.8R must:

(1) check whether its client money resource, being the aggregate balance on the firm's client bank accounts as at the close of business on the previous business day, was at least equal to the client money entitlement, as defined in CASS 4.3.71R, as at the close of business on that day; and

(2) ensure that

(a) any shortfall is paid into a client bank account by the close of business on the day the calculation is performed; or

(b) any excess is withdrawn within the same period unless [irrelevant]

Comments: The policy is clear. The scheme of the rules was that, in so far as the accounting records of a firm like Global Trader showed that it should be holding money on trust for clients, it should actually hold the required sum in one or more segregated bank accounts. There should be daily reconciliations of the accounting records with the actual balances in the bank accounts, and, to the extent that discrepancies arose, there should be transfers of money between the firm's own bank accounts and the segregated trust accounts (which did of course stand in the firm's own name) so as to keep them in line with each other. One of the documents which I have seen in this case refers to

‘the usual daily reconciliation amount’, a term which creates the impression that, very much as I would expect, transactions in the course of a day would usually mean that by the end of the day the amounts which should be held in segregated accounts and the amounts actually so held would not be identical to each other. Therefore a daily transfer one way or the other in order to match them up should be made. Assume that at the close of business on the previous day (1) the aggregate balances of all the client accounts held with the firm by segregated clients, and (2) the aggregate amounts of all sums held by the firm in segregated client accounts, were exactly equal (as in principle they ought to have been). Assume that during the day several open positions under contracts for differences or spread bet trades between the firm and segregated clients were closed, some at profits to the clients and some at losses to the clients. If the clients’ profits on closings during the day exceeded the clients’ losses on closings during the day, the aggregate balance in the client bank accounts would be too low, and the firm would have to make a payment in to achieve an exact matching of account balances and bank balances at the end of the day. Conversely, if the clients’ profits on closings during the day were lower than the clients’ losses on closings during the day the aggregate balance in the client bank accounts would be too high, and the firm would need to take a transfer out of the client bank accounts to achieve an exact matching.

- vii) *CASS 4.3.99R Money ceases to be client money if it is paid:*
- (1) *to the client, or a duly authorised representative of the client; or*
 - (2) *to a third party on the instruction of the client, unless [irrelevant]; or*
 - (3) *into a bank account of the client (not being an account which is also in the name of the firm); or*
 - (4) *to the firm itself, when it is due and payable to the firm in accordance with CASS 4.1.19R to CASS 4.1.24G; or [Have I transcribed this paragraph correctly?]*
 - (5) *to the firm itself, when it is an excess in the client bank account as set out in CASS 4.3.66R(2)(b).*

Comment: This rule largely speaks for itself. It was referred to in CASS 4.3.10R, which I have reproduced and commented on earlier.

The client money rules: on and after 1 November 2007

37. I now move from CASS 4 to CASS 7. As I mentioned earlier, for MiFID business and therefore for the business carried on by Global Trader, CASS 7 replaced CASS 4 on 1 November 2007. The background is that, on that date, a European Community Directive took effect. The directive was the Markets in Financial Instruments Directive, Directive 2004/39/EC. It is generally referred to as MiFID. In the course of the hearing I was shown several provisions, some in MiFID and others in an associated Directive generally referred to as the MiFID Implementing Directive. So

far as this case is concerned MiFID required a recasting of some aspects of United Kingdom domestic law. Part of the recasting resulted in the replacement of CASS 4 by CASS 7. (Another part required the recasting of clients' classifications, to which I have referred earlier.) The new domestic provisions should, of course, be interpreted and applied in the light of and consistently with the provisions of MiFID and the associated Implementing Directive. However, I believe that I can deal with the issues which arise before me by reference to the United Kingdom provisions, and that I need not make any specific references to the European Directives. I will only say that I do not believe that anything which I decide in this judgment is in any way inconsistent with anything in the Directives.

38. As far as I can see the only transitional provision in United Kingdom law concerning the change (in relation to MiFID business) from CASS 4 to CASS 7 is paragraph C of the Client Assets Sourcebook (MiFID Business) Instrument 2007, FSA 2007/4. Under the heading 'Commencement' paragraph C simply states: 'This instrument comes into force on 1 November 2007.' Among the operative provisions of the instrument were ones which, as respects MiFID business, terminated CASS 4 and introduced CASS 7 in its place. So future transactions between a regulated firm, like Global Trader, and its clients are governed by CASS 7. There is nothing to change the way that CASS 4 had operated in relation to previous transactions, or to change the rights and obligations, whatever they may have been, which existed between a firm and its clients immediately before 1 November 2007 and which had arisen in part through the operation of provisions of CASS 4.

39. I now refer to relevant provisions of CASS 7, in some cases quoting and commenting on them as I did earlier in relation to some provisions of CASS 4. Given that I have examined some of the provisions of CASS 4 at a little length, I will be able to deal with CASS 7 more briefly.

i) CASS 7.1 describes the entities to which the Chapter applies. It certainly applied to Global Trader.

ii) **CASS 7.2** *Definition of client money*

7.2.1R For the purposes of this chapter ..., client money means any money that a firm receives from or holds for, or on behalf of, a client in the course of, or in connection with, its MiFID business unless otherwise specified in this section.

Comments: This provision is substantially similar to CASS 4.1.1 R. I repeat my comments that the definition (unless later provisions change the position) covers a payment by a client to Global Trader, typically of margin money, but does not apply where a client's open position is closed at a profit to the client so that Global Trader owes a contractual debt to the client.

iii) **Title transfer collateral arrangements**

CASS 7.2.3R Where a client transfers full ownership of money to a firm for the purpose of securing or otherwise covering present or future, actual or contingent or prospective obligations, such money should no longer be regarded as client money.

Comment: The ‘opt-out’ system provided for in CASS 4.1.9 is not carried forward into CASS 7. Instead the firm can put in place ‘arrangements’ such as are described in this paragraph 7.2.3R. Such arrangements are referred to henceforth as ‘TTC Arrangements’, TTC being the initial letters of ‘title transfer collateral’, words which appear in the heading to the rule. If a firm does have TTC Arrangements in place, money received from the client will not be ‘client money’, but will be capable of being used by the firm towards the general expenses of its business. I may be wrong about what I say now (not, I think, something which matters in this case anyway), but, whereas the opt-out provision in CASS 4 was only available where the client was an intermediate customer, it seems to me that TTC Arrangements under the present system can be made both with professional clients (the closest present equivalent of intermediate customers before 1 November 2007) and with retail clients (broadly equivalent to private customers before 1 November 2007). A question which I will consider later (paragraphs 43 to 45 and 79 below) is whether this provision in CASS 7.2.3R applied to post-1 November 2007 payments of margin money made to Global Trader by members of the Rossib and Soukholinski classes.

- iv) *CASS 7.2.9R Money is not client money when it becomes properly due and payable to the firm for its own account.*

Comments: this is the same as the formerly applicable CASS 4.1.19, which I commented on earlier. There is an accompanying guidance provision in CASS 7.2.10G, which is similar to the former CASS 4.1.21G. The provisions contemplate a situation where money which originated from a client may have been client money in the first place, but ceases to be client money when a specific contractual debt has become owed by the client to the firm. The main situation when that could arise is when a position of a client has been closed at a loss to him.

- v) CASS 7.2.15R is virtually identical to the formerly applicable CASS 4.3.99R, which I quoted and commented upon earlier. In the circumstances I will not set out this rule verbatim here. The new rule is headed ‘Discharge of fiduciary duty’, specifically indicating that the rule is describing circumstances where money which has been client money in the past and so was held by the firm on the statutory trusts (as to which see CASS 7.7, considered below) ceases to be so held.
- vi) **CASS 7.3** *Organisational requirements: client money*

Requirement to protect client money

7.3.1R A firm must, when holding client money, make adequate arrangements to safeguard the client’s rights and prevent the use of client money for its own account.

Requirement to have adequate organisational arrangements

7.3.2R A firm must introduce adequate organisational arrangements to minimise the risk of the loss or diminution of client money, or of rights in

connection with client money, as a result of misuse of client money, fraud, poor administration, inadequate record-keeping or negligence.

Comment: These provisions seem not to be the same as anything in CASS 4. It might be said that they recognise that merely to declare that client money is held on trust is all very well, but it may still leave the money at risk of being dissipated or misused and thereby lost, so that something more is needed to make the protection more secure. The provisions about segregation, to which I turn next, are a more explicit recognition of the same point.

vii) **CASS 7.4 Segregation of client money**

Depositing client money

7.4.1R A firm, on receiving any client money, must promptly place this money into one or more accounts opened with any of the following: [a list then follows, which certainly included the banks with which Global Trader placed money from time to time].

7.4.17G Under the normal approach, a firm that receives client money should either:

(1) pay it promptly, and in any event no later than the next business day after receipt, into a client bank account; or

(2) pay it out in accordance with the rule regarding the discharge of a firm's fiduciary duty to the client (see CASS 7.2.15R)

Comment: these provisions are largely self-explanatory. They are similar to the former CASS 4.3.10R.

viii) *7.4.21R If it is prudent to do so to ensure that client money is protected, a firm may pay into a client bank account money of its own, and that money will then become client money for the purposes of this chapter.*

Comment: this provision is consistent with the proposition (a manifestly correct one, in my view) that, if circumstances arise in which a firm comes to owe an amount to a client who has not been removed from the protection of the client money rules by means of a TTC Arrangement within CASS 7.2.3R, there is no 'client money' held on trust for the client unless and until the firm makes a payment into a segregated client bank account. This is important for the situation (to which I have already referred several times and to which I will no doubt refer several more times) where a client closes a position at a profit so that a debt is owed by Global Trader to the client. Indeed, that situation arises in connection with the provision of CASS 7 which I quote next.

ix) ***Money due to a client from a firm***

CASS 7.4.29 Pursuant to the MiFID client money segregation requirements, a firm operating the normal approach that is liable to pay money to a client should promptly, and in any event no later than one business day after the money is due and payable, pay the money:

(1) to, or to the order of, the client; or

(2) into a client bank account.

- x) Part 7.6 of CASS 7 is headed ***Records, accounts and reconciliations***. It requires firms to keep full records and accounts, and to carry out regular reconciliations. The principal purpose of the reconciliations is to ascertain and quantify any discrepancies between the amounts which, according to the firm's accounting records, it should be holding on trust for the segregated clients and the amounts which it is actually holding in the segregated bank account or accounts. This leads to the following rule:

Reconciliation discrepancies

CASS 7.6.13R When any discrepancy arises as a result of a firm's internal reconciliations, the firm must identify the reason for the discrepancy and ensure that:

(1) any shortfall is paid into a client bank account by the close of business on the day that the reconciliation is performed; or

(2) any excess is withdrawn within the same time period.

Comment: The reference in the above rule to the firm being required to identify the reason for any discrepancy might imply that, if there is a discrepancy, something must have gone wrong. In some cases it may be true that something has gone wrong, but I believe that in the course of virtually every day a discrepancy would arise without anything having gone wrong at all. As to this see my comment in paragraph 36(vi) above, relating to the expression 'the usual daily reconciliation amount.'

- xi) In CASS 4 the statutory trust of client money was imposed by a provision quite early in the section: CASS 4.2.3R, quoted earlier. In CASS 7 there is a provision which does the same thing, but the draftsman has placed it much later in the Chapter

7.7 Statutory trust

Requirement

7.7.2R A firm receives and holds client money as trustee ... on the following terms:

(1) for the purposes of and on the terms of the client money rules and the client money (MiFID business) distribution rules;

(2) ... for the clients ... for whom that money is held, according to their respective interests in it;

(3) [Irrelevant: relates only to insurance undertakings]

(4) on failure of the firm, for the payment of the costs properly attributable to the distribution of the client money in accordance with (2); and

(5) after all valid claims and costs under (2) to (4) have been met, for the firm itself.

Comment: I will make my observations on what the statutory trust does and does not apply to in later sections of this judgment.

40. CASS 7 does not end at the point which I have reached. In particular there is a long succession of sub-sections in CASS 7.9: ***Client money distribution***. Those provisions are relevant to issues to which I will come in later parts of this judgment, and therefore I do not refer to them further at this point.

What Global Trader did upon the introduction of CASS 7

41. CASS 7 came into effect on 1 November 2007. It is necessary to distinguish between what Global Trader did in relation to new, post-1 November 2007, clients and what it did in relation to existing clients who continued as such on and after that date. It is only the latter who matter for this case. I assume that Global Trader did obtain some new clients after 1 November 2007 and before it went into administration on 15 February 2008, but as far as I am aware no questions arise as to the treatment of them in the administration and in the liquidation. At least no such questions have been notified to me. However, I mention for completeness that, as I understand the facts, Global Trader introduced new application forms for clients who wished to open accounts with it, and that the forms included a page, which the potential clients signed, designed to ensure that there was a TTC Arrangement which would come within CASS 7.2.3R and would mean that money received by Global Trader from new clients would not be client money within the meaning of CASS 7.2.1R. I note incidentally that this could be done in the case of all clients, retail clients as well as professional clients, whereas the nearest equivalent under CASS 4, which was the opt-out route provided for by CASS 4.1.9R, was only available for intermediate customers, and could not be used in the case of private customers.
42. As regards existing clients, whether intermediate customers or private customers, Global Trader did not send them new application forms or other documents to sign. Instead it decided to send to them emails informing them of changes to its terms of business. (Emails were the normal medium through which communications passed between Global Trader and its clients – placing trades, closing positions, sending statements to clients, and the like – so an email was in principle a perfectly acceptable method for Global Trader to notify existing clients of the changes.) The email which was drafted for sending to intermediate customers who, through the ‘grandfathering’ provided for in the transitional regulations, were going to become ‘professional clients’ for the future, contained wording intended to cause future trading between Global Trader and those customers to be done on the basis that there was a TTC Arrangement in place. The critical wording, which clearly set out as far as possible to track the wording of CASS 7.2.3R (the provision which specified what was required to have a TTC Arrangement), was:

“Since the funds you place in your trading account are for use in the course of Global Trader’s investment business for the purpose of securing or otherwise covering present or future, actual or contingent or prospective obligations, you are informed that these funds will not be regarded as ‘Client Money’ per the FSA Client Money Rules and will not be subject to the protections conferred by these regulations.”

The email was intended to be sent to all intermediate customers (who were regarded by Global Trader as non-segregated clients) on 31 October 2007.

43. If the wording of the emails and the way in which they were used clearly achieved the objective of causing the future relationship between Global Trader and each of its former intermediate customers to be a TTC Arrangement, future receipts by Global Trader of money from former intermediate customers would, I think, have certainly been excluded from being ‘client money’. However, it is not clear that the objective was achieved. Several problems arise. One is that, although the email was intended to be sent to all existing intermediate customers, investigations have shown that it was not. Some customers did get it. Mr Soukholinski is an example. Others did not, Rossib being an example. Some intermediate customers got an email, but it was the wrong email, being the one which was intended for private customers and which did not set out to create a TTC Arrangement.
44. Also, the email was in large measure a ‘one-way document’ in that it purported simply to inform those of the intended recipients who did receive it that the contractual terms of trading were being changed. It did not ask them to agree. But against that two points can be made. One is that the email contained a sentence stating that, if the recipient entered into a trade with Global Trader after 1 November 2007, he was deemed to have accepted the new terms. The topic which I am considering at this stage seems to me only to matter to former intermediate customers who made payments to Global Trader after 1 November 2007, and I imagine that nearly all such persons would have entered into a trade with Global Trader after the date. (Of course some of them may not have received the email at all, which serves only to add to the obscurities.) The other point is that the original pre-1 November 2007 standard conditions of trading conferred on Global Trader a unilateral power to amend them. However, I do not think that whoever drafted the email thought that he was amending the standard terms of trading.
45. Furthermore, points of a small-print technical nature were put to me, principally by Mr Herberg, to the effect that, simply as a matter of close construction of the wording, the email did not quite do the job it was intended to do. At one point it cross-referred to Global Trader’s new standard terms of trading, which were available electronically and for which a hyperlink address was given in the email itself. Mr Herberg submitted that, when one followed the matter through into the standard terms, some of them did not accord with what the email appeared to be saying. Rather they had the effect that post-1 November 2007 receipts from clients fell to be classified simply by the terms of CASS 7, and were not removed from that provision by reason of there being a TTC Arrangement. On that basis Mr Herberg’s submission was that the receipts fell to be regarded as client money within CASS 7.2.1, not as receipts pursuant to TTC Arrangements within CASS 7.2.3. I will come back to the questions to which I have just been referring later.

The main claim of the Rossib and Soukholinski classes: discussion

46. At last, after the foregoing long and, I fear, somewhat laborious analysis of the history of the matter and of the relevant FSA rules, I can turn to the first of the issues which I have to decide. An order of Blackburne J dated 18 July 2008 established the categories of respondents, and named the representatives of each class. Paragraph 5 of the order appointed Rossib to represent the class of pre-1 November 2007 non-segregated clients (i.e. clients who had been designated by Global Trader as intermediate customers) who received the 31 October 2007 email. The fact that a substantial number of intermediate customers did not in fact receive the email had not been identified at that time, so in the event Miss Toubé and Mr Al-Attar, counsel for Rossib, have made submissions on behalf of all the former intermediate customers who, having been converted into professional clients by the grandfathering process which I have described earlier, were still clients of Global Trader when it was placed into administration on 15 February 2008, whether they received the email or not.

47. In addition, paragraph 6 of Blackburne J's order appointed Mr Soukholinski as respondent to represent:

“clients which were designated by the Company as non-segregated clients for whom money was held in non-segregated accounts and who ... had no open positions at the time of the appointment, alternatively maintain that the money held by the Company at the time of the appointment [i.e. at the time of the appointment of the administrators, which was on 15 February 2008] was held otherwise than for the purpose of securing or otherwise covering their present or future, actual or contingent or prospective obligations to the Company.”

Paragraph 6 of the order continued:

“For the avoidance of doubt, such clients will also fall within one of the categories delineated in paragraph 5 above [i.e. they will be within the Rossib class], but wish to advance further arguments arising from their particular circumstances.”

48. At the time of Blackburne J's order it must have been anticipated that the Soukholinski class, while supporting the arguments to be presented on behalf of the Rossib class as a whole, would be mainly concerned in the hearing to argue that, even if those arguments did not succeed, there were further arguments available to themselves (i.e. to the Soukholinski class) which meant that they should succeed even if the rest of the Rossib class failed. In the event I detected little sign of any such arguments, except possibly in one relatively minor respect, and, as I said at an early stage in this judgment, Miss Toubé for the Rossib class and Mr Herberg for the Soukholinski class effectively supported and adopted each other's arguments. (Lest it might be thought otherwise, let me say that I make no complaint about this. Although in the event I have not accepted the submissions of either Miss Toubé or Mr Herberg, each of them was very helpful.)

49. I touched earlier on the background to the arguments of the Rossib and Soukholinski classes. Enlarging somewhat on what I said then, the position in outline is this. Most

of the figures which I give now are rounded numbers derived from an estimated outcome statement prepared by the liquidators as at 15 October 2008. At that date the liquidators expected that, when all recoveries by them had been completed, they would hold two kinds of money. First there is what they describe as the segregated fund. The cash held in this fund on 15 October 2008 was just over £2m. It was held in a segregated account which is agreed on all sides to have been and still to be a trust account. The contents of the trust account would be payable in the outcome to whoever the beneficiaries of the statutory trust were at the commencement of the administration on 15 February 2008, but they were not available to meet the claims of contractual or other creditors. Second the liquidators expect by the end of the liquidation process to have recovered a fund likely to be somewhere between £22m and £23m. (That will be the amount after the costs of the administration and liquidation processes, including the far from inconsiderable costs of the present proceedings.) But the claims of non-preferential creditors, towards the meeting of which that fund will be available, were estimated by the liquidators as likely to be over £36m. Thus on the liquidators' estimates unsecured creditors face a shortfall of about 38% in recovery of the amounts owed to them.

50. However, the estimates which I have just given were prepared on the basis that the members of the Rossib and Soukholinski classes are unsecured creditors, and that their claims are included in the £36m plus to which I referred in the previous paragraph. I do not have a precise figure for their claims at 15 October 2008, but I think that the aggregate was about £25m. If they are indeed unsecured creditors they can currently expect to recover only some 62% of their claims.
51. The main argument of the Rossib and Soukholinski classes is that they are not unsecured creditors for their claims of (I think) about £25m, but rather are trust creditors entitled to a proprietary interest in monies which the liquidators have been and are in the process of recovering. They say that, out of what the liquidators expect to recover, an amount up to the aggregate of their claims should be, actually or notionally, segregated and held on trust for them. On that basis, and if their claims are £25m and the liquidators' eventual recoveries are £22m, they would take the whole of what the liquidators recover (less, of course, the liquidators' costs). The amounts claimed by them would be paid; not in full, but to an extent significantly greater than 62%. (It would be 88% if the broad estimates of £25m of claims and £22m of recoveries turned out to be right.) This improved treatment for the Rossib and Soukholinski classes would be at the expense of the ordinary trade creditors, represented by CFM, who would recover nothing instead of some 62% of the debts owing to them.
52. A second (and fall-back) argument for the Rossib and Soukholinski classes is that, if the argument which I have just outlined is not accepted, then at least they should be treated as trust beneficiaries in relation to the segregated fund which is accepted by all to be held on trust and not to be exposed to the claims of general creditors. In the estimated outcome statement to which I have referred in the last few paragraphs the liquidators assumed that the beneficiaries of the whole of that fund consisted only of the Crawford-Brunt class. Miss Toubé and Mr Herberg submit that the Rossib and Soukholinski classes should be regarded as beneficiaries of that fund, together with the Crawford-Brunt class. This is 'the £2m plus issue', and I discuss it under a later sub-heading.

53. I am unable to accept the submissions of the Rossib and Soukholinski classes, for the reasons which I will now explain. It is, in my view, helpful for me to divide their submissions into five separate components, and to consider each of them in turn. The first four components are relevant to their main claim, and I discuss them under sub-headings within the present main heading. The fifth component is relevant to the £2m plus issue (indeed, it is the £2m plus issue), and I discuss it under a separate main heading. The five components are:
- i) Claims deriving from money payments made by members of the Rossib and Soukholinski classes to Global Trader before 1 November 2007.
 - ii) Claims deriving from credits arising to members of the Rossib and Soukholinski classes upon positions being closed at profits to them and losses to Global Trader before 1 November 2007.
 - iii) Claims deriving from money payments made by members of the Rossib and Soukholinski classes to Global Trader on and after 1 November 2007.
 - iv) Claims deriving from credits arising to members of the Rossib and Soukholinski classes upon positions being closed at profits to them and losses to Global Trader on and after 1 November 2007.
 - v) The fall back argument of the Rossib and Soukholinski classes that they are entitled to share with the Crawford-Brunt class in the £2m plus held by the liquidators in a segregated account.

Component (i) (see paragraph 53): Claims deriving from money payments made by members of the Rossib and Soukholinski classes to Global Trader before 1 November 2007

54. In this and the following parts of my judgment I will borrow Miss Toube's convenient expressions of 'old money' and 'new money' to describe payments made respectively before and on or after 1 November 2007. Some of what I say in this section of my judgment has been largely anticipated in the comments subparagraphs which I added earlier in the section when I set out and commented on relevant provisions of CASS 4. (I add that I do not propose to prolong this judgment by setting out the provisions again here. I must ask a reader from time to time to refer back to the earlier part of the judgment for the text of a relevant statutory provision.)
55. The starting point of the claims is a submission that when, say, Rossib paid an amount of old money to Global Trader, typically an amount by way of margin payment, the money was at that time 'client money' within CASS 4. Miss Toube and Mr Herberg say that, when Global Trader received the money, it was trust money even though Global Trader did not pay it into a segregated account.
56. So far I am in substantial agreement. The following words taken from CASS 4.1.1 are satisfied: 'a firm .. receives money from ... a client in the course of, or in connection with: (a) its [the firm's] designated investment business'. The provision does not explicitly describe itself as a definition of 'client money', but everyone agrees that inferentially it provides one. Money, and especially margin payments, received by Global Trader from clients in the course of or in connection with its business, was therefore client money by virtue of CASS 4.1.1R unless Global Trader

put the opt-out provisions of CASS 4.1.9R into operation. Global Trader may have intended to put those provisions into operation, but for the reasons which I gave earlier (see paragraph 36(ii) above) it did not effectively do so. Global Trader needed to obtain written confirmation of three matters from the client, and it obtained confirmation of at most only one of them.

57. However, Global Trader believed, mistakenly but honestly, that the money was not client money, and in the Classification as an Intermediate Customer notice which it supplied to prospective clients it had said that the money would not be client money: see paragraphs 27 and 28 above. Therefore Global Trader did not pay the money into the segregated account or accounts which it had entirely properly opened in order to receive and hold money paid to it which it did believe to be client money. Nevertheless, I agree with Miss Toube that it was not necessary for the money to be paid into the segregated account before it could become trust money. As long as the money was still identifiable it was client money, and was held on the statutory trust.
58. Mr Davis has submitted that, when Global Trader took the money into a bank account of its own and thereby regarded the money as being available for itself to use in whatever way it chose in the course of its business, it thereby caused the money to cease to be client money. He says that that is in accordance with, or at least tacitly assumed by, provisions of CASS 3. I have not yet referred to CASS 3, which is a section of CASS much shorter than CASS 4. I can see nothing in it which somehow excludes the operation of the provisions of CASS 4 to which I have referred in the foregoing subparagraphs, and which resulted in the money received by Global Trader from, say, Rossib being client money at the time of receipt. The only significant rule in CASS 3 was one which required firms to keep adequate records. If CASS 3 had the far-reaching effect which Mr Davis says it had it would have drastically undermined the protections for clients which CASS 4 set out to provide. There was a way out of CASS 4, but it was by means of the opt out under CASS 4.1.9R, not by the route which Mr Davis submits was available through CASS 3.
59. Thus I agree with Miss Toube and Mr Herberg that the money, at the point of receipt of it by Global Trader, was subject to the statutory trust imposed by CASS 4.2.3R. The problem for the Rossib and Soukholinski classes derives from the words which I used at the end of paragraph 57 above: 'as long as the money was still identifiable'. Trust money does not have to be held in a segregated account to be trust money, but if it is not so held its protection as trust money is precarious, particularly if, as in this case, the trustee, in all good faith but mistakenly, thought that it (the trustee) was perfectly entitled to spend the money on its own legitimate business purposes. As CASS 4.3.2G said: 'Segregation, in the event of a firm's failure, is important for the effective operation of the statutory trust that is created to protect client money.' Segregation was not necessary for the creation of the statutory trust in relation to a payment, but it was highly desirable for the continued effectiveness of the trust into the future.
60. It is, I think, virtually certain (and accepted to be so by Miss Toube and Mr Herberg) that a payment of margin money which, when received by Global Trader was, on the true interpretation on the CASS 4 rules, trust money, but which was paid by Global Trader into one of its own bank accounts, will long ago have lost its identity. The accounts were active trading accounts of a busy company, and payments into and out of them, often of large sums, were made constantly. It appears that from time to time

bank accounts of Global Trader went into overdraft. The issue is really a tracing one. Miss Toube says that she did not attempt on the present hearing to establish a proprietary claim to money through a tracing route, and she asks me not to make a specific finding that it is impossible for her to do that. In deference to her request I will not make such a finding, but I have to say that, on the facts as I understand them, her task if she does attempt to establish a tracing case will be difficult indeed.

61. The submissions of Miss Toube and Mr Herberg seek in various ways to navigate round this obstacle. For example Mr Herberg writes in his skeleton:

“SS [Mr Soukholinski] executed further trades with Global Trader post-1 November 2007. His funds (deposits and proceeds of closed out transactions) continued to be held in non-segregated accounts.”

But if ‘his funds’ were not held in a segregated account (which they were not), it is wrong to speak of ‘his funds’ being ‘held in non-segregated accounts’. What Mr Herberg means is that Global Trader owed money to Mr Soukholinski, and Global Trader had money in bank accounts of its own. But money in Global Trader’s accounts was Global Trader’s funds, not ‘his [Mr Soukholinski’s] funds’.

62. Another way of seeking to gloss the position appears in this sentence in the skeleton argument of Miss Toube and Mr Al-Attar:

“The issue before the court concerns whether *the* moneys [my italics] relating to the accounts of the Rossib clients are ‘client money’ subject to the statutory trust ...”

This gives the impression that some particular money relating to the accounts of the Rossib clients had a specific existence and identity. But that was simply not the case. Presumably ‘the accounts of the Rossib clients’ referred to the running accounts between the clients and Global Trader. Those accounts at any particular time were likely to record that the clients had credit balances, but if the sentence in the skeleton implies that Global Trader had specific items of money which could in some way be identified with the credit balances of the clients, then in my view it is quite wrong.

63. The matter which I am considering now is one where lawyers are well familiar with the difference between common linguistic usage and the correct legal position. One often hears someone say: ‘Most of my money is at the ABC Bank’, or ‘The bank has got most of my money’, or something similar, but any lawyer understands that those are misstatements of the legal position. As Lord Millett said in *Foskett v McKeown*, [2001] 1 AC 102 at 127:

“We speak of money at the bank, and of money passing into and out of a bank account. But of course the account holder has no money at the bank. Money paid into a bank account belongs legally and beneficially to the bank and not to the account holder.”

What His Lordship said of the relationship between a customer and his bank is equally true of the relationship between a client of Global Trader and Global Trader

itself. See also the rigorous and trenchant analysis of the bank and customer relationship by Lord Templeman in *Space Investments Ltd v Canadian Imperial Bank of Commerce Company (Bahamas) Ltd* [1986] BCLC 485.

64. There were several other cases cited to me, all of which, in my judgment, are inconsistent with the arguments being advanced by Miss Toube and Mr Herberg. I will mention only two. In *MacJordan Construction Ltd v Brookmount Erostin Ltd* [1992] BCLC 350, Brookmount, a property developer, had a contract with MacJordan, a building contractor. The contract provided for Brookmount to make interim payments from time to time to MacJordan as the work progressed, but it also provided that Brookmount was each time to retain 3% of the interim payment. Brookmount was to hold the 3% retentions as trustee for MacJordan. It was common ground that Brookmount also had an implied obligation to segregate the retentions and to keep them distinct from its own moneys. Brookmount did make the retentions, but it never set them aside, and they were simply mixed in unidentifiably with its own monies. Brookmount then became insolvent at a time when it had made retentions of over £100,000 out of interim payments which it had already paid to MacJordan. But it had created no trust account into which it had paid the £100,000 plus. In the case MacJordan argued, and the receivers of Brookmount disputed, that it (MacJordan) was entitled as a trust beneficiary to an amount out of Brookmount's assets equal to the amount of the retentions. The Court of Appeal rejected MacJordan's argument. Brookmount had had an obligation to create a trust of money equal to the retentions, but had not performed its obligation. In those circumstances Brookmount was not a trustee for MacJordan of money which belonged as a matter of law to it. MacJordan was simply an unsecured creditor.
65. In this case the argument for the Rossib and Soukholinski classes is that, when Global Trader received moneys from clients who were members of one or other of those two classes, the moneys were trust moneys and Global Trader had an obligation to place them in a segregated trust account.. However, Global Trader did not perform its obligation (the reason being that it did not realise that the obligation existed, although I do not think that the reason is relevant), and, in accordance with the principles explained by the Court of Appeal in the *MacJordan* case, I consider that Global Trader's omission to pay the trust moneys into a segregated account, coupled with those moneys ceasing to be identifiable, did not cause a trust to attach to all or part of Global Trader's own money. The only real difference between MacJordan and this case is that in that case the obligation to segregate money in a trust account was imposed by contract whereas in this case it was imposed by an FSA regulation which had statutory effect. Miss Toube and Mr Herberg say that that makes all the difference. In my judgment it makes no difference.
66. The second case which I mention is a recent case, called *re B.A. Peters plc* in the High Court ([2008] EWHC 2205 (Ch)), and *Moriarty v Various Customers of B.A. Peters plc* in the Court of Appeal ([2008] EWHC Civ 1604). The company had carried on a boat-building and boat-brokerage business. It received money from or for clients from time to time, and under the terms of its contracts with the clients it had an obligation to pay money so received into a client account. It was accepted by all that money in the client account was trust money held for the clients who had contributed it or for whom it had been received. At the time of the company's insolvency there was a substantial credit balance in the client account. Indeed, for a reason which I do

not think is explained in the reports, the credit balance exceeded the amounts which had originated from clients and which were accepted as belonging beneficially to the clients from whom it had come or for whom the company had paid it into the account. In this paragraph I refer to the excess in the client account as ‘the excess client account balance’ (my expression, not used in the judgments themselves). In principle the excess client account balance must have belonged beneficially to the company itself, since the beneficial interests of the clients for whom the company was holding money in the client account were satisfied by the part of the account which was not an excess. (Essentially the same proposition was expressly enacted in CASS 4.2.3R(4) and CASS 7.7.2R(5), but in my view follows as a matter of principle without the need for specific enactment.)

67. In the case of two clients (‘the Atkinsons’ and ‘the Clarkes’) the company had failed to perform its obligation to pay money originating from them into the client account, and had paid it into its own account. That account was overdrawn, so the actual money which had originated from or for the Atkinsons and the Clarkes had lost its identity. Nevertheless they argued that they should be treated as trust beneficiaries of part of the excess client account balance. The argument was not accepted. The excess client account balance was part of the company’s funds available towards meeting the claims of unsecured creditors, and in the events that had happened the Atkinsons and the Clarkes were among the unsecured creditors, ranking *pari passu* with the others.
68. The main claim of the Rossib and Soukholinski classes seems to me to be in essence the same as or similar to the unsuccessful argument of the Atkinsons and the Clarkes. In Lord Neuberger’s judgment in the Court of Appeal he observed that the Atkinsons and the Clarkes ‘have a good claim against the company for breach of trust in not paying the money into the client account, but that does not mean that they have a proprietary or other sort of equitable interest or right over that account.’ Still less do the Rossib and Soukholinski classes in this case have a proprietary or equitable interest or right over money held by Global Trader in its own account or accounts. I have also taken note of cautionary observations by Lord Neuberger in paragraph 21 of his judgment, including the following:

“In my view, the court should not be too ready to extend the circumstances in which proprietary or other equitable claims can be made in insolvent situations bearing in mind the consequences to unsecured creditors. ...[E]very time such a claim is held to exist in the case of an insolvent debtor, the consequence is that one commercial creditor gets paid in full to the detriment of all the other commercial creditors, who also have no financial security, but are found to have no proprietary claim.”

69. I add that if, before Global Trader became insolvent, it had discovered that it ought to have paid amounts received by it from intermediate customers into a segregated trust account, and if Global Trader had wished to rectify the position, it could and should have paid the appropriate amount of its own money into the trust account. Upon it doing that the money so paid would have become trust money, but unless and until that happened Global Trader was not a trustee of any of the money which it held from time to time in its own bank accounts. (In saying this I am assuming that the original

receipts of client money which Global Trader did not realise to be trust money had lost their identity and could not have been traced into any credit balances from time to time held by it in its own accounts.) There are several allusions in CASS 4 (and in CASS 7) to money which is the firm's own money being paid into a client account, and it seems clear that the rules proceed on the basis that, when that is done, the amount so paid in becomes trust money; it is not trust money before. See for example CASS 4.3.6R; 4.3.66R(2)(a); CASS 7.4.21R; 7.6.13R(1).

70. That is all that I wish to say at this stage about moneys received by Global Trader from intermediate customers before 1 November 2007.

Component (ii) (see paragraph 53.) Claims deriving from credits arising to members of the Rossib and Soukholinski classes upon positions being closed at profits to them and losses to Global Trader before 1 November 2007.

71. The issues discussed under the previous sub-heading revolved around the words in CASS 4.1.1R 'a firm that receives .. money from ... a client'. The issues which I discuss under this sub-heading revolve around the words, also in CASS 4.1.1R, 'a firm that .. holds money ... on behalf of a client.'
72. As I have explained, clients of Global Trader of all classes had running accounts with the company. The accounts were likely at nearly all times to be in credit. Certainly the accounts of the Rossib and Soukholinski classes taken collectively were in credit. There were, as far as my understanding goes, two ways in which credits could have fallen to be added to the balances of the clients in their running accounts. One was through payments of money by the clients to Global Trader. Under the foregoing sub-heading I considered whether credits which arose in that way could substantiate the proprietary claim which the Rossib and Soukholinski classes are advancing. The second way was through trades between Global Trader and a client being closed at a time when a loss arose to Global Trader and a corresponding profit arose to the client. When that happened Global Trader credited the amount of the client's profit to the running account which Global Trader maintained in its records of the balance from time to time owing between them. It did that in the case of all clients, both the Crawford-Brunt class clients and the Rossib and Soukholinski class clients. In the case of a Crawford-Brunt class client Global Trader also paid an amount equal to the profit into the segregated trust account. In the case of a Rossib or Soukholinski class client it did not.
73. Miss Toube and Mr Herberg submit that, when a profit on closing arose to a Rossib or Soukholinski client in such circumstances before 1 November 2007, a consequence was that Global Trader thereupon held money – an amount of money equal to the profit – on behalf of the client within the meaning of CASS 4.1.1R. Further, they submit that that was so notwithstanding that Global Trader did not pay an amount equal to the profit into the segregated account. I think that the next stage in the argument is that a corresponding amount of money which Global Trader held in one of its own bank accounts (or, to put the matter in more strictly technical terms, a corresponding part of any credit balance which Global Trader had in its bank accounts with its bankers) thereupon became money which Global Trader held on behalf of the client. It is then said that this money became subject to the statutory trust imposed by CASS 4.2.3R.

74. I do not agree with these arguments. To a considerable extent I have already explained my reasons in some of the comments subparagraphs of the section of my judgment in which I reproduced and commented upon significant provisions contained in CASS 4; see in particular paragraph 36(i) above. The critical points are these. When a client's position was closed and a profit arose to the client, the consequence was that a contractual debt from Global Trader to the client came into existence. Global Trader noted and recorded the contractual debt in various ways, including by crediting the amount of it to the client in the running account between them. It is, however, in my opinion wrong to say, as Miss Toubé and Mr Herberg do, that a further consequence was that, in consequence of and upon the closing of the position, Global Trader commenced to hold money on behalf of the client. If, when the client's position was still open and was standing at a potential profit to the client, Global Trader had money of its own in its own bank accounts Global Trader was plainly not a trustee of that money or any part of it for the client. Upon the client closing the position and realising the profit Global Trader did not thereupon become a trustee of any of the money in its own accounts. And suppose that at the time when the client's position was closed all of Global Trader's own bank accounts were in overdraft. Global Trader would not even have owned any money, or, more strictly, have been owed by the bank any debt, to which any trusts could possibly attach. In the course of trading relationships of all sorts trade debts constantly arise, owed by one party to the other. It is wholly wrong to say that the debtor thereupon becomes a trustee for the creditor and holds some of his (the debtor's) own money on behalf of the creditor. He just owes a contractual debt. It was exactly the same between Global Trader and a client when an open position was closed and a profit arose to the client.
75. When the position was closed at a profit to the client, Global Trader was thereupon liable to pay money to the client. If the client was one for whom Global Trader regarded itself as required to hold client money in a segregated client bank account, Global Trader would, in accordance with CASS 4.3.24R, either pay the money into the client bank account or pay it directly to the client. If Global Trader did the first of those things the money, once it was paid into the client bank account, became trust money. Rule 4.3.24R did not specifically say that the money became trust money only upon being paid into the client bank account, but there is no basis on which any identifiable money could have been regarded as trust money before then. I also draw attention to CASS 4.3.6R, which expressly provided that a firm's money which it thought ought prudently to be paid into a client bank account so as to ensure that client money was protected became client money when it was paid into the account. On the actual facts of the case Global Trader, upon a closure of a position which created a profit for the client and a loss for itself, did not believe that it was liable to pay an amount equal to the client's profit into the client bank account and did not do so. It follows that no money became trust money which Global Trader was holding on behalf of the client.
76. What I have said is sufficient in itself to demonstrate that the arguments of the Rossib and Soukholinski classes are unfounded in the case of amounts which came to be owed to them when profits arose to them upon the closing of open positions. In the circumstances which I considered under the previous sub-heading (cases which began with a receipt of money by Global Trader from a client) there was at least, in my view, some trust money at the time of receipt, but the trust money would have soon lost its identity, and in my judgment a trust could not thereafter spring up and attach

to an equivalent amount of Global Trader's own money. In the circumstances which I have considered in this section of my judgment there was never even a receipt of any trust money in the first place.

Component (iii) (see paragraph 53). Claims deriving from money payments made by members of the Rossib and Soukholinski classes to Global Trader on and after 1 November 2007.

77. As I have said earlier, I do not need to consider receipts from new professional clients who became clients of Global Trader for the first time on or after 1 November 2007. There are, as far as I know, no disputed issues arising in connection with margin payments or other payments deposited with Global Trader by such clients.
78. I do, however, need to consider money – ‘new money’ – received by Global Trader, typically by way of further margin money, on or after 1 November 2007 from former intermediate customers who had been reclassified as professional clients. What Global Trader did with receipts of new money was exactly what it did with similar receipts of old money before 1 November 2007. It credited the amounts received to the running accounts which it maintained of the balances outstanding between itself and the clients. It believed that the money which it received from the professional clients was not client money that had to be segregated in a trust account, and accordingly it did not pay it into such an account. Rather it took the money into one of its own bank accounts, and presumably over time spent it in the normal course of carrying on its business. I think that it is clear from the emails to which I have referred earlier (see paragraphs 41 and 42 above) that Global Trader intended to do those things and believed that, by reason of the emails, it would be fully entitled to do them. How far was Global Trader's belief right? And if it was not, does it matter?
79. The first question which arises is whether, in the case of the clients who received the correct email and thereafter entered into a trade with Global Trader, the effect of their deemed agreement to the email meant that there was a TTC Arrangement between them and Global Trader. If there was it is, I think, accepted on behalf of the Rossib and Soukholinski classes that, by reason of CASS 7.2.3R, post-1 November 2007 payments made by such clients to Global Trader were not client money and were not subject to the statutory trusts. I find the question of whether there was a TTC Arrangement or not very troublesome, and I have difficulty making up my mind upon it. I have alluded to the nature of the arguments in paragraphs 43 to 45 above. If it is crucial for me to come to a conclusion on the point, it is that there was a TTC Arrangement. The wording of the email closely follows the wording of CASS 7.2.3R about what a TTC Arrangement requires. It is true that Mr Herberg has placed before me arguments, which certainly have some substance, that the position becomes much less clear by reason of the cross-reference, through a hyperlink, to provisions of the new standard terms of business: those terms are by no means so clear as the wording of the email itself. However, if there is an inconsistency I think that, since this particular topic (creating a TTC Arrangement) is the main one which the email specifically sets out to deal with, whereas the standard terms of business range comprehensively over all aspects of the relationship between Global Trader and a professional client, the email would prevail. That is why, with some hesitation, I believe that post-1 November 2007 margin payments made by clients who received the email and accepted its contents by entering into at least one new trade with Global

Trader did not fall to be regarded as client money: they were taken out of CASS 7.2.1R by CASS 7.2.3R.

80. But I could be wrong about that, and in any event there appear to have been quite a lot of former intermediate customers who did do business with Global Trader on or after 1 November 2007, who paid new money to the company, but who did not receive the email. I do not see how it can be said that there was a TTC Arrangement with them. So it seems to me that new money received from them could not have been taken out of CASS 7.2.1R by CASS 7.2.3R (which only applies in the case of clients with whom there is a TTC Arrangement). So that new money was client money when received. As such it was, upon receipt, subject to the statutory trusts imposed by CASS 7.7.2R.
81. However, in the case of that new client money exactly the same difficulty arises as in the case of old client money. Because Global Trader believed that it was not client money, Global Trader did not keep it in identifiable existence in a segregated account. Instead Global Trader took it into one of its own bank accounts and presumably spent it in the course of business. As with old money it seems clear that the money would have lost its identity by the time that the company went into administration on 15 February 2008. Mindful of Miss Toube's request to me not to make a finding that the new money cannot still be identified on a tracing basis, I leave open the question of whether that is so.
82. However, from the point of view of the Rossib and Soukholinski classes it is a case of tracing or nothing. Unless they can trace any of their payments of new money into money actually held by Global Trader at the commencement of the administration, and then only in the case of new money payments which they can trace in that way, I conclude that their claims to have a proprietary interest in any of the monies recovered by or held by the liquidators must fail. Their claims rank as claims of unsecured creditors only.

Component (iv) (see paragraph 53). Claims deriving from credits arising to members of the Rossib and Soukholinski classes upon positions being closed at profits to them and at losses to Global Trader on and after 1 November 2007

83. These claims fall to be considered under the terms of CASS 7, not those of CASS 4, but in my judgment the two sets of regulatory provisions work in the same way in this respect. Unlike CASS 4, where the meaning of 'client money' was indicated inferentially but clearly, CASS 7 has an express definition. CASS 7.2.1R provides:

“client money means any money that a firm receives from or holds for, or on behalf, of a client...”

On the specific issue which I am addressing at this point the words which matter are 'money ... that a firm holds for, or on behalf of, a client'. CASS 4.1.1R did not include 'for, or', but the difference is immaterial.

84. Earlier in this judgment I set out my opinion that, when, before 1 November 2007 (when CASS 4 was in force), a position was closed at a profit to the client and a loss to Global Trader, a contractual debt arose but no part of Global Trader's own money which it held at the time (if, indeed, it did hold any money at the time) thereupon

became money which it held on behalf of the client. For exactly the same reasons the same conclusion follows if the position was closed on or after 1 November 2007 (when CASS 7 was in force): no part of Global Trader's own money thereupon became money which it held 'for, or on behalf of, a client'. If the client was one for whom money was held in a segregated account and Global Trader, upon or promptly after the closing of the position, paid an amount equal to the profit into the segregated account, the amount so paid would then be client money. If, as Miss Toube and Mr Herberg argue was the case, Global Trader ought to have been holding money for the particular client in a segregated account, but Global Trader (rightly or wrongly) did not understand that to be the position and did not pay an amount equal to the profit into a segregated account, then no money became client money as defined and no money became subject to the statutory trusts declared in CASS 7.7.

85. It follows that, even if in the case of all or any of the members of the Rossib and Soukholinski classes Global Trader did not succeed in excluding CASS 7 on the basis that the emails created TTC Arrangements, credits which arose to the members of those classes on closure of positions on or after 1 November 2007 were not client money held in trust for the clients.

Concluding observations on the main claim of the Rossib and Soukholinski classes

86. At the risk of repeating myself, by 'the main claim of the Rossib and Soukholinski classes' I mean their claim to have a proprietary interest in the funds held by the liquidators which the liquidators have hitherto regarded as unsegregated and available towards meeting the claims of unsecured creditors. These are the funds which I said in paragraph 49 above the liquidators were estimated to be between £22m. and £23m. For the reasons which I have set out at length in foregoing paragraphs of this judgment I do not accept the claim. I have five final observations to make about it, and then I will move on. The first two of my concluding observations about the main claim address two specific arguments, one advanced by Miss Toube and the other by Mr Herberg.
87. Miss Toube, if I understood her correctly, argued, with reference to amounts which she said should have been treated as client money before 1 November 2007 but were not, that the coming into force of CASS 7 somehow caused a new trust to arise then and to attach to money held by Global Trader at the moment of commencement of the new CASS Chapter. I may have misunderstood the argument, and if so I apologise, but if that was indeed argued I cannot see any basis for it and I do not accept it. If, as I believe was the case, some members of the Rossib and Soukholinski classes had claims against Global Trader but they were normal creditor claims, not trust claims of a proprietary nature, then they continued to be normal creditor claims after 1 November 2007. I see no justification for saying that they were somehow transmuted into proprietary claims which attached to money which Global Trader happened to have in its own bank accounts at the time. That is my first concluding comment on this aspect of the case.
88. The second one only applies to the Soukholinski class. It arises in this way. Mr Herberg argued that, in the case of those members of the Soukholinski class who had no open positions on 1 November 2007, there was no need for Global Trader still to hold amounts of margin. Alternatively he argued that such a situation certainly arose for members of the Soukholinski class who had no open positions on 13 February

2008. On that date (a fact which I have not mentioned previously) the FSA modified Global Trader's authority so that it could not enter into any new trades with clients. Mr Herberg says that therefore, in so far as such clients (clients in the Soukholinski class who had no open positions) had credit balances in the running accounts between them and Global Trader, trusts sprang up and Global Trader became a trustee for them for amounts equal to their former credit balances.

89. I agree with the first stage or stages of the argument. It is quite true that, if a client had no open positions at any date, Global Trader did not have any reason to require the client to have amounts standing to the credit of his running account with itself (that is with Global Trader). But I do not agree with the next stage in the argument, where it is contended that, if a client had a credit balance but Global Trader did not at the time need him to have one, Global Trader became a trustee for the client of an amount of its own money equal to the credit balance. The basic relationship between Global Trader and a client was contractual. If a client had a credit balance in his running account and had no open positions he was entitled under the contract to call on Global Trader to pay him the balance. The balance was a debt, and in the circumstances postulated by Mr Herberg the client was entitled to have it repaid. It was just the same as a case where a customer of a bank whose account is in credit can call on the bank to pay him money up to the amount of the balance. (That assumes that there is no special feature like, say, a right of the bank to set off the customer's credit balance against an overdrawn balance in another account.) It is a contractual matter, and I can see no basis for seeking to impose a trust such as that for which Mr Herberg contended.
90. My third concluding comment on the main case of the Rossib and Soukholinski classes is that the case seems to postulate the existence of a trust the nature of which I have never encountered before. Mr Herberg, if I recall correctly, said that when CASS 7 refers to money that a firm 'holds for or on behalf of a client' the words are used in an 'everyday' or 'vernacular' sense. He had in mind the way in which people often say that the bank is 'holding their money'. But as I have said earlier, that is a total misstatement of the legal position, and, if the proposition is analysed in the present context it loses all reality. The case seems to be that, if the money which the firm received from a client had lost its identity but the firm still had bank balances of its own, some part of the firm's money at the bank was trust money held on behalf of the client. What part? No answer is given. And it appears that the firm could still spend any of the money in its own accounts without committing a breach of trust. If the firm's own bank accounts went into overdraft (as from time to time they did in this case) it is accepted that there was then no money held for the client in this everyday or vernacular sense, but it is argued that, if the accounts moved back into credit (as they did), then there was money (unidentified) held on trust for the clients again.
91. This cannot be right. It conjures up the image of something analogous to floating charges, which companies can and regularly do grant in support of debentures. The trust argued for here is a kind of floating trust which does not attach to any particular property but still means that an unidentified part of any fluctuating money which a firm has in its ownership at any particular time is held on trust. I do not believe that a trust of that sort is recognised by our law. Nor is the difficulty overcome by the circumstance that the trusts upon which the Rossib and Soukholinski classes seek to

rely here are created by statute. I accept that a statutory trust may not have to comply with all the conditions which private law trusts need to satisfy in order to be valid and enforceable in equity – as Lawrence Collins J decided in *re Ahmed & Co.* [2006] EWHC 480 (Ch), to which I was referred. But I say that the statutory trusts created by CASS 4 and CASS 7 do at least require the trust property to exist and to be ascertainable. Hence the attention devoted by the rules to seeking always to have the trust property segregated in order that its identity should not be lost.

92. My fourth comment on the main claim of the Rossib and Soukholinski classes is that the relief which they are seeking may be ruled out in any case by provisions of FSMA 2000. I reproduce ss. 150(1) and 151.

“150 Actions for damages

- (1) A contravention by an authorised person of a rule is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

151 Limits on effect of contravening rules

- (1) A person is not guilty of an offence by reason of a contravention of a rule made by the Authority.
- (2) No such contravention makes any transaction void or unenforceable.”

93. At the heart of the case of the Rossib and Soukholinski classes is the proposition that some aspects of how their relationship with Global Trader was handled by the company were contraventions of the rules in CASS 4 and CASS 7: unwitting contraventions, but contraventions nevertheless. For the company to take payments of margin moneys from the members of the class into its own bank accounts, not keeping them distinct in segregated accounts, and over time to spend them on the general expenses of its business, contravened the client money rules. Let me assume that those propositions are right – as indeed I believe that they are, at least as regards money received in the CASS 4 period, and possibly also as regards money received in the CASS 7 period. The result would appear to be, not that what Global Trader did was void or unenforceable (s.151(2)), but only that the members of the two classes may have claims for damages for breach of statutory duty (section 150(1)). Those claims have no attraction to the members of the two classes, because they will be claims of unsecured creditors. But, putting the matter at its lowest, I have difficulty in seeing how the proprietary relief which the classes seek to assert can survive ss. 150 and 151. I do not base my decision on that point, but I mention it nevertheless.

94. My fifth and final comment on the matters which I have discussed in recent sections of this judgment is this. I have based my decision on what I believe the correct legal position to be, and not on an attempt to grope for the supposed merits. Nevertheless, I do not think that there is any real underlying unfairness in the result. It is true that I have agreed that moneys, principally if not entirely margin moneys, paid by members of the Rossib and Soukholinski classes to Global Trader were client money upon

receipt (at least before 1 November 2007), but were not treated as such by Global Trader. But I think it most unlikely that any of the clients thought, when they made margin payments, that the money would be trust money entitled to the high level of regulatory protection which Miss Toube and Mr Herberg now say should have been extended to it. At any rate no evidence has been put in by any former intermediate customer saying that he understood that his margin payments would be trust money and expected them to be held in a segregated account. And if he had read the documentation which he received from Global Trader he would have noticed several statements to the effect that he would not receive the degree of protection extended to other clients, and that the FSA's client money rules would not apply. Those statements may have been mistaken, but no-one doubts that they were honestly made. The proposition that they were mistaken seems to have been discovered by the legal advisers to the Rossib and Soukholinski classes in the preparation for this case.

95. I have no other observations to make on what I have described as the main case of the Rossib and Soukholinski clients.

The fall-back case of the Rossib and Soukholinski clients: the £2m plus issue: component (v) (see paragraph 53)

96. This fall back case is that the Rossib and Soukholinski classes, even if they have no proprietary claim to the assets held by the liquidators otherwise than in segregated accounts, at least have proprietary claims, in common with the members of the Crawford-Brunt class, to the amount ('the £2m plus') held by the liquidators in a segregated account. It is agreed on all sides that the £2m plus is client money held on trust, and that it is not available to meet claims of Global Trader's creditors. It is also agreed on all sides that the members of the Crawford-Brunt class are trust beneficiaries entitled to share in the £2m plus. What is disputed is whether they are the only beneficiaries entitled to share in it, or whether the members of the Rossib and Soukholinski classes are also beneficiaries entitled to participate.
97. In my judgment the members of the Rossib and Soukholinski classes are not beneficiaries entitled to share in the £2m plus. I can explain my reasons quite briefly.
98. The critical provisions, in my opinion, are CASS 7.7.2R(2) and CASS 7.9.2R, especially subparagraph (2) thereof. The first provision is as follows:

"7.7.2R A firm receives and holds client money as trustee ...
on the following terms:

(2) ... for the clients ... for whom that money is held according
to their respective interests in it."

The relevant provisions of CASS 7.9, which is headed 'Client Money distribution', are as follows:

"Application

7.9.1R This section ... applies to a firm that holds client money which is subject to the client money rules when a primary pooling event ... occurs"

Provisions which I need not set out (but of which I say a little more in paragraph 108 below) state that one situation where a primary pooling event occurs is when a firm goes into administration. So in this case there was a primary pooling event on 15 February 2008. I can move on to the major provision of CASS 7.9.

“Pooling and distribution

7.9.6R If a primary pooling event occurs:

(1) client money held in each client money account of the firm is treated as pooled; and

(2) the firm must distribute that client money in accordance with CASS 7.7.2R, so that each client receives a sum which is rateable to the client money entitlement calculated in accordance with CASS 7.9.7R.”

I do not need to quote any further.

99. If Global Trader had more than one client money bank account at the commencement of the administration (as, if my memory serves me correctly, I think it did, because client moneys were not all held in the same currency), they have all now been pooled as required by CASS 7.9.6R(1). So CASS 7.9.6R(2) requires Global Trader (meaning now the liquidators) to distribute the pooled fund in accordance with CASS 7.7.2R. The important words in CASS 7.7.2R are ‘for the clients for whom that money is held’. The £2m plus was held by Global Trader for the members of the Crawford-Brunt class. No part of it was held for members of the Rossib and Soukholinski classes. Therefore the £2m plus fell to be distributed to the members of the Crawford-Brunt class, and the members of the Rossib and Soukholinski classes have no right, under the combination of CASS 7.7.2R and CASS 7.9.6R(2) to receive any part of the distribution. It does not assist the members of the Rossib and Soukholinski classes to say that, on a proper interpretation of other provisions in CASS 4 and CASS 7 Global Trader ought to have been holding more money than the £2m plus in client accounts, and ought to have been holding such further money, not for the members of the Crawford-Brunt class, but for themselves (the members of the Rossib and Soukholinski classes). The fact was (whether it should have been that way or not) that the only money which Global Trader was holding as client money was the £2m plus, and the persons for whom it was holding that money were the members of the Crawford-Brunt class.
100. I therefore do not accept the Rossib and Soukholinski’ classes’ fall back argument, and I decide the £2m plus issue in favour of the Crawford-Brunt class.
101. I add that, as far as I am aware, there is no internal issue within the members of the Crawford-Brunt class as the proportions in which the £2.2m should be divided between themselves.

The incomplete transfer issue

102. This issue arises in the following way. Global Trader went into administration in the course of 15 February 2008. Earlier in that day Global Trader instructed its bank,

Barclays, to make two transfers from one of its own bank accounts to the segregated account. One transfer was what I have referred to on a few occasions already as ‘the usual daily reconciliation amount’. It was £3,161.55, and was in no way out of the ordinary. The other transfer was of £499,994.00. The two sums aggregate to £503,157.55. The £499,994 was out of the ordinary, but as far as I can see it was not connected with the events which caused the insolvency. It appears to have been purely fortuitous that the time when it was instructed to be paid was so close to the commencement of the administration.

103. What I say now does not matter, but I will briefly describe the background to the £499,994. That sum had been paid to Global Trader some time previously by a third party, but with reference to the account of one of the retail clients (as it happens, Mr Crawford-Brunt who is the representative respondent for the Crawford-Brunt class). Circumstances arose in which the £499,994 needed to be repaid to the third party. It was repaid. The money, when originally received by Global Trader, had, by a process which I am not sure that I understand fully but the details of which do not matter, ended up being credited to one of its (Global Trader’s) own bank accounts, not to a segregated account held on trust for the segregated clients. The repayment to the third party ought, therefore, to have been made out of one of Global Trader’s own accounts. But by mistake it was not. It was made out of the segregated account held for the segregated clients. The mistake was identified. The way to put it right was for £499,994 to be transferred from Global Trader’s own account to the segregated account, and that was the instruction which was given to the bank on 14 February 2008.
104. However, the bank did not act upon Global Trader’s instructions to make the two transfers, aggregating to £503,157.55, from Global Trader’s own account to the segregated account: hence the ‘incomplete transfer’. There was no evidence about why not, but I was told that at the time of the instructions Global Trader’s own account out of which the bank had been instructed to make the payment was in overdraft, and that the bank was aware that later in the day Global Trader was going to go into administration. In the circumstances it is not surprising that the bank did not act upon the instructions.
105. The effect, however, is that the segregated account, which ought in principle at any time to be equal to the aggregate of the credit balances of the segregated clients for whom the account was held in trust (except for inevitable daily variances which should be rectified by a transfer of ‘the usual daily reconciliation amount’), was short by over half a million pounds. If it stays that way the result appears to be disadvantageous to the Crawford-Brunt class, but Mr Davis, on behalf of the members of the class, has addressed submissions to me designed to establish either that the disadvantageous result does not arise at all, or that the disadvantage can and should be removed.
106. His first argument is that, although the bank did not transfer £503,157.55 to the segregated account, nevertheless there was an effective transfer by Global Trader of that amount of money. The submission is that Global Trader’s unsuccessful attempt to have the bank make a transfer of the sum amounted to a declaration of trust by Global Trader: Global Trader declared itself a trustee of £503,157.55 for the members of the Crawford-Brunt class. I cannot accept this argument. There may be exceptional circumstances in which an unsuccessful attempt to transfer property

(including money) can operate as a declaration of trust, as in *re Rose* [1952] 1 Ch 499, but I cannot see any realistic basis on which that can be said to have happened here. If a bank is instructed by a customer to make a transfer of money to a third party and the bank declines to act on the instruction, there is no basis on which that can be regarded as the customer having made a declaration of trust of money. As I have noted earlier, what the bank's customer owns is not money, but rather a debt owed to him by the bank. I suppose that it would be possible for a bank's customer to declare himself a trustee of a part of the debt owed to him by the bank, but it is utterly unreal to suggest that that was what Global Trader did on this occasion. It would be unreal if Global Trader's account was in credit by £503,157.55 or more, but in any event I was told that the account was in fact in overdraft at the time. It seems to me impossible for a person to declare himself a trustee of an overdraft, which is a liability, not an asset.

107. Mr Davis then submitted that there is an alternative route for putting right the fact that the balance in the segregated account fell significantly short of the aggregate credit balances of the beneficiaries of the account. The alternative route is for me to direct the liquidators to remove the shortfall by transferring £503,157.55 from their general funds to the segregated account. Mr Peacock, on behalf of the CFM class, says that it would be wrong for me to do that. I sympathise with the Crawford-Brunt class over this matter, which is remarkably unfortunate for them, but I believe that Mr Peacock's submissions are correct.
108. There are, I think, two main stages in Mr Peacock's argument, and I agree with both of them. The first stage is that CASS 7.9 lays down mandatory rules as to what has to be done in relation to client money when there is a 'failure' of a firm to which CASS 7.9 applies. There is no doubt that Global Trader was a firm to which CASS 7.9 applied, and there is also no doubt that the definition of 'failure' included the company going into administration. (There is a Glossary which contains definitions applicable to a wide range of FSA legislative provisions, including CASS. One of them is that a 'failure' is 'the appointment of a liquidator, receiver, administrator, or trustee in bankruptcy, or any equivalent procedure in any relevant jurisdiction.') On a failure of a firm client money held in each client account of the firm is pooled, and the firm must distribute that pooled client money: CASS 7.9.6R(1) and (2). (I have set the provisions out earlier, in paragraph 98.) The money in the client accounts of Global Trader upon its 'failure' created the pool of just over £2m. That was what fell to be distributed to the beneficiaries. The £503,157.55 to which the incomplete transfer issue relates was not included in the pool, and it would be contrary to the mandatory system of CASS 7.9 for that amount to be distributed to the trust beneficiaries otherwise than as part of the pool. I agree with that.
109. The second stage in Mr Peacock's argument is directed against a suggestion that the first stage can be circumvented by recourse to CASS 7.4.21R:

"If it is prudent to do so to ensure that client money is protected, a firm may pay into a client bank account money of its own, and that money will then become client money for the purposes of this chapter."

Can that provision be used as a mechanism for getting £503,157.55 out of the general funds held by the liquidators and into the segregated account? It is not, I think,

suggested by Mr Davis on behalf of the Crawford-Brunt class (the beneficiaries of the segregated account) that the liquidators could, or a least would, make such a transfer on their own initiative. But it is suggested that the court, in exercise of the wide jurisdictional authority which it has over liquidators, can and should direct the liquidators to make such a transfer.

110. Mr Peacock submits that it would be wrong in principle for the court to make such a direction. He relies on observations of Scott LJ, with whose judgment the other two members of the court concurred, in the Court of Appeal in *MacJordan Construction Ltd v Brookmount Erostin Ltd* [1992] BCLC 350, a case to which I have referred earlier (see paragraph 64 above) for the propositions that, where a person has an obligation to make an amount of money the subject matter of a segregated trust fund for a beneficiary but does not perform the obligation, the person's own money is not held by him in trust; he is in breach of his contract to create a separate trust, but the trust has not been created, and the intended beneficiary (unless he can establish some sort of tracing case and remedy) is just an unsecured creditor. Scott LJ continued in the later part of his judgment to say that, if the person who has not performed the obligation is insolvent, it would be wrong for the court to order him to transfer the money to trustees or otherwise to take steps which would result in some part of his money being held on trust for the intended beneficiary. That would amount to the court creating a preference for one unsecured creditor over others, something which a substantial body of insolvency legislation sets out to prevent. In this case the members of the Crawford-Brunt class are trust beneficiaries of £2m plus held by the liquidators in a segregated account, and thus have a good proprietary claim to that money. But as respects £503,157.55 they are unsecured creditors of Global Trader, and, for the reasons which Scott LJ explains, it would be wrong to elevate their status to that of proprietors, not just of the fund of £2m plus of which they are properly proprietors already, but also of £503,157.55 more.
111. It is most unfortunate for the members of the Crawford-Brunt class that, because of the fortuitous circumstance that the events concerning the £499,994 occurred when they did, the amount for which the members of the class actually have proprietary protection stands at so large a shortfall below the amount for which they reasonably expected that they would have that protection. The CASS provisions contain several elements designed as far as possible to secure that segregated funds held in segregated accounts for protected clients like the Crawford-Brunt class are sufficient to meet the claims of the clients. But if the vicissitudes of trading, including things going wrong or mistakes being made, leave a shortfall at any time, the clients do not have their full protection as long as the shortfall continues. If the firm concerned is solvent there is unlikely to be any impediment to it taking steps to eliminate the shortfall, but, unfortunately for the Crawford-Brunt class, that is no longer so in an insolvency situation.
112. Accordingly I am unable to accept the submissions of the Crawford-Brunt class as respects the uncompleted transfer issue. In my judgment the members of the class are unsecured creditors of Global Trader for the shortfall in the segregated fund which I have described in this part of my judgment. I add that this conclusion is in accordance with the guidance contained in CASS7.9.8G:

“A client's main claim is for the return of client money held in a client bank account. A client may be able to claim for any

shortfall against money held in a firm's own account. For that claim, the client will be an unsecured creditor of the firm.”

The further shortfalls issue

113. I hope that I have understood correctly how this issue arises. There was an interim hearing before David Richards J on 3 October 2008. He gave directions and made orders on several matters. One of the orders related to the open positions of segregated clients whose moneys were held in segregated client bank accounts at the commencement of the administration on 15 February 2008. Those clients are the members of the Crawford-Brunt class. I understand that nearly all of their open positions at 15 February 2008 have now been closed, and that only six remain open. However there were many open positions of segregated clients on 15 February 2008. I believe that the further shortfalls issue arises from the impact upon those positions of the rules, as declared in the relevant paragraph of David Richards J's order. That paragraph was paragraph 10:

“10 For the purposes of distribution pursuant to CASS 7.9.6R, the client money entitlement calculated in accordance with CASS 7.9.7R of each [segregated] client is to be calculated as at the date of the Appointment [of the administrators, i.e. 15 February 2008]. The liquidators shall, in respect of each position held by each such client which was closed during the administration or liquidation of the Company, quantify the client money entitlement as though that position was liquidated and closed at the closing or settlement prices published by the relevant exchange or other appropriate pricing source at the time of the Appointment.”

114. So there was a notional closing of open positions of segregated clients at the values which they held on 15 February 2008. On the notional closings of some of those positions notional profits to the clients arose; on the notional closings of others notional losses arose. It was not spelt out in the order, but it was obviously assumed that the amounts of the notional profits or losses would be credited or debited to the running accounts of the segregated clients, and I believe that that is what the administrators and the liquidators have done. Since it was to be expected (given the way that the margining system was operated) that the balances of the running accounts would be in credit, the notional closings would, in almost all cases if not in all, increase or reduce credit balances rather than increase or create debit balances. I understand that on the notional closings the figures have been such that, taking all the open positions together, significantly greater notional profits than notional losses have arisen. This has had the effect of increasing the aggregate balances of the running accounts of the segregated clients taken as a whole, and thus increasing the liability of Global Trader (in administration and now in liquidation) to the segregated clients. But without more the notional closings did not change the amounts held by Global Trader in segregated accounts for the segregated clients. So the amounts owed by the liquidators to the segregated clients have gone up while the money in the segregated account has remained at its level at the commencement of the administration. That level is the figure to which I have referred from time to time as £2m plus. (And because of my decision on the incomplete transfer issue it stays at £2m plus and is not increased by £503,157.55.)

115. Quite apart from the shortfall between the money in the segregated account and Global Trader's liability to the segregated clients immediately before the administration, a question arises of whether a further shortfall arises because notional profits exceed notional losses in the implementation of David Richards J's order, and therefore increase the amount owed by Global Trader to the segregated clients. A further shortfall will inevitably arise if the amount held in the segregated account remains at the £2m plus.
116. I do not find it easy to decide what the correct position is on this aspect of the case, but I have come to the conclusion that there should not be a further shortfall. The reason is that, in my view, the logical and correct corollary of the notional closing of open positions on 15 February 2008, the date of appointment of the administrators, is that Global Trader (which means here the administrators and now the liquidators) should transfer out of its own funds (being now the general funds held by the liquidators) to the segregated accounts an amount equal to the net increase in the credit balances of segregated clients arising by reason of the effect of provisions in CASS 7 as declared in David Richards J's order. If there had been a net decrease I would have said that there should be an appropriate transfer in the other direction: from the segregated fund to the general funds held by the liquidators. I can understand that the liquidators will not wish to make a transfer to the segregated fund without the protection of a court order. I will be willing to hear further submissions about this if any party wishes to put them forward, but my present intention is that I will make such an order. It may be appropriate for the order to refer to the company's power under CASS 7.4.21R to pay money of its own into a client bank account (see paragraph 39(viii) above).
117. I have of course thought carefully and at some length about whether there is an inconsistency in my saying (1) that in the context of the further shortfalls issue the liquidators should make the transfer to the segregated fund which I have described, and (2) that in the context of the incomplete transfer issue the liquidators should not transfer £503,157.55 to the segregated fund. In my judgment the two situations are sufficiently different, and there is no inconsistency. The shortfall deriving from the bank not having transferred £503,157.55 to the segregated fund was something which already existed before the administration commenced. It arose from events which had occurred adventitiously in the course of Global Trader's trading. By adventitiously I mean that the shortfall was not brought about by the administration or, so far as I know, by the events which led to the administration. When the administrators moved in they discovered that one feature of the situation with which they had to deal was that the balance in the segregated account which was supposed to be sufficient to cover Global Trader's liabilities to the segregated clients currently fell short by £500,000 or thereabouts. Could they do anything about that? The answer, in my judgment, was and remains: no.
118. The 'further shortfalls', the origin of which I have described, are different. They were directly brought about by the administration and the impact upon it of binding legal rules, the effect of which was declared by David Richards J's order. He was not asked to consider the question which I now have to consider. I do have to consider it, and, in doing so, I note that the law required Global Trader's liability to segregated clients to increase as a direct result of the company going into administration. I note also that, if that was all that happened, the increase in liability would necessarily lead

to a shortfall in the funds in the segregated account. Yet the purpose for which the law provided that the segregated fund should exist was to protect the segregated clients against a situation where a firm like Global Trader owes money to them but is not able to pay it. In those circumstances it is in my judgment right that the company, now acting by the liquidators, should transfer an amount equal to the increase in liability. As I have said, the liquidators may well not wish to do that without the protection of a court order, but I believe that the court's jurisdiction is wide enough to permit it to make such an order, and (subject to further argument if it is requested) I propose to make one.

119. There is, I believe, an analogy in one aspect of how Global Trader's business was normally conducted. This point was not explored in the course of the hearing, but it seems to me to have some force, and therefore I make it now. Under some spread bet trade instruments which operated between Global Trader and some of its clients the practice was to adopt a 'rolling cash system'. All the positions as respects which the system was adopted were closed and reopened at the end of each day, so that each day there would be a profit or a loss to the client. That seems to me to be in principle the same thing as the notional closings of open positions on 15 February 2008 provided for by David Richards J's order. I do not think that the evidence about the rolling cash system specifically says what I say now, but it surely must have been the case that, in the case of the clients who were segregated clients and whose spread bet trade trades were dealt with on the rolling cash basis, the daily openings and closings of their positions would be associated with daily money transfers from Global Trader's own bank accounts to the segregated accounts or vice versa. Otherwise, over time the cash balances in the segregated bank accounts would progressively diverge from the amounts shown by the running accounts to be owed by Global Trader to the clients (or in theory vice versa, but that would be a rare case). The logic which led to notional closings of positions within the rolling cash system being associated with the appropriate cash transfers between Global Trader's bank accounts and the segregated accounts also leads to the notional closings of all open positions on 15 February 2008 pursuant to David Richards J's order being associated with the appropriate cash transfer between Global Trader's bank account and the segregated account. On the facts of how the notional closings worked out the transfer should be to one or more of the segregated accounts (there are three, one each for sterling, US dollars and Euros), not from the segregated accounts.
120. I have one other point to make before I move on from the further shortfalls issue. The order of David Richards J refers to CASS 7.9.7R. That is a very difficult subparagraph. At one stage in Mr Peacock's submissions he developed submissions about it and about an even more difficult Annex which appears at the end of CASS 7.9. The submissions were carefully worked out and impressive, although other counsel did not necessarily agree with them. I am not going to explain and examine them here, because as far as I can see at present they do not affect the questions which I have been asked to decide. I have been asked to decide questions arising between the various classes of respondents collectively, not internal questions between different members of the same class. I can imagine that CASS 7.9.7R could impact on the sharing of a segregated fund between the various members of the segregated class, but I do not think that in this case it affects the relationship between the Crawford-Brunt class taken collectively and the other classes, also taking collectively. My decision in this part of my judgment is that the notional closings of the open

positions of the members of the Crawford-Brunt class (who were the segregated clients) on 15 February 2008 should be associated with a money transfer from the liquidators' general funds to the segregated fund. One consequence of that decision will presumably be a reduction in the amount available for the CFM class, but I cannot see that that could be changed by anything in CASS 7.9.7R, or for that matter by anything in the Annex to CASS 7.9, to which Mr Peacock also referred in the course of his submissions.

The post-administration closings issue

121. The administration of Global Trader commenced on 15 February 2008. On that date there were 168 open positions of clients. Forty of those open positions were positions of clients whom Global Trader was treating as segregated clients. Thus there were 40 open positions held at that time by members of the Crawford-Brunt class. The order of David Richards J has confirmed that those 40 open positions all fell to be valued at 15 February 2008 on the basis that they were notionally closed at their current values. Since, however, the closings were notional, the positions in fact remained open. Since 15 February 2008 all except six of the 168 open positions have been closed, including the 40 open positions held by the Crawford-Brunt class. On the actual closings profits or losses arose to the clients by comparison with the values of the positions on 15 February 2008. The post-administration closings issue concerns what should happen when a position of a segregated client (that is one of the 40 positions) was closed after the commencement of the administration (whether during the administration period or during the liquidation), and on the closing a profit arose to the client. I repeat that the 'profit' to which I refer here is a profit by comparison with the value of the position on the notional closing on 15 February 2008. If a segregated client's position had a value of nil when it was first opened, was valued at 100 at 15 February 2008, and was closed at a value of 150 on a later date, the profit with which I am concerned under this heading is 50. If the position had declined in value after 15 February 2008 and was closed at, say, 75, there would have been a loss of 25 on the closing, and that amount would have been owed by the client to Global Trader. Here, however, I am only concerned with cases where the value at closing was greater than the 15 February 2008 value.
122. In the example which I have given of a profit of 50 on the closing, there are two possibilities. One is that the 50 is to be treated as client money, to be paid into a segregated account and held on trust for the client. The other is that the proceeds of the closing simply form part of the general funds of the administrators or liquidators; no part of them (and in particular not 50 out of them) should be paid into a segregated account; and the client is an unsecured creditor of Global Trader for the profit of 50. In Mr Cork's witness statement, made before the administration had been converted into a liquidation, he explained that the administrators were proceeding on the second basis. That was, of course, before the decision of David Richards J had confirmed that positions which were open at 15 February 2008, the date of commencement of the administration, should be valued as at that time. The witness statement indicated that the administrators considered, correctly in my opinion, that there was a connection between two questions: (1) what should be done about the value of open positions at 15 February 2008? (2) what should be the treatment of post-15 February 2008 increases in value of such positions arising on future closings of the positions? In paragraph 63 of his witness statement Mr Cork wrote:

“At the present time the Administrators are working on the premise that the open positions on 15 February 2008 (the date of the Appointment) should be valued as at that date, irrespective of whether an instruction to close has been received or not.”

The decision of David Richards J confirmed the correctness of the view taken by the administrators in that respect. In paragraph 64.3 of Mr Cork’s witness statement he added the following:

“to the extent that profit is generated in respect of an open position in the period after 15 February 2008, such profit will fall to be treated as non-segregated funds even if the profit was generated by an open position held on behalf of a Segregated Client.”

123. Mr Davis, on behalf of the Crawford-Brunt class, submits that what Mr Cork says in his paragraph 64.3 is not correct. Mr Davis says that profits arising to segregated clients of Global Trader on post-administration closings should be treated as client money; the administrators, or now the liquidators, should have opened one or more new segregated accounts and paid into them amounts equal to the profits. Because the administrators and the liquidators have not done that I should now direct them to do it. The amounts which, on that basis, would be held in new segregated accounts would be trust monies. The segregated clients would be entitled to them as beneficiaries, and would not be merely unsecured creditors. This, if correct, would be advantageous to the members of the Crawford-Brunt class, and correspondingly disadvantageous to the members of the CFM class. Mr Peacock, on behalf of the CFM class, submits that what Mr Cork said in his witness statement was correct: members of the Crawford-Brunt class to whom profits arose on post-administration closings are unsecured creditors of Global Trader as respects those profits.
124. I agree with Mr Peacock. A general point is that, until Global Trader went into administration, the relationship between it and its clients – particularly, so far as the present question is concerned, its segregated clients – was governed by the CASS 4 and CASS 7 rules and by its own conditions of business so far as they (the conditions) were not inconsistent with the CASS rules. But when Global Trader went into administration it, and the rights and obligations between it and its clients, became subject to the insolvency regimes, initially the administration regime and then the liquidation regime, provided for by the Insolvency Act 1986. As to the necessity for a company in administration or liquidation to be conducted in accordance with the insolvency regimes, see the observations of Mummery LJ in *re Polly Peck International plc (No. 4)* [1998] 2 BCLC 185 at 201 d to i.
125. I have commented a few paragraphs earlier that, as Mr Cork’s first witness statement shows, the administrators (now the liquidators) saw a connection between the treatment of open positions on the administration date of 15 February 2008 and the treatment of profits on post-administration closings. I agree with them. The rationale for having a notional valuation of open positions on 15 February 2008 must have been that that date was a cut-off point for the trust protection afforded to segregated funds. The segregated clients should have the full protection of their segregated status until then. Further, they should have the benefit of that protection as respects increases in

the values of their positions until then even though, because the positions had not been closed, the increases in value were unrealised at that date. But the corollary of that is, as it seems to me, that the protection is not going to continue for further increases in the value of the positions after 15 February 2008.

126. To put the same point the other way round, I ask myself: why did the administrators consider that there should be a valuation of open positions on 15 February 2008, and why did David Richards J take the same view? It seems likely to me that the reason lay in an assumption that profits realised on closings after that date would not enjoy the benefit of the trust protection which had applied to profits realised on closings before that date. David Richards J did not have to consider the specific point which I am addressing now, but if he had considered that profits on actual post-administration closings of positions of segregated clients would still have to be paid into segregated accounts, it is hard to see any significant consequence arising from his order requiring the positions to be notionally closed at their values on 15 February 2008. There may be minor respects in which the interposition of a notional closing would make a difference, but I believe that it would be inconsistent with the basis on which the judge made his order if, after the notional closing on that date, further surpluses on actual closings of the same positions later would continue to be treated in the same way as they had been treated before the administration commenced.
127. The points which I have made in the last few paragraphs are of a general nature. When I turn to the detailed provisions of CASS 7 I find myself reinforced in the same conclusion. For money to be held on trust for members of the Crawford-Brunt class it has to be 'client money': CASS 7.7.2R. CASS 7.2.1R defines client money as 'any money that a firm receives from or holds for, or on behalf of, a client'. For reasons which I have explained at several earlier points in this judgment (especially the comments parts of paragraphs 39(ii) and 36(i)), when a client's position was closed at a profit to the client a contractual debt became owed by Global Trader to the client, but it was not the case that an amount equal to the profit thereupon became money which Global Trader held for or on behalf of the client. That position applies to profits arising on post-administration closings just as it did to profits arising on pre-administration closings.
128. Before 15 February 2008 a profit which arose to a segregated client upon a closing would lead to the creation of client money, but that happened when Global Trader paid an amount equal to the profit into a segregated client bank account. That is another proposition which I have made at earlier points in this judgment. In this respect there is a difference between the situation as it was before the commencement of the administration on 15 February 2008 and the situation as it became after that event: after 15 February 2008 there has not been, and there cannot be, any segregated client bank account into which the administrators or liquidators are required to pay profits on post-administration closings, thereby creating client money to which the trust in CASS 7.7.2R can attach.
129. As respects the segregated client accounts which existed immediately before the commencement of the administration, they and the moneys contained in them were subject to the process required by CASS 7.9.6R. As I have mentioned earlier, the commencement of the administration was a 'failure' of Global Trader, and therefore it was a 'primary pooling event' to which CASS 7.9.4R applied. All client money held in the segregated accounts on 15 February 2008 was notionally pooled by virtue of

CASS 7.9.6R(1), and that client money had to be distributed (or will in time have to be distributed) to the segregated clients rateably to their entitlements to it: CASS. 7.9.6R(2). That plainly meant a distribution to the clients rateably to their entitlements as they stood on 15 February 2008. CASS 7.9 makes no provision for the notional pool to be increased by amounts arising after the date on which the primary pooling event occurred. Nor does it make any provision for the relative entitlements of the segregated beneficiaries to the pooled money to be changed by reference to events occurring after that date.

130. In those circumstances, and against the background of the system laid down in CASS 7.9, it is not possible for amounts equal to profits arising on post-administration closings of open positions of segregated clients to be turned into client money by being paid into the segregated accounts which existed at the time of the administration. Mr Davis has not suggested that that can be done. He submits that the administrators or the liquidators could and should have opened one or more new bank accounts after 15 February 2008, designating them as client accounts, and should have paid into those accounts amounts equal to any contractual profits arising to segregated clients on post-administration closings.
131. In my judgment, however, even if the administrators or liquidators had done that, the result would not have been to create ‘client money’ to which the statutory trusts applied. I assume that the administrators and liquidators could open new bank accounts if they wished to do so, and I also assume that they could call such new accounts client accounts or something similar. But in my opinion such accounts would not be client bank accounts for the purposes of CASS 7. The key provision here is CASS 7.4.1R, which requires a firm, ‘on receiving any client money’, to place it in a bank account. It is a bank account created in that way which is a client bank account for the purposes of CASS 7. Before Global Trader went into administration it was regularly receiving money from clients, principally margin money, and therefore always had segregated client accounts in existence. But the administration was preceded by a restriction on Global Trader’s authorisation from the FSA which prevented it from doing any new business for clients. There can, therefore, (and subject to the point made in the next paragraph) no longer be any new client money arising under the part of the definition which refers to ‘any money that a firm receives from a client’.
132. I should qualify what I have just said by reference to CASS 7.9.9R, which is headed ‘Client money received after failure of the firm’. The rule is as follows:
- “Client money received by the firm after a primary pooling event must not be pooled with client money held in any client money account operated by the firm at the time of the primary pooling event. It must be placed in a client bank account that had been opened after that event and must be handled in accordance with the client money rules, and returned to the relevant client without delay ” (Two irrelevant exceptions are then set out.)

The main situations covered by the rule seem likely to be where money is in transit from a client to the firm at the time of the primary pooling event but arrives at the firm after the event, or where a client does not realise that the event has occurred and

sends some money to the firm which otherwise he would not have sent. The bank account referred to in the rule can only be used as a mechanism in the process of returning money to clients. The administrators and liquidators could not use it as a segregated account into which to pay amounts equal to profits on post-administration closings. And there is a more general point. Rule 7.9.9R seems to me to reflect an assumption on the part of the draftsman that, once a primary pooling event has occurred, the client money rules of the earlier parts of CASS 7 are no longer operative. Mr Davis's submission is that they do still operate.

133. I have two further comments to make on Mr Davis's submission on this part of the case. First, even if the creation by the administrators or liquidators of a new client bank account, and the payment into it of amounts equal to profits arising to segregated clients on post-administration closings, would have caused the amounts to be held on trust for the segregated clients (which in my view they would not for the reasons which I have given in paragraph 131 above), it would in my judgment be quite wrong for the administrators or liquidators to do it unless they were positively obliged to do so by the CASS rules – which in my view they were not. They would be exercising management powers in such a way as to cause a change in the respective entitlements of the different classes of persons claiming entitlements of one sort or another in the insolvency of the company. I do not believe that the liquidators would think it appropriate for them to do that, and I agree with them. Their function is to manage the running down of Global Trader's affairs so as to secure that the different classes receive their entitlements, not to do things which would change the entitlements.
134. Second, for essentially the same reason I would not be prepared myself to direct the liquidators now to do what Mr Davis suggests. For me to do that would be contrary to the decision of the Court of Appeal in the *McJordan* case to which I have referred at earlier points in this judgment (see in particular paragraph 103 above), and also contrary to the principles underlying the decision of the Court of Appeal in the *Polly Peck* case (see paragraph 124 above).
135. To an extent Mr Davis makes a fair point when he says that for a company to go into administration does not necessarily mean that trading ceases, and if the trading before the administration was of a nature to entitle the persons with whom the company was trading to the benefits of a special statutory protection regime, there is no policy reason why the same protection regime should be withdrawn from post-administration trading. However, it appears to me that under the present law the client money protection regime under CASS 7 does not continue to apply after the 'failure' of Global Trader constituted by the commencement of the administration. The law might have been formulated differently, but, given the way that it is formulated, I am unable to accept Mr Davis's submissions on this part of the case.
136. I have no further observations to make on the post-administration closings issue.

Other matters

137. Miss Stubbs asked me briefly to address three other matters. Two of them are in a sense associated with each other. The company maintained records of who the beneficiaries of the segregated fund were. The administrators and liquidators and the professional teams working under their directions have checked the records against the more detailed documentation which is available to them. They have concluded

that there are a few errors, some in one direction and others in the opposite direction. What I mean by that is as follows:

- i) Global Trader believed, and maintained its records on the basis, that the only beneficiaries of the segregated funds were clients classified (before 1 November 2007) as private customers and (on and after 1 November 2007) as retail clients. It would have been inconsistent with that for the company's records to show that any clients classified as intermediate customers or as professional clients were beneficiaries of money held in the segregated accounts. However, careful examination of the underlying records has shown that there are a small number of instances (it is believed nine) where Global Trader mistakenly (at least mistakenly by comparison with what the company intended to do) paid into a segregated account money originating from or payable to intermediate customers or professional clients. So the company's records of the beneficiaries of the segregated accounts at 15 February 2008 (which should have included only retail clients – members of the Crawford-Brunt class) included a small number of professional clients as well.
- ii) There is a smaller number of cases (three, and one of them has very special features so that I am not asked to deal with it) where Global Trader, following the general principles on which it was operating, should have paid into a segregated account an amount of money received by it from or owed by it to a retail customer or private client, and should have recorded the customer or client as a beneficiary of the funds in the account, but did not in fact do so. (The case with special features involved an intermediate customer whose funds Global Trader had agreed to keep segregated; his funds were initially paid into the segregated accounts, but Global Trader later swept them out of the account in breach of the agreement.) So at 15 February 2008 there were two (or possibly three) clients who can say that, although they were not recorded as being beneficiaries of funds held in the segregated accounts, they ought to have been.

What should the liquidators do about those cases?

138. As Miss Stubbs reminded me, the clients in the two categories have not been given notice of the situation, and have had no opportunity to appear before me to make submissions. In the circumstances she does not ask me to decide what the rights, if any, of these clients are. All that she asks is that I should indicate what I think that the liquidators should do next. In each case I think that the liquidators should write to the clients concerned. Broadly it seems to me that the letters should cover the following matters.

- i) The particular facts of the client to whom the letter is addressed.
- ii) What the current intention of the liquidators is. I say more about this in later paragraphs.
- iii) A statement that, if the client wishes to make representations about the matter he should set them out in a letter to the liquidators; the liquidators will consider the representations carefully and keep the client informed about what they propose to do.

139. It is difficult for me to take it further and make suggestions about what the liquidators should do in response to any representations which the clients may make. They will have to await developments and take decisions about what to do in the light of what the clients say and their own reactions to it. I hope that it will not happen, but there must be a possibility of the liquidators at some stage having to inform a client that they cannot agree to do what he wants, and that the client will have to decide whether to bring proceedings seeking an order preventing them from doing it. An alternative, if there is a deadlock between the liquidators and one or more clients, would be for the liquidators to bring proceedings themselves, seeking a declaration that their proposed course is appropriate. I feel sure that they are highly experienced liquidators, and I know that they have access to excellent legal advice. What I have said in this and the last few paragraphs is most unlikely to suggest anything to them which they do not know already, but I understood Miss Stubbs to ask me to make a few comments on these matters, so I have done so. If my comments are little more than platitudes I am sorry, but I do not think that I can say more.
140. I will, however, say a little about what the liquidators might put in their initial letter for the two situations in subparagraphs (i) and (ii) of paragraph 137 above. I suggest that the liquidators should approach each situation on the basis that an amount of money (say £x) should be payable from a segregated account to a person claiming or appearing to be a beneficiary of it if, first, the amount was actually paid into the segregated account by Global Trader before it went into administration, and, second, the liquidators consider (assisted by such legal advice as they may receive) that £x of the funds in the segregated account is held on trust for the putative beneficiary.
141. In situation (i) outlined in paragraph 137 above, if I was one of the liquidators I believe that I would write to each putative beneficiary making the following points.
- i) If Global Trader had followed its usual practice it would not have paid the £x into the segregated account, but rather would have retained it in one of its own accounts and used it in the course of its business.
 - ii) It was presumably only because of a mistake that Global Trader did not do that, but instead paid the £x into a segregated account.
 - iii) Nevertheless Global Trader did in fact pay the £x into a segregated account, and its records showed that it regarded the addressee as a beneficiary of that account in the sum of £x.
 - iv) Therefore the liquidators accept that, despite Global Trader's apparent mistake, it did hold £x of the balance in a segregated account on trust for the addressee, and they propose to pay it over to him.
142. I add two points here. First, there is authority that if a person owes an amount to another and chooses, even without any obligation to do so, to set it aside in a segregated account into which he pays the money, he has created a trust in favour of the other. What I have suggested that the liquidators might write is consistent with that. Second, however, if the amounts are at all significant, the liquidators might think it appropriate to notify their intention, not just to the nine professional clients who would benefit from it, but also to unsecured creditors, in order that they can make representations and possibly dispute the matter if they wish.

143. Turning to situation (ii) in paragraph 137 above, and proceeding along the lines which I suggested in paragraph 140 above, I suggest as an initial approach for the liquidators that they might write to the two (or possibly three) clients affected along the following lines: the liquidators' investigations suggest that the addressees ought to have been beneficiaries of the segregated funds, but the unfortunate fact is that, by reason of mistakes made by Global Trader, no part of those funds was in fact being held for them at the time of the insolvency; accordingly the liquidators believe that they (the addressees of the liquidators' letters) cannot take shares in the segregated fund.
144. For a time I was attracted (influenced, I think, by the small scale of this particular matter) by the alternative approach of the liquidators saying that, although the clients concerned did not appear on the list of beneficiaries of the segregated fund, the liquidators believe that they were beneficiaries, and therefore propose that they will receive distributions from the fund. On reflection, however, I have come to the view that I would not myself do that: it would clearly be inconsistent with what my reason, explained in paragraph 99 above, is for not accepting the argument of the Rossib and Soukholinski classes upon the £2m plus issue. I stress, however, that I am not saying that as a matter of law what I think that I would do is what the liquidators ought to do. When the question is essentially what the liquidators should say in an initial letter, the decision is theirs, not mine, particularly having in mind their experience in this field, experience which I certainly do not possess myself.
145. I have nothing more to say on the first two further matters which Miss Stubbs asked me to address. The third matter is this. The liquidators owe money to all of the beneficiaries of the segregated accounts. Many of those beneficiaries – I suspect most of them – will have had open positions at the time of the administration order, and their positions will have been closed in the period which has passed since the order was made. In some of the cases the positions will have been closed at losses to the clients – losses compared to the notional values at which the positions were notionally closed in accordance with David Richards J's order. In those cases the clients owe the amounts of what might be called their post-15 February 2008 losses to the company. The question is whether the liquidators can recover the losses by setting them off against the distributions out of the segregated fund which the liquidators would otherwise be making to the clients concerned. In my judgment the answer is: yes. I will not go into detail on this. I will merely say that, under provisions in the post-1 November 2007 terms of trading between Global Trader and the retail clients (who are the clients to whom I have referred frequently in this judgment as segregated clients), and in the light of the decision of Jonathan Parker J in *re ILG Travel Ltd* [1995] 2 BCLC 128, I am satisfied that the right of set-off exists and that the liquidators are perfectly entitled to exercise it.

Conclusion

146. At last I believe that I have reached the end of this judgment. I have tried to give my views on all the matters which I have been asked to consider. I have no further observations to make.