Neutral Citation Number: [2026] CIGC (FSD) 75

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 9 OF 2026 (NSJ)

BETWEEN:

MEX ATLANTIC CORPORATION

Plaintiff

AND

NCM GLOBAL (MAURITIUS)

Defendant

Before:	**The Hon. Justice Segal**
Appearances:	**Hermann Boeddinghaus KC instructed by Carey Olsen for the Defendant**
	James Sheehan KC and Caley Wright instructed by Ms Gemma Belfield of Ogier (Cayman) LLP for the Plaintiff
Heard:	**6 August 2026**
Draft judgment circulated:	**19 August 2026**

Request for clarification by the Defendant and Plaintiff's response: **26 and 28 August 2026**

Judgment circulated: **4 September 2026**

JUDGMENT ON DEFENDANT'S APPLICATION FOR PROPRIETARY INJUNCTION

Introduction

1. On Thursday 6 August 2026 I heard the Defendant's *inter partes* summons dated 27 May 2026 (the ***Summons***) in which it seeks an interlocutory proprietary injunction.

2. The underlying dispute relates to sums which were credited to the Defendant's account with the Plaintiff in connection with securities trades between them. In the main proceedings the Plaintiff seeks relief consequential on its asserted rescission for misrepresentation of the agreements and trades between the parties and the Defendant has filed a counterclaim in which it challenges the purported rescission and the Plaintiff's withdrawal from the Defendant's account of sums representing the substantial profits earned by the Defendant on the trades.

3. The Plaintiff opposed the Defendant's application.

4. At the hearing the Defendant was represented by Mr Hermann Boeddinghaus KC and the Plaintiff was represented by Mr James Sheehan KC.

5. The Defendant, as I explain further below, asserts that the Plaintiff holds certain funds on trust for it. The trust claim is based on the Defendant's assertion that the funds in question are "*client money*" for the purpose of and under the agreements between the parties and, as I understand the Defendant's case as presented at the hearing, pursuant to the regulatory regime applicable to firms carrying on a securities investment business

who are regulated by the Cayman Islands Monetary Authority (***CIMA***). The Plaintiff carries on a securities investment business and is regulated and authorised by CIMA.

6. However, the Defendant's written skeleton argument failed to refer to or discuss any of the relevant statutory provisions governing client money paid to and held by such regulated entities. The original authorities bundle for the hearing only included a copy of the Securities Investment Business Act (2020 Revision) (***SIBA***). A further supplemental bundle was filed shortly before the hearing without any covering letter explaining the significance of the material included therein which contained the Securities Investment Business (Conduct of Business) Regulations (2003 Revision) (the ***SIBRs***) and the related guidance statement issued by CIMA (the ***Guidance Statement***). During the hearing Mr Boeddinghaus did take me to the relevant provisions but because of the failure to refer to them in the skeleton argument the Court was not properly briefed in advance of the hearing on the Defendant's case and on material critical to it and had to spend time locating the relevant materials before the hearing. The Plaintiff was also not properly briefed on the Defendant's case. This meant that it was necessary at the hearing to consider this new material in detail for the first time. This was a serious omission by the Defendant and deeply unsatisfactory (as I explained to Mr Boeddinghaus at the hearing).

7. The failure to address this important statutory and regulatory material resulted in a wide-ranging and vigorous debate with Mr Boeddinghaus during the hearing and a significant revision to (or perhaps clarification of) the Defendant's case at the end of the hearing. At the end of his oral reply submissions, Mr Boeddinghaus proposed amendments to the Defendant's draft order and the relief sought on the Summons and the Defendant filed a revised form of order immediately after the hearing.

8. Primarily because of the need further to consider carefully this important statutory and regulatory material and the Defendant's revised case for the proprietary injunction, at the end of the hearing I told the parties that I would reserve my judgment and let them know my decision during the following week. On 13 August 2026 my PA emailed the parties to confirm that I had decided that the Defendant's application for a proprietary injunction should be dismissed and that my reasons would follow shortly in this judgment. My conclusions and my core reasons are summarised at [10] – [32] below.

Evidence

9. In support of the Summons, the Defendant has filed and relies on the Second Affirmation of Mr Muhammad Danish Nisar (***Nisar 2***) dated 20 May 2026 and Mr Nisar's Third Affirmation (***Nisar 3***) dated 23 July 2026. The Plaintiff filed in response to the Summons and relies on the Third Affidavit of Mr Shah Athar (***Athar 3***) dated 3 July 2026. Both parties also referred to other evidence adduced to date in the main proceedings, in particular Mr Athar's First Affidavit (***Athar 1***).

Summary of my conclusions

10. It seems to me that the statutory and regulatory regime governing the holding and protection of client money (the SIBA, the SIBRs, and the Guidance Statement, which I refer to collectively as the regulatory regime) is critical to understanding and interpreting the Plaintiff's obligations to the Defendant and to determining the legal effect of the Plaintiff's actions (in particular the transfer by it of funds to the Omnibus Account).

11. I have decided that the Trading Profits when credited to the Defendant's account with the Plaintiff were not and could not be held on trust by the Plaintiff. The crediting of the Trading Profits to the Trading Account merely recorded and acknowledged the liability of the Plaintiff to the Defendant in respect of profits accrued on the closing of each Trade (which were entered into by the Defendant and Plaintiff on a principal-to-principal basis). The Trading Profits only amounted to liabilities owed by the Plaintiff to the Defendant and without more could not form the subject matter of a trust. Before the separate transfer of funds by the Plaintiff to the Omnibus Account, no funds representing the Trading Profits existed or were transferred by the Plaintiff into an account with a third party (thereby giving rise to an asset of the Plaintiff, namely its claim against and the debt owed by the bank). The Trading Profits merely resulted in book entries in the Trading Account, an account opened by the Plaintiff to record the state of its account with the Defendant.

12. However, it is reasonably arguable that when the Plaintiff transferred to the Omnibus Account funds representing (in an amount equal to) realised Trading Profits (due and payable by the Plaintiff to the Defendant on the closing of Trades), the Defendant

obtained and was granted a beneficial interest in the chose in action and debt represented and evidenced by the total credit balance in the Omnibus Account. It is clear that the Omnibus Account was opened on the basis that it (and the debt owed to the Plaintiff by the bank with whom the Omnibus Account was opened) would be held on trust for clients. It appears to me reasonably arguable that the trust arises by the act of the licensee, acting as required by the regulatory regime, rather than there being a statutory trust created by the SIBA and the SIBRs (compare the position in the UK – see the Supreme Court's judgment in *Re Lehman Brothers International (Europe) (In Administration)* [2012] UKSC 6, [2012] 3 All E.R. 1, to which I referred during the hearing).

13. The SIBRs (Regulations 39 and 40) require that client money must be segregated and must be paid as soon as possible and by no later than the business day following receipt (if not paid to the client) into a client bank account, which is defined as an account that is identified by the bank that opened it as an account which holds the clients' and not the licensee's funds. It seems to me that it is reasonably arguable that clause 3.3 of the Client Agreement, when it states that "*All moneys deposited by you to the credit of your account is client money within the meaning of the client money handling obligations and which will be held in an account with an approved foreign bank in accordance with the client money obligations*", creates (or confirms) an obligation on the Plaintiff to deal with client money deposited by the Defendant in accordance with the requirements of the SIBRs, and that when the Plaintiff transfers funds into the Omnibus Account, which appears to be a client bank account for the purpose of the SIBRs, it is declaring itself a trustee of the funds for all relevant clients on the terms of the SIBRs. Indeed it seems to me reasonably arguable that the Plaintiff is to be treated as having declared itself a trustee of the Omnibus Account when it was opened on similar terms, and that when funds representing client money are paid directly into that account by clients, if that is permissible, they, as part of the credit balance in the account, become subject to that trust.

14. But even if this analysis is correct, the Defendant would only be a beneficial co-owner (with an interest under an unsevered tenancy in common) of the debt and the account, with other clients for whose benefit sums were paid into the Omnibus Account. The extent of its interest as a tenant in common is calculated by reference to the sums paid into the Omnibus Account for, and referable to sums owed by the Plaintiff to, the

Defendant. Such rights are subject to the operation of the Omnibus Account by the Plaintiff in accordance with the regulatory rules and guidance, in particular the Plaintiff's right to make daily withdrawals and transfers from the Omnibus Account to ensure that the balance in the Omnibus Account is at least equal to the "*client money requirement*" (see [9] of the CIMA Guidance, set out below). The evidence provides no details of the bank with whom the Omnibus Account is held or where that account is located (although the Client Agreement states that client money "*will be held in an account with an approved foreign bank in accordance with the client money obligations*"). In the absence of such details or submissions that the law of another jurisdiction is relevant, I have assumed that all issues, including issues relating to proprietary rights, are governed by Cayman law.

15. It also seems to me that it is reasonably arguable that as a result the Defendant has standing to challenge any improper transfers or withdrawals from the Omnibus Account, if and to the extent that such withdrawals are likely to affect its rights and the protections granted to it by the client money regulatory regime. It is reasonably arguable that if funds are transferred from the Omnibus Account improperly, the funds transferred may be subject to equitable tracing claims. Neither the SIBRs nor the Guidance Statement state or indicate that the *only* consequence of a breach of the regulatory regime is a regulatory sanction imposed by CIMA. CIMA has stated that the SIBRs create binding obligations on all licensees for which a breach may lead to the imposition of a fine or regulatory action being taken against the licensee by the Authority and that the Guidance is for use by CIMA for assessing the conduct of licensees. But these consequences are not expressed to be exclusive. As the Guidance Statement makes clear (see [3]: "*Adequate protection is afforded by segregating client accounts form the licensee's accounts which should prevent liquidators from setting off clients' assets against the debts of the licensee itself as well as preventing the licensee from using clients funds to finance its own business*") the regulatory regime for client money is intended to affect and protect private rights by for example preventing a liquidator of a licensee refusing to respect the client's rights in respect of the client money.

16. It seems to me that there is an issue, however, as to the precise remedy that a client and beneficial tenant in common in the position of the Defendant would be awarded. The

Defendant asserts (see the relief sought in the Counterclaim) an immediate right to be paid the approximately US$25 million of Trading Profits. But that is because it claims that the Plaintiff's purported rescission was wrongful and that the Trading Profits remain due and payable to it. Accordingly, on its case the Trading Profits (or funds in the amount of the Trading Profits) should be credited to the Omnibus Account and since the Trading Profits are immediately due and payable the Plaintiff should pay the Defendant what is due to it either by making withdrawals from the Omnibus Account or from its own funds. But where a client and beneficial tenant in common in the position of the Defendant seeks relief from the improper withdrawal and transfer of funds from the Omnibus Account while there is a dispute as to what is owed to (and the amount of client money held for) it, it is strongly arguable that the Court should order that the amount held in the Omnibus Account should be adjusted to reflect what should be credited to it on the assumption that the wrongful withdrawal had not been made. That might involve an order that sums transferred from the Omnibus Account (or their traceable substitutes) be repaid by the Plaintiff into the Omnibus Account or that the Plaintiff transfer its own funds into the Omnibus Account.

17. But even assuming that it was appropriate to freeze by way of injunction funds paid out of the Omnibus Account and to keep them separate pending the result of the Counterclaim, the Defendant faces an insuperable problem in this case because it has been unable to identify any funds paid out of the Omnibus Account to which an injunction can relate. The Defendant has not been able to identify whether any transfers were made from, and if there were transfers what was paid out of, the Omnibus Account on 23 January 2026 (and subsequently). The evidence does not reveal what transfers were made from and to the Omnibus Account on and after 23 January 2026 so that the Defendant is unable to identify a specific transfer payment or a specific recipient of funds transferred from the Omnibus Account. The Defendant has asked for this information from the Plaintiff who has refused to provide it but the Defendant has not made an application, save by way of ancillary relief in the Summons, for an order requiring that the Plaintiff provide relevant information.

18. The Defendant argued that even though it could not identify any transfer of funds from the Omnibus Account made on 23 January 2026 or thereafter referable to the amount of

the Trading Profits, the Court should still make an order requiring the Plaintiff to "*preserve and …. not in any way dispose of, deal with or diminish the value of any of ….. any asset purchased with, or representing the value of, the [Trading Profits]*." This was on the basis (as I understood it) that the Plaintiff must have undertaken its daily calculation of the amount to be held in the Omnibus Account (the client money requirement) on the basis that the amount of the Trading Profits could be excluded, so that it was therefore likely that at some point too much would have been transferred from the Omnibus Account. This recognises that it was possible that movements on other client accounts could have required the Plaintiff to make a net transfer *into* the Omnibus Account on 23 January 2026 and possibly subsequently – although, when it comes to the account balance, rather than transfers out of the Omnibus Account, the balance in the account must be lower than it should be because the Plaintiff's calculation of the client money requirement after the (assumed) improper debiting of the Trading Profits will be based on there being no need to hold in the Omnibus Account the Trading Profits, or an amount equal to them.

19. However, it seems to me that it would, in the circumstances, be inappropriate to grant a proprietary injunction in that generic form. While I am prepared to accept that the Defendant has an arguable case that the Trading Profits were debited from the Trading Account improperly and that as a result the Plaintiff will have calculated the amount to be held in the Omnibus Account on an erroneous basis (so that it was arguable that less had been held in the Omnibus Account on and from 23 January 2026 than should be deposited there), the Defendant can only speculate as to the property which it wishes the injunction to cover. It does not know on which dates funds were transferred from the Omnibus Account, how much was transferred and to where/whom, or what has subsequently happened to any such funds. The overarching principles of clarity and precision govern the drafting of injunction orders of all kinds and the injunction must be in sufficiently clear and precise terms to enable the Plaintiff, and others affected by it, to know what they must not do. An injunction which prohibited dealings with any funds transferred from the Omnibus Account on or after 23 January 2026 where the transfer resulted from the Plaintiff's calculation of the client money requirement based on the exclusion of the amount of the Trading Profits, and any account into which those funds had been paid, or any asset purchased with those funds, or any other asset (tangible or

intangible) representing the value of those funds, would not satisfy these criteria. Such an injunction would in my view be oppressive to the Plaintiff and create a real risk of inadvertent breaches of the Court's order.

20. As I have said, on the state of the evidence the Defendant can only say that transfers from the Omnibus Account may at some point on or after 23 January 2026 have been made which were larger than they should have been and that, on the basis that its case is right, an additional US$25 million should be added to the client money requirement for the purpose of determining the sums required to be held in the Omnibus Account. I am satisfied that, based on the materials before me at the hearing, the regulatory regime did and does require the Plaintiff to hold in the Omnibus Account an amount which broadly speaking was equivalent to the total amount of client money it was holding for clients and the amounts owed and estimated to be owed, as adjusted from day to day, to clients from time to time.

21. Accordingly, I am not satisfied that the Defendant has shown that its claim to a proprietary interest in the Trading Profits raises a serious issue to be tried. The claim does not have a real prospect of success. It therefore falls at the first hurdle and is unable to satisfy the first requirement for a proprietary injunction as regards that claim.

22. As regards the Balance Amount (or Balance Collateral), it seems to me that it is reasonably arguable that the US$7.2 million paid by the Defendant to the Plaintiff represented client money and that the funds transferred by the Defendant to the Plaintiff to make this deposit may have been held on trust from the time the funds were paid into the Plaintiff's bank account. In any event, when funds were paid into the Omnibus Account representing that US$7.2 million, the Defendant acquired a beneficial interest (as a beneficial tenant in common) in the Omnibus Account for that amount (in addition to other amounts of the Defendant's client money deposited into the Omnibus Account). The Plaintiff, as I understand it, did not and does not dispute that the Balance Amount represents and is to be treated as client money (see [109] of the Plaintiff's skeleton argument) although it appears to deny that it has an obligation to pay such sums to the

Defendant. Accordingly, the proprietary claim to the Balance Amount does identify property which is capable of being held on trust and has a real prospect of success.

23. It seems to me that I should treat the Defendant's claim to be entitled to the Balance Amount, as set out in its defence and counterclaim, as also raising a serious issue to be tried and as having a real prospect of success. The defence and the counterclaim clearly raise multiple factual disputes regarding the meetings and statements alleged to have been made before the Client Agreement was entered into, which form the basis of the Plaintiff's fraudulent misrepresentation claim, which will need to be resolved at trial.

24. It also seems to me that, contrary to the Plaintiff's submissions, damages would not be an adequate remedy for any misuse of the funds held on trust in respect of the Balance Amount. These funds are held on trust and required to be protected pursuant to the regulatory regime for the safeguarding of client monies. It would not be justifiable, in my view, to leave a client to a claim in damages where a licensee took action improperly to transfer or to prejudice the client's interest in the funds. However, even though the Defendant has unsuccessfully sought payment of the Balance Amount the evidence indicates that a sum equal to the Balance Amount is held in the Omnibus Account. The Defendant therefore retains its claimed proprietary interest. It has a beneficial interest in the Omnibus Account in a sum representing the Balance Amount. There is in my view insufficient evidence to indicate that the Defendant's proprietary interest in the Omnibus Account needs further protection at this time. The Plaintiff is required by the regulatory regime to include the Balance Amount in the client money requirement for the Defendant and to calculate the sum to be held in the Omnibus Account on that basis. There is no evidence that the Plaintiff has prejudiced the Defendant's acknowledged interest in the Omnibus Account in respect of the Balance Amount or that it is likely to act inconsistently with its obligations under the regulatory regime with respect to it.

25. It is not entirely clear to me how the Defendant expected the injunction in the form filed with the Court to operate in relation to these sums credited to the Omnibus Account. It could be that the Defendant expected that the Plaintiff would be unable to make any withdrawals from the Omnibus Account in respect of the Balance Amount or to exclude the Balance Amount from the daily calculation of its client money requirement. It is far

from clear to me that this would be consistent with the regulatory regime, and where the position is unclear, I do not consider that the Court should order a licensed entity to act in a manner which is arguably inconsistent with the regulatory regime. Alternatively, the Defendant may have had it mind that the Plaintiff should withdraw funds equal to the Balance Amount and hold the funds in escrow pending the resolution of the proceedings. This was however not what was drafted in the form of draft order. Furthermore, there appears to be no need for the Plaintiff to withdraw a sum equal to the Balance Amount from the Omnibus Account. Indeed, it would appear that to do so might also result in a breach of the regulatory regime (although presumably there would be no problem if the Defendant gave its consent).

26. Taking into account all these matters and in any event, I have concluded that, having regard to the position of and potential prejudice to the parties, and to the balance of convenience and what is just and convenient in the circumstances, the Defendant has not shown that an injunction in the form it sought should be granted in relation to sums credited to the Omnibus Account relating to the Balance Amount.

27. I have a good deal of sympathy for the Defendant in so far as it has sought further information from the Plaintiff regarding transfers from the Omnibus Account relating to the Trading Profits but the Plaintiff has refused all such requests. This has left the Defendant in the dark as to the impact on the balance in the Omnibus Account of the allegedly improper deduction from the client money requirement of the Trading Profits and as to the likely substantial reduction in the client money protection to which it is entitled pursuant to the Client Agreement and the regulatory regime, by way of a beneficial interest in the balance in the Omnibus Account.

28. However, the Defendant has not applied outside and independently of its application in the Summons for an order requiring the Plaintiff to provide it with the information it needs. The Defendant has instead sought information as to the whereabouts of the assets in which it claims an interest by way of the usual information order in the draft proprietary injunction filed with the Summons (and in its revised form of injunction filed after the hearing). The draft injunction includes an order that the Plaintiff "*must within 5 working days of service of the order inform the Defendant's attorneys in writing at once*

of all the [assets covered by the injunction] whether in or outside the Cayman Islands giving the value, location and details of [all such assets] and what has become of them since their receipt by the Plaintiff or any nominee for the Plaintiff… [with such details to include] the name and contact details of any individual or company to which any [such assets] have been transferred and the account number and sort code of any bank account to which any such transfer was made."

29. At the hearing, I asked Mr Boeddinghaus whether the Defendant argued that it was entitled to such an information order even if the Court dismissed its application for a proprietary injunction. He said that the Defendant did submit that the Court should order the Plaintiff to provide the same information sought in the draft proprietary injunction even if the Court was not prepared to grant the proprietary injunction itself. He said that the Court had a wide jurisdiction to order parties to proceedings to provide information and should exercise that jurisdiction in the present case even if no injunction was granted.

30. However, while, as I have said, having sympathy with the Defendant regarding the failure of the Plaintiff to provide it with relevant information, I do not accept that the Court should make an order for the provision of information by the Plaintiff in the terms set out in [4] and [5] of the form of order filed after the hearing (which is the only form of order for the provision of information sought by the Defendant). It seems to me that such orders are granted as relief ancillary to the injunction and that it would not be justifiable to make such an order when the Court has declined to grant the injunction sought.

31. That does not mean that the Defendant is not entitled to bring proceedings seeking an order that the Plaintiff provide it with the information it seeks. But it needs to formulate the basis for such a claim and, if the Plaintiff continues to refuse to provide it with the required information upon being told of the basis of the Defendant's claim and that a failure to provide the information will result in the commencement of proceedings, go ahead and issue separate proceedings seeking such relief.

32. I have already noted the difficulties to which the Court was put at the hearing by the Defendant's failure to address in its skeleton the impact of the regulatory regime. In addition, I must confess to serious misgivings at having to deal with the impact of the

regulatory regime on the analysis of the Defendant's asserted proprietary claims without such detailed written submissions (and even though this is only an interlocutory application without some guidance in expert evidence as to how the detailed and complex rules operate). I have also had some misgivings about analysing the Defendant's claims to proprietary rights in a manner that was not articulated or at least clearly articulated by the Defendant and its counsel themselves in submissions and was arguably not the basis for those claims as set out in the Defendant's pleaded case. As I explain below, I found the Defendant's case to be difficult to follow and on occasions confused as to the applicable legal principles (as the Plaintiff claimed it to be). I also found the Defendant's pleaded case to be ambiguous and not clearly drafted when dealing with the basis of its asserted proprietary claims. However, in light of the change of approach adopted at the end of the hearing by Mr Boeddinghaus and the terms of the revised draft order filed after the hearing, in which the Defendant did assert and adopt the claim that its proprietary rights related to the Omnibus Account, I have sought to consider the Defendant's case by reference to how it could most appropriately be formulated on the assumption that this was the basis of the claim. I am satisfied that this is appropriate and that the position of the Plaintiff would not be unfairly prejudiced because the formulation of the claim as I have set out above, and discuss further below, is in accordance with the analysis and description of the best basis for the claim as I described and discussed it during the hearing, and is at least arguably consistent with the broad terms of the Defendant's pleaded case.

Background

33. The Plaintiff is a Cayman incorporated company which is regulated and authorised by CIMA to provide financial product advice, deal and make a market in foreign exchange contracts and derivatives to retail and wholesale clients.

34. In 2025 the Plaintiff and the Defendant entered into agreements pursuant to which the Plaintiff would execute trades with the Defendant. The parties entered into a client agreement dated 28 October 2025 (the ***Client Agreement***) and a credit facility agreement dated 30 October 2025 (the ***CFA***).

35 The Client Agreement established the terms of the parties' trading relationship. Pursuant to the Client Agreement the Plaintiff agreed to open an account (the ***Trading Account***) with it in the Defendant's name (clause 3.1) to record the state of the account between them.

36. Subsequently, the Defendant entered into various trades (the ***Trades***) with the Plaintiff (on a principal to principal basis) which turned out to be very profitable for the Defendant. The total realised profits (the ***Trading Profits***) on the Trades were in excess of US$25 million. This sum was originally credited to the Trading Account. In addition to these sums, US$15 million (originally the sum was US$20 million but this was immediately corrected and reduced to US$15 million) had been credited to the Trading Account in respect of the amounts available to be advanced and advanced by the Plaintiff to the Defendant as a loan under the CFA.

37. In addition to making book entries in the Trading Account, the Plaintiff paid sums into its account with a third-party bank which it had opened as required by the statutory and regulatory regime governing the holding and protection of client money. This account, which the Plaintiff referred to as an omnibus account (the ***Omnibus Account***), was a segregated account for the holding of funds on behalf of and as trustee for the Plaintiff's clients as required (and was operated in accordance with the rules and regulations established) by the regulatory regime.

38. In 2026 the Plaintiff, according to its account and case, discovered that the Defendant had made serious and fraudulent misrepresentations to the Plaintiff in the negotiations relating to entry into the Client Agreement and the CFA. As a result of this discovery and in response to requests made by the Defendant to make substantial withdrawals from the Trading Account, the Plaintiff purported to rescind the Client Agreement, the CFA and the Trades and to withdraw from the Trading Account the credit balance representing the Trading Profits. In consequence of the purported withdrawal of the Trading Profits from and the debiting of the Trading Account, the Plaintiff determined that the amount required to be held in the Omnibus Account could and was required to be reduced by the amount of the Trading Profits.

39. At about the same time the Plaintiff issued proceedings in this Court against the Defendant seeking relief consequential on the Plaintiff's purported rescission of these agreements and the Trades and applied *ex parte* for and was granted certain interlocutory relief (see my judgment dated 16 February 2026 which also briefly sets out the background to the present dispute).

40. The Defendant denies that it made any misrepresentations or that the Plaintiff was entitled to rescind the Client Agreement, the CFA or the Trades. It also challenges the Plaintiff's withdrawal of the Trading Profits from and debiting of the Trading Account. The Defendant says that the Plaintiff had no right and was not permitted to make such withdrawals or debit the Trading Account. The Defendant asserts that the Plaintiff held the Trading Profits and the sums credited to the Trading Account on trust for it. This includes the balance of US$1,201,685.56 remaining in the Trading Account after the allegedly improper withdrawal and debiting of the amount of the Trading Profits (the ***Balance Amount*** – this is the term defined by the Defendant at [126] of the Counterclaim although the term "*Balance Collateral*" is used in the Defendant's written skeleton). The Defendant claims that the withdrawal of the Trading Profits from the Trading Account and the refusal to pay over to the Defendant the Balance Amount was a breach of trust, and that the funds representing the Trading Profits and the Balance Amount need to be preserved pending the determination of the main proceedings.

41. In the main proceedings issued by the Plaintiff, the Plaintiff has filed an amended statement of claim (the ***SOC***), the Defendant has filed a defence and counterclaim (the ***Counterclaim***) and the Plaintiff has filed a reply to the defence and a defence to the Counterclaim.

42. The relevant background and the disputes that have resulted are summarised in more detail in the Defendant's written skeleton argument as follows (my underlining):

> *15. Following execution of the agreements, trading commenced through NCM Global's trading account with Mex Atlantic.*
>
> *a. <u>Mex Atlantic pleads that the US$15 million credit facility was credited to NCM Global's trading account and matched by a corresponding</u>*

transfer from Mex Atlantic's house account into its client omnibus account (SOC at paragraph 24(b)-(c)).

b. *Mex Atlantic further pleads that NCM Global subsequently deposited approximately US$7.2 million by way of collateral in four tranches between 7 November and 25 November 2025 (the "**Collateral**") (SOC at paragraph 24(d)).*

16. *There is no dispute that the trading activity generated substantial trading profits. Mex Atlantic pleads that the executed trades "have been apparently profitable for the Defendant to date" (SOC at paragraph 24(e)), while also pleading that the "purported (but disputed) profits" stood to the credit of NCM Global's account as at January 2026 (SOC at paragraph 26). Indeed, by January 2026, NCM Global's trading account reflected approximately US$25.3 million in Trading Profits (Nisar-2 at [19]).*

17. *It is common ground that Mex Atlantic processed 3 withdrawal requests made by NCM Global between 17 December 2025 and 8 January 2026, totalling US$6 million (less it seems some small charges). Mex Atlantic's position is that these withdrawals ought not to be treated as withdrawals from the Trading Profits, but from the Collateral provided by NCM Global. The net result was that "only US$1.2 million currently remains" from the Collateral deposited by NCM Global (SOC at paragraphs 25 and 25(d)) i.e. the Balance Collateral.*

18. *It is also common ground that:*

a. *On 14 January 2026, a fourth withdrawal request for US$15 million was made by NCM Global, but that it was not complied with by Mex Atlantic (Nisar-2 at [22]).*

b. *On or about 23 January 2026, Mex Atlantic froze NCM Global's trading account. It then proceeded to debit the Trading Profits from NCM Global's trading account and to withdraw the US$15 million credit facility. This reduced NCM Global's account balance to approximately US$1.2 million (representing the Balance Collateral) (Reply at paragraphs 75(a)-75(e)). (This appears to have occurred shortly after the hearing by this Court – also on 23 January 2026 – of its ex parte application for service out of the jurisdiction: the Court appears not to have been informed that Mex Atlantic intended to carry out these actions, or had just done so.)*

19. *The parties fundamentally disagree as to whether Mex Atlantic was legally entitled to take those steps.*

a. *Mex Atlantic's case is that NCM Global induced it to enter into the relevant agreements through fraudulent misrepresentations concerning the nature of its intended trading and whether the trades* *it intended to bring to Mex Atlantic could be described as "retail flow" (as Mex Atlantic alleges) or "toxic flow"; that it became entitled as a consequence to rescind the Client Agreement, the Credit Facility Agreement and/or the trades themselves (SOC at paragraphs 28-51); and that the Trading Profits do not belong beneficially to NCM Global (Reply at paragraph 66).*

b. *Mex Atlantic accordingly contends that it was entitled to reverse the Trading Profits, refuse withdrawal requests and retain the Trading Profits.*

c. *NCM Global disputes those allegations. NCM Global's case is that it made no representations concerning the nature of its intended trading and whether the trades it intended to bring to Mex Atlantic could be described as "retail flow" (as Mex Atlantic alleges) or "toxic flow"; that the trades it brought to Mex Atlantic were properly to be described as "retail flow" (both parties agree that ultimately this is likely to be a matter for expert evidence); that Mex Atlantic placed no reliance upon any such representations and was induced by them; and that even if any representations had been made as alleged they were neither false nor fraudulent. Accordingly, its case is that the trades were validly executed, the Trading Profits accrued lawfully to NCM Global, and that those profits became client monies and/or trust property held for NCM Global's benefit to the credit of its trading account under the terms of the Client Agreement (D&CC at paragraphs 127.1-127.4 and 128).*

d. *NCM Global further contends that Mex Atlantic's unilateral reversal of the Trading Profits, withdrawal of the credit facility, refusal to honour withdrawal requests and continuing retention of the disputed monies constituted breaches of trust, breaches of contract, conversion, detinue and unjust enrichment (D&CC at paragraphs 117-138, as summarised at paragraphs 72-84).*

20. *NCM Global has requested the return of the two categories of property, namely:*

a. *US$25,309,528.76, being the Trading Profits reversed by Mex Atlantic; and*

b. *US$1,201,685.56, being the Balance Collateral which Mex Atlantic accepts remains standing to NCM Global's account.*

21. *Mex Atlantic has refused to return either category of property notwithstanding NCM Global's demands. Its continued refusal to restore the Trading Profits and the Balance Collateral, or alternatively to provide any satisfactory protection for those monies pending determination of the parties' rights, was the direct impetus for NCM Global issuing the Proprietary Injunction Application.*

The relevant terms in the Client Agreement and the Risk Disclosure Statement

43. When a client of the Plaintiff wishes to use the Plaintiff's services to facilitate dealing in Margin Contracts, CFDs and Options it must complete a Corporate Account Application to which is annexed the Client Agreement, the Risk Disclosure Statement, and the Electronic Trading Terms.

44. The following terms in the Client Agreement are of particular relevance in relation to the Defendant's proprietary claims and the trust issue (my underlining):

> *2. PRINCIPAL*
>
> *We will deal with you as principal and not as agent on your behalf. This means that any trades are agreed directly between you and us and we will be the counterparty to all your trades.*
>
> *3.1 OPENING*
>
> *<u>After we accept your application, we will open an account in your name</u>. We may split your account into different sub-accounts .....*
>
> *……*
>
> *3.3 <u>TRUST ACCOUNT</u>*
>
> *<u>All moneys deposited by you to the credit of your account is client money within the meaning of the client money handling obligations and which will be held in an account with an approved foreign bank in accordance with the client money obligations. Client money is held in trust for the clients entitled to it or if the money is invested in accordance with the client money obligations the investment is held in trust for the clients entitled to it</u>.*
>
> *……..*
>
> *6.4 TIMING OF CREDITS DEDUCTIONS OR FEES WHICH YOU ARE TO PAY FROM YOUR ACCOUNT*
>
> *…….*
>
> *c. <u>If a position is closed at a profit that profit will immediately be credited to your account</u> and your available trading resources will be adjusted accordingly ….*
>
> *23. <u>All money paid to us by you or a person acting on your behalf or which is received by us on behalf of you will be held by us in one or more segregated</u>*

bank accounts. These moneys do not constitute a loan to us and are held on trust by us. You agree and acknowledge that individual accounts of our clients are not separated from each other within the segregated trust accounts operated by us.

……..

35. GOVERNING LAW AND JURISDICTION

35.1 LAW

This Agreement and each margin FX contract, FX option contract and CFD between us and you will be governed by and construed in accordance with the law of the Cayman Islands

38. ENTIRE AGREEMENT

This Agreement, the Account Application Form, the Confirmation, Risk Disclosure Statement and any additional terms and conditions as determined and notified to you from time to time contain the entire agreement between the parties with respect to its subject matter. ….

40. SCHEDULE 1

………

Client money: *means the moneys clients have deposited with us and held by us*

45. The Risk Disclosure Statement contains the following relevant statement (my underlining):

> *Our insolvency or default may lead to your positions being liquidated or closed out without your consent. As all deposits lodged with us are held in a segregated client account or accounts, in such circumstances those deposits would attract all legal protections afforded under applicable laws. Net unrealised running profits are also held in trust by us (in excess of our contractual and regulatory requirements) and would normally be similarly protected for your benefit as beneficial owner, unless a Court were not to uphold the trust in relation to the net unrealised profits, in which event you would rank as an unsecured creditor of ours in relation to such net unrealised profits. It should also be noted that keeping your funds in a segregated account does not offer or guarantee absolute protection of your funds in the event of our insolvency or default where there is a deficit in the segregated client account.*

> *Although by dealing with us you will be dealing in securities, you need to be aware that you may still be subject to applicable laws.*
>
> *<u>The obligations to you under the Client Agreement and the margin FX and CFDs are unsecured obligations, meaning that you are an unsecured creditor of ours</u>.*

The Plaintiff's evidence regarding the Trading Account, the client bank account opened with a third-party bank – the Omnibus Account – and the payment of funds into and out of the Omnibus Account

46. The Plaintiff's evidence dealt with the operation of its trading platform, the manner in which Trades were processed and recorded and, importantly, the way in which the Plaintiff dealt with client money.

47. At [56] of Athar 1 (sworn on 19 January 2026) Mr Athar stated as follows (my underlining):

> *<u>I also note that MEX Atlantic is required, for regulatory reasons, to keep a certain level of liquidity referrable to the exposure across client trading accounts. In practice this means that MEX Atlantic causes the payment of money from its bank account into the Omnibus Account to match the total Equity balance across all client accounts. This payment is made at the end of each trading day</u>.*

48. At [17] of Athar 3 Mr Athar (filed and served in signed but unsworn form on 3 July 2026) gave a more detailed explanation as follows (my underlining):

> *16. <u>At paragraph 18 of Nisar 2, it is suggested that profits made by the Defendant and credited to its account "formed part of the client money held" by the Plaintiff "for" the Defendant. There is no basis for the suggestion that the notional (and disputed) 'profits' were held on trust for the Defendant by reference to the specific terms of the Client Agreement. While it is accepted that the Defendant placed trades which purportedly made profits in the amount of c. US$25 million, for the reasons set out in detail in the Amended Statement of Claim, there were in fact no profits, and in any event there is no distinct sum of money that exists which the Defendant can point to as constituting its profits</u>. As has previously been explained, <u>the Plaintiff does not maintain individual 'pots' of money representing "Client Funds" (i.e. sums which are subject to Clause 23 of the Client Agreement, still less representing profits, whether realised or unrealised). The correct position is that the Plaintiff maintains an 'omnibus' client account, which, at the end of each day, is adjusted by the transfer in or out of sums of money so that the total sum held in that account matches the total in the Plaintiff's client's</u>*

> *trading accounts. As explained in paragraph 56 of Shah 1, this is for regulatory reasons as opposed to a contractual requirement. But no sum of money in that account represents any particular sum of money in any individual client account. And in this instance, as I expand on below, when the Plaintiff rescinded the Client Agreement, Credit Facility Agreement and the Trades, there would (subject to other adjustments for the movement on other client accounts) have been a reduction in the sum retained in the omnibus client account. The correct position is that there has never been a sum of money representing the Defendant's purported 'profits' and even if there had been there no longer is.*

The pleadings

The Defendant's Counterclaim

49. The relevant paragraphs in the Defendant's Counterclaim are as follows (my underlining):

> *118. By the Client Agreement, the Plaintiff agreed to provide brokerage and related services to the Defendant and to open and operate a trading account for the Defendant on terms including provisions governing the holding of client money by the Plaintiff for the Defendant and withdrawals by the Defendant.*
>
> *119. The NCM Trading Account was opened on 28 October 2025 and the Defendant was given access to this account on 30 October 2025.*
>
> *120. Pursuant to the Credit Facility Agreement, the Plaintiff extended a credit facility of US$15 million to the Defendant on 28 October 2025.*
>
> *121. Between 7 November 2025 and 25 November 2025, the Defendant remitted various sums of monies totalling approximately US$7.2 million into the NCM Trading Account, comprising the Deposited Collateral. The Defendant only started trading activity in its account after it deposited funds on 7 November 2025, and did not utilize the US$15 million credit facility provided by the Plaintiff for its trades.*
>
> *122. Under the parties' trading relationship, the Defendant placed the Trades through the NCM Trading Account. Realised trading profits were credited to the Defendant's account balance as they arose and formed part of the client money held by the Plaintiff for the Defendant.*
>
> *123. Between approximately November 2025 and January 2026, the Defendant generated trading profits credited to the NCM Trading Account in the sum of US$25,309,528.76 (the "**Profits**").*

124. *Between 17 December 2025 and 8 January 2026, the Defendant requested withdrawals totalling US$6 million, which were complied with by the Plaintiff.*

125. *On 14 January 2026, the Defendant requested a withdrawal in the sum of US$15 million, which was not complied with by the Plaintiff.*

126. *On or around 23 January 2026, the Plaintiff froze the NCM Trading Account, closed the Defendant's open hedge positions with a notional value of approximately US$82.6 million, wrongfully debited and/or reversed the Profits in the NCM Trading Account reflecting such debit as "ADJ – Void Trades Legal Advice", and withdrew the US$15 million credit facility extended to the Defendant reflecting such withdrawal as "Credit Out – Legal Advice". This left the NCM Trading Account with a balance of US$1,201,685.56 (the "**Balance Amount**") at 11.26pm on 23 January 2026.*

L. Breach of Trust

127. *At all material times, the Plaintiff held client money for the Defendant in accordance with the Client Agreement. The Client Agreement includes express terms that:*

   127.1. *All monies paid by the Defendant to the Plaintiff do not constitute a loan and are held on trust by the Plaintiff.*

   127.2. *All monies deposited by the Defendant are held by the Plaintiff in one or more segregated bank accounts*

   127.3. *Profits are immediately credited to the Defendant's account and the Defendant's available trading resources will be adjusted accordingly.*

   127.4. *The Defendant may request payment by the Plaintiff of such amount from the Defendant's credit balance as the Defendant may specify.*

128. *On the proper construction of the Client Agreement, the Deposited Funds [I assume that this is a reference to the US$7.2 million paid by the Defendant to Mex which is defined as the Deposited Collateral at [39.4] of the defence, as there does not appear to be a separate definition of Deposited Funds] and monies credited to the NCM Trading Account, including the Profits and the Balance Amount, were held by the Plaintiff on trust for the Defendant.*

129. *The Plaintiff's failure to fulfil the 14 Jan 2026 Withdrawal Request, reversal of the Profits on 23 January 2026 and withholding of the Balance Amount is a breach of [an] express trust by the Plaintiff.*

130. *Alternatively, the Plaintiff holds the Profits and Balance Amount on constructive trust for the Defendant.*

……..

AND THE DEFENDANT CLAIMS:

(1) A declaration that the profits in the Defendant's account held with the Plaintiff, which are in the sum of US$25,309,528.76, and the balance in the Defendant's account in the sum of US$1,201,685.56, are held on trust by the Plaintiff for the Defendant;

(2) A declaration that the Plaintiff has breached the express trust for the Plaintiff to hold the Defendant's money as client money on trust for the Defendant;

(3) An order for the Plaintiff to account for all profits and balances held in the Defendant's account with the Plaintiff and repay the amount found due on the account;

(4) A declaration that the Plaintiff holds the profits of US$25,309,528.76 and balance amount of US$1,201,685.56 on constructive trust for the Defendant and is liable to account as a constructive trustee for the sum of US$26,511,214.32 or such other amount found due on the account

The Plaintiff's Defence to the Counterclaim

50. The relevant paragraphs in the Plaintiff's Defence to the Counterclaim are as follows (my underlining):

L. Breach of Trust

76. Paragraph 127 purports to summarise terms of the Client Agreement, without reference to any clauses of that agreement; the Client Agreement will be relied upon for its full terms and effect. As to the specific allegations under paragraph 127:

a. Paragraph 127.1 is admitted as an accurate summary of the Client Agreement, save that the Client Agreement provides that client money is held "in trust for the clients entitled to it". The Defendant's counterclaim does not relate to monies paid by the Defendant to the Plaintiff , or to which the Defendant is entitled, and so its relevance is denied;

b. The relevance of paragraph 127.2 is denied for the same reason;

c. Paragraphs 127.3-127.4 are not admitted, pending proper particulars of the clauses of the client agreement relied upon.

The draft orders

51. The Summons seeks the following orders (set out in a draft order attached to the Summons – the ***Summons Draft Order***):

> 2. *Until further order of the court:*
>
> 2.1 *the Respondent must preserve and must not in any way dispose of, deal with or diminish the value of any of the Proprietary Assets, whether they are in or outside the Cayman Islands, and must not remove from the Cayman Islands any Proprietary Assets which are in the Cayman Islands; and*
>
> 2.2 *the Respondent must preserve and must not dispose of or part with possession of any document which relates to the transfer, receipt or possession of the Proprietary Assets, the use made of the Proprietary Assets or what has become of the Proprietary Assets.*
>
> 3. *In this order, the term "Proprietary Assets" shall mean:*
>
> 3.1 *US$25,309,528.76 in trading profits made by the Applicant and credited to its account number 895933 held with the Respondent (the "**NCM Account**") [this is the Trading Account] but which were subsequently debited by the Respondent;*
>
> 3.2 *US$1,201,685.56 balance remaining in the NCM Account; and*
>
> 3.3 *any asset purchased with, or representing the value of, the sums referred to in paragraphs 3.1 and 3.2 above.*

52. As can be seen, the Summons Draft Order identified the Proprietary Assets as the subject matter of the Defendant's proprietary claim and the asserted trust. These were the Trading Profits as, and which had been, credited to the Trading Account and the current balance credited to the Trading Account, together with any substitute assets in respect (being assets purchased with or representing the value) of the Trading Profits.

53. [3.3] was designed, as I understand it, to capture the Trading Profits after they had been withdrawn by the Plaintiff from the Trading Account (there was no need based on the evidence to assert a proprietary claim to substitute assets representing the credit balance in the Trading Account since this remained unaltered and intact). It is not clear whether [3.3] was also intended to refer to the transfer of funds by the Plaintiff into the Omnibus

Account, and whether the Defendant claimed an interest in the Omnibus Account (technically the debt or chose in action owed by the relevant bank to the Plaintiff). If the Defendant had intended to assert such a proprietary claim and that the Omnibus Account (or sums credited thereto) were to be treated as "*Proprietary Assets*" one would have expected to see a clear reference to the Omnibus Account. While, as I note below, the Defendant had not seen Athar 3 before filing the Counterclaim (filed and I assume served on 3 July 2026) or filing the Summons (filed on 27 May 2026), it had seen Athar 1, which at [56] stated that the Plaintiff paid "*money from its bank account into the Omnibus Account to match the total Equity balance across all client accounts. This payment is made at the end of each trading day*"). It had seen Athar 3 by the time of the hearing.

54. But the Defendant's position changed (or as it might possibly be said, was clarified) at the conclusion of the Defendant's oral reply submissions, right at the end of the hearing. Mr Boeddinghaus at this point proposed amendments to the Summons Draft Order. These amendments were confirmed immediately after the hearing in a revised form of draft order which was filed with the Court (the ***Revised Form of Order***). The Defendant now explicitly identified the sums credited to the Omnibus Account as Proprietary Assets. The material amendments were to [3] of the Summons Draft Order as follows (with the proposed amendments underlined):

> 3. *In this order, the term "Proprietary Assets" shall mean:*
>
> 3.1 *US$25,309,528.76 <u>or such other amount</u> in trading profits made by the Applicant and credited to <u>and/or held on behalf of the Applicant in the Respondent's omnibus bank account referred to in paragraphs 16 and 56 of the First Affidavit of Shah Athar sworn on 19 January 2026</u>;*
>
> 3.2 *US$1,201,685.56 <u>or such other</u> balance <u>collateral amount credited to and/or held on behalf of the Applicant in the Respondent's omnibus bank account referred to in paragraphs 16 and 56 of the First Affidavit of Shah Athar sworn on 19 January 2026</u>; and*
>
> 3.3 *any asset purchased with, or representing the value of, the sums referred to in paragraphs 34.1 and 34.2 above*

55. This is a significant last minute amendment, or possibly clarification, made following the debate during the hearing and my comments on the Defendant's case and how its proprietary claims could and perhaps should be formulated. Mr Sheehan objected to the

Defendant being permitted to amend its case or at least the relief sought in this way but as I have said above I am satisfied that it is fair and appropriate to consider all formulations of the Defendant's case which are consistent with the proprietary claim as made as set out in or as fairly to be understood from the pleadings, the Summons (including the draft orders filed and as amended as a result of the debate at the hearing) and its submissions both written and oral (including those made in response to my comments at the hearing).

The Defendant's case

The approach to granting a proprietary injunction

56. There was no dispute as to the applicable law.

57. The Defendant (as did the Plaintiff) referred to the judgments of Justice Parker in *Charitable DAF Holdco v Patrick and others* [2026] CIGC (FSD) 9 and *In Frabran Holdings Limited and Ors. -v- Daventree Trustees Limited and Ors* (unreported, 17 January 2024).

58. In *Charitable DAF* Justice Parker set out the approach to be adopted when considering an application for a proprietary injunction:

> *83. In deciding whether to grant a proprietary injunction, the Court applies the principles of American Cyanamid v Ethicon Ltd [1975] AC 396.*
>
> *84. In applying those principles, the applicant must establish three general matters:*
>
> > *(1) There is a serious issue to be tried on the merits;*
> >
> > *(2) The balance of convenience is in favour of the grant of an injunction; and*
> >
> > *(3) It is just and convenient to grant the injunction.*
>
> *85. This Court, in In Frabran Holdings Limited and Ors. -v- Daventree Trustees Limited and Ors, [unreported, 17 January 2024] ("Daventree Trustees") confirmed the application of the American Cyanamid principles to proprietary injunctions, and stated at §154:*

> *"In applications for proprietary injunctions, the matter is one for the discretion of the court. On ordinary principles, a plaintiff beneficiary would have to show:*
>
> *a) a prima facie case the property is his,*
>
> *b) a serious issue to be tried that the trust property is in danger pending the hearing of his claim,*
>
> *c) that damages would not be an adequate remedy,*
>
> *d) that the balance of convenience favours the grant of an injunction,*
>
> *e) and that it is just and convenient to order an injunction"*

Prima facie case of proprietary rights and serious issue to be tried – the Defendant's proprietary claim

59. The Defendant's case as summarised at [65] of its skeleton argument was that it had a real prospect of success in establishing that:

    (a). it has a proprietary interest in the Trading Profits and the Balance Amount (or Balance Collateral) under the terms of the Client Agreement and the related arrangements, which the Plaintiff holds on trust for the Defendant.

    (b). the Plaintiff had acted in breach of trust.

    (c). the Defendant's proprietary interest in the Trading Profits and the Balance Amount remained sufficiently identifiable notwithstanding that those monies had been held in a pooled omnibus account.

    (d). that proprietary interest survived even if the Plaintiff had subsequently removed the monies from the omnibus account and mixed them with its own assets.

60. The Defendant relied on clauses 3.3 and 23.1 of the Client Agreement. The Defendant submitted that on their proper construction, these provisions provide that monies deposited or paid into the Trading Account by the Defendant did not belong beneficially to the Plaintiff and were instead held upon express trust for the Defendant. The Defendant

also relied on what was stated in the Risk Disclosure Statement and noted that clause 38 of the Client Agreement expressly incorporated the Risk Disclosure Statement into the parties' contractual bargain.

61. The Defendant noted that the Plaintiff had relied on the fact that the Trading Profits and Balance Amount were held within a client omnibus account and were not segregated (in what it had referred to as separate pots on a customer-by-customer basis). The Defendant argued that this arrangement did not defeat the existence of a trust or proprietary interest and that, as a minimum, there was a serious issue to be tried in this respect also. The authorities (including the well-known case of *Hunter v Moss* [1994] 1 WLR 452) recognised that segregation was unnecessary where the property consisted of fungible intangible assets forming part of a homogeneous fund.

62. Accordingly, the Defendant argued that its claim that it has a proprietary interest in the Trading Profits and the Balance Amount and that these monies are held on trust for it by the Plaintiff had a real prospect of success; that its claim that the Plaintiff had no right to withdraw the Trading Profits from the Trading Account also had a real prospect of success and that it had established that in view of that impermissible withdrawal and consequential transfer by the Plaintiff of trust property, steps needed to be taken to protect the Trading Profits and the Balance Amount to ensure that the monies are preserved pending the determination of the Counterclaim and the main proceedings.

63. In the Defendant's written skeleton argument the Defendant's position was further explained as follows (my underlining):

> *43. <u>NCM Global's primary proprietary case is that the Trading Profits and the Balance Collateral constituted client monies and/or trust property held by Mex Atlantic for NCM Global's benefit under the Client Agreement and the client money arrangements governing the parties' relationship</u>.*
>
> *44. <u>NCM Global therefore asserts a proprietary claim to the Trading Profits and the Balance Collateral (and, to the extent the Trading Profits were removed from the omnibus client accounts following the reversal exercise, any traceable substitute assets)</u>.*

> 45. *The proprietary claims ground the Proprietary Injunction Application (the merits of these claims are detailed in section D.1 under two alternative heads: see D&CC at paragraphs 117-122; Nisar 2 at [48(a)]).*
>
> a. *First, NCM Global relies on breach of an express trust. NCM Global's case is that Mex Atlantic's unilateral reversal of the Trading Profits, refusal to return the Balance Collateral, and refusal to identify the whereabouts of the Trading Profits and the Balance Collateral constituted breaches of an express trust.*
>
> b. *Secondly, even if Mex Atlantic succeeds in disputing the express trust analysis, Mex Atlantic's receipt, retention and dealing with the Trading Profits and Balance Collateral in the circumstances pleaded give rise to constructive trust obligations.*
>
> c. *As confirmed in Khan v Goldfarb [2025] EWHC 874 (Ch) ("Khan v Goldfarb") at [24]–[26] and [38], a proprietary injunction lies not only to protect a presently existing proprietary interest, but also to preserve specific assets subject to a claim that may result in a proprietary remedy.*
>
> b. *US$1,201,685.56, being the Balance Collateral which Mex Atlantic accepts remains standing to NCM Global's account.*
>
> 21. *Mex Atlantic has refused to return either category of property notwithstanding NCM Global's demands. Its continued refusal to restore the Trading Profits and the Balance Collateral, or alternatively to provide any satisfactory protection for those monies pending determination of the parties' rights, was the direct impetus for NCM Global issuing the Proprietary Injunction Application.*

64. In Nisar 2, Mr Nisar set out the Defendant's position in support of the Summons (my underlining):

> 48. *The Counterclaim sets forth the following causes of action which NCM Global has against Mex Atlantic.*
>
> a. *Breach of trust: On a proper construction of the Client Agreement, the Profits of US$25,309,528.76 and Balance Amount of US$1,201,685.56 are client monies which are held by Mex Atlantic on trust for NCM Global. Mex Atlantic's failure to fulfil NCM Global's withdrawal request on 14 January 2026, its reversal of the Profits on 23 January 2026 and withholding of the Balance Amount is a breach of express trust by Mex Atlantic. Alternatively, Mex Atlantic holds the Profits and Balance Amount on constructive trust for NCM Global.*

b. Unjust enrichment: Further or alternatively, Mex Atlantic is liable in restitution to repay the total sum of US$26,511,214.32 to NCM Global based on unjust enrichment.

c. Conversion: Further or alternatively, by wrongfully debiting and/or reversing the Profits made by NCM Global, and withholding the balance of US$1,201,685.56 in the NCM Trading Account, Mex Atlantic has converted the monies to its own use and NCM Global is entitled to repayment of those sums and damages sustained by NCM Global as a result of Mex Atlantic's conversion in a sum to be assessed.

d. Detinue: Further or alternatively, by wrongfully debiting and/or reversing the Profits made by NCM Global, and withholding the balance of US$1,201,685.56 in the NCM Trading Account, and refusing to repay the said sums, the Plaintiff is liable in the tort of detinue. NCM Global is entitled to repayment of those sums and damages it sustained as a result of Mex Atlantic's detention of those sums in a sum to be assessed.

e. Breach of contract: Further or alternatively, Mex Atlantic's wrongful debit and/or reversal of NCM Global's Profits and retention of the Balance Amount constitutes a repudiatory breach of the Client Agreement and Credit Facility Agreement, entitling NCM Global to terminate the agreements and claim for losses suffered.

49. A serious issue to be tried will be addressed fully in legal submissions. However, I consider that the case set out in NCM Global's Counterclaim in these proceedings and the matters I set out above establish that there is a serious issue to be tried that Mex Atlantic holds the Profits and Balance Amount on trust for NCM Global and is additionally liable to compensate NCM Global for losses suffered as a result of Mex Atlantic's wrongful closure of NCM Global's hedge positions and withholding of the Profits and Balance Amount.

50. Furthermore, I am advised that Mex Atlantic's claim for misrepresentation and rescission of the agreements and Trades entered by Mex Atlantic is likely to fail. The claim rests upon the assertion that the client flow transferred by NCM Global to Mex Atlantic was "toxic", yet this assertion fails on three distinct levels:

a. As is apparent from the Statement of Claim, the parties never discussed, let alone agreed upon, a definition of "toxic flow" or the level of "toxic flow" which was acceptable.

b. Mex Atlantic now puts forward a description of "toxic flow" that does not conform to the standard industry definition or any recognisable industry definition. The standard industry definition requires technical exploits or asymmetries to *systematically disadvantage a market maker. As particularised in the Defence & Counterclaim, NCM Global's client flow involved no such exploits.*

c. *Even on Mex Atlantic's own definition, which incorrectly equates "toxic flow" with any flow originating from institution or sophisticated traders, a claim for misrepresentation fails. Mex Atlantic entered into the agreements with NCM Global without concern for the specific nature or origin of NCM Global's trading profile. Following the commencement of the relationship, as Mex Atlantic requested more data regarding NCM Global's trading profile, NCM Global acted with transparency and disclosed such data. Mex Atlantic had full knowledge of and accepted the trading profile of NCM Global's clients for several months.*

d. *Therefore, if (contrary to NCM Global's primary case) the representation(s) alleged by Mex Atlantic in the Statement of Claim, or any representation(s), was or were made, then Mex Atlantic did not rely upon them. In consequence, any such representation(s) cannot have been causative of any alleged loss on the part of Mex Atlantic (of which Mex Atlantic is put to proof).*

Balance of convenience

65. The Defendant said that the Court was required to consider which course was likely to involve the least risk of injustice or irremediable prejudice if the Court subsequently reached a different conclusion at trial (citing *Ascentra Holdings v Yashida* [2024 (1) CILR 409] at [124]-[126]). The analysis included consideration of the prejudice which may be suffered if relief is refused; the prejudice which may be suffered if relief is granted; the likelihood of such prejudice occurring; the extent to which either party may be compensated through damages or a cross undertaking and the practical consequences of the Court reaching the wrong conclusion at the interlocutory stage.

66. The Defendant submitted that in the present case every factor pointed towards preservation of the disputed property pending trial. If the proprietary injunction was refused and the Defendant succeeded at trial, there was a real risk that the Trading Profits and Balance Amount would no longer be available for recovery. Absent injunctive relief, the Plaintiff remained free to draw down or transfer the disputed funds, especially if as the Plaintiff had claimed, the Trading Profits were no longer held in the client omnibus account. Further, even if the Plaintiff did not actively dissipate funds, leaving the

Defendant to wait until judgment risked converting a proprietary entitlement into an unsecured credit risk. Should the Plaintiff face insolvency, any eventual money judgment would be hollow. The commercial solvency risk was real. The Defendant's evidence had identified a series of disputes and litigation involving the Plaintiff (and entities within the MultiBank Group) concerning allegations of withheld client monies, disputed profits and rescinded trades, which gave rise to serious concerns. In addition, even if the Plaintiff did not dissipate funds and remained solvent, there was enforcement risk. The Plaintiff had admitted (when seeking its *ex parte* order for service out) that it possessed no assets in the Cayman Islands (and further, that it holds no operational funds in Australia, the place of its operations) (Athar 1 at [16] and [102]) so that the Plaintiff was asking the Court to proceed on the assumption that any eventual judgment will be readily satisfied. However, the evidence revealed an acute risk that any money judgment on the Counterclaim will be rendered entirely hollow.

67. Further, the Defendant argued, there was a minimal countervailing prejudice to the Plaintiff. The injunction would simply preserve the disputed property until the Court determined the merits at trial. If the Counterclaim ultimately failed, the fund will simply be released back to the Plaintiff unencumbered, alongside any applicable contractual or statutory interest that was supported by the Defendant's cross-undertaking in damages.

68. The Defendant also submitted that it was entitled to the disclosure order set out in the Summons Draft Order requiring the Plaintiff to provide details of what had happened to the Trading Profits, in particular to whom and into which account they had been paid when withdrawn from the omnibus account. At the hearing, Mr Boeddinghaus argued that the Court could and should grant this relief even if it refused to grant the proprietary injunction sought. The Court had an independent jurisdiction to require a party to proceedings to provide information or produce documents and in view of the Defendant's asserted rights and the Plaintiff's repeated refusal to provide any information as to what had happened to the Trading Profits, it was just and appropriate for the Court to make a disclosure order now in any event.

The Plaintiff's case

The Defendant was unable to show a case with any prospect of success that the Trading Profits were held on trust or that there was any identifiable trust property that represented the Trading Profits

69. The Plaintiff argued that the Defendant was unable to show that there was a real prospect of it establishing a proprietary claim to the Trading Profits. There was no identifiable trust property relating to the Trading Profits which could be the subject matter of a trust.

70. The Plaintiff said that the mechanics of how the Omnibus Account functioned had been set out in detail in Athar 3 at [17] and [39], Athar 1 at [16] and [55]-[56] and in Ogier's letter of 3 July 2026. The Plaintiff summarised the position as follows:

(a). each client has a trading account, which shows its trades, any credit allocated to the account, any collateral posted to the account as margin, and profits and losses from the trades entered into. A figure shown as the balance on the trading account was not referable to the sum of money standing to the credit of any particular account, whether held on trust or otherwise. It was just an accounting entry of the sort one expects from a running trading account.

(b). in order to comply with its regulatory obligations, the Plaintiff maintains an account in which it segregates funds as so-called "*client money*". Clients looking to deposit funds (e.g. as collateral, or to meet a margin call) are able to pay monies directly into this account.

(c). however, the omnibus account does not segregate monies paid in by one client from those paid in by another. Instead they are pooled, and thus no client has a claim to any particular sum standing to the credit of the Omnibus Account, and nor is any sum in the Omnibus Account referable to any particular client's account.

(d). thus, on any given day, the Omnibus Account holds a balance equivalent to the "*equity*" total balances of all of its clients' trading accounts. The "*equity*" balance of each client reflects the total funds available for trading on any particular day, and consists of its credit line, any collateral provided, and its trading balance, which fluctuates daily depending on the amount of realised profit and loss at the end of each trading day, any withdrawals, and use of any credit facility.

(e). the balance in the Omnibus Account is updated daily, by a payment at the end of the day. It followed that, if the equity balance of all of the Plaintiff's clients taken together had increased, the Plaintiff would make a payment into the Omnibus Account, whereas, if the equity balance of all clients taken together had decreased, then the Plaintiff would make a payment out of the Omnibus Account.

71. The Plaintiff submitted that as a result the Defendant was wrong (a) to make reference to the sum of US$25,309,528.76 as, first, being identifiable as a sum held as client money by the Plaintiff for the Defendant specifically in the Omnibus Account, and (b) to assert that such sum had been "*removed*" (still less "*dissipated*") from that account by the Plaintiff. The payment which was made in respect of the Omnibus Account at the end of the day on 23 January 2026 (the date on which the disputed Trades were allegedly voided) would have depended not on the voiding of this single notional accumulated profit, but on the total movement on all of the trading accounts of the Plaintiff's clients taken together.

72. The Plaintiff gave the following example. If the total balance of the trading accounts rose on 23 January 2026, there would have been no payment out of the Omnibus Account at all, but rather a payment in. If the total balance of those trading accounts reduced by an amount less than the US$25,309,528.76 of purported Trading Profits, then such lesser amount will have been paid out. If the total balance of those trading accounts was reduced by an amount greater than this, then such greater amount will have been paid out. But, the Plaintiff argued, that would still not mean that what was paid out was (or included) US$25,309,528.76 of the Defendant's money. Instead, any payment out would always reflect the overall net movement on all clients' accounts taken together.

73. The Plaintiff submitted that whatever the precise details of how monies moved, there was no credible basis for the assertion that it was holding a sum of US$25,309,528.76 on trust

for the Defendant and had then paid that sum of money in such a way as to leave it identifiable in the Defendant's hands.

74. The Plaintiff argued that it was only necessary to consider the question of what happened after 23 January 2026 to lay bare the lack of reality in the Defendant's case. Mr Athar has exhibited a daily snapshot of the Defendant's account dated 24 January 2026, showing movements in the overall balance on almost every day (as would be expected for an active trading client). This included a trade history report, showing each of the Defendant's trades. It stretched to 754 pages, with each page containing between 29 and 50 entries, making for something approaching 35,000 entries for a single client. When one extrapolated this to the trading platform as a whole, and the passage of several months since 23 January, it became impossible to credit the idea that there was an identifiable pot of money sitting somewhere which represented money beneficially belonging to the Defendant.

75. The Plaintiff said that the Defendant had not pleaded any case as to tracing that might enable it to identify an asset to freeze on the Summons. That, it said, was no accident, nor a feature of any lack or asymmetry of evidence. The fact was that no such case could ever be pleaded, still less evidenced, because it rested on a fundamentally flawed presentation of how this trading activity works.

76. The Plaintiff submitted that it was trite law that the Court will not grant an injunction (a) unless it is expressed in clear and unambiguous language, or (b) where compliance with the terms of the injunction would or might be impossible. That was particularly so given the penal consequences. The Plaintiff referred to the recent English decision in *SPP Pumps Limited v ADE Power Limited* [2026] EWHC 1461 (TCC) at [13]-[15].

77. The Plaintiff said that the Summons Draft Order would require the Plaintiff to preserve and not dispose of, deal with or diminish the value of the "*Proprietary Assets*" which were defined to include "*US$25,309,528.76 in trading profits made by the Applicant and credited to its account…but which were subsequently debited by the Respondent*", and "*any asset purchased with, or representing the value of*" such sum". This committed the error of treating sums standing to the credit of the Trading Account as if they were sums

of money, rather than the accounting entries that they are. The Summons Draft Order also sought to create the fiction that there were assets "*purchased with*" or "*representing the value of*" such accounting entries in the Trading Account.

78. The Plaintiff submitted that if such an order were made against it, it was wholly unclear how it should seek to go about complying with it, and how it could possibly do so in practice. This was not a matter of drafting, nor simply a matter of justice and convenience (though it was undoubtedly relevant in that context too). Instead, these were problems of substance, reflecting the fundamental flaw in the Defendant's application.

Damages would in any event be an adequate remedy

79. The Plaintiff submitted that damages would be an adequate remedy in principle on the facts of this case. The case does not concern real property or a unique chattel. If the Defendant was right, then it will be entitled to payment of its disputed Trading Profits. It was and should no doubt be indifferent as to the source from which those profits are paid.

80. The Defendant's case on this issue was confused and did not provide any basis for departing from this analysis. For example, Mr Nisar had suggested at Nisar 2 at [51] that factors which may make damages an inadequate remedy "*include when to refuse an injunction would lead to the destruction of the applicant's business.*" However, he had not gone on to suggest that this would be the consequence of a refusal to obtain an injunction. The suggested problem was that the Plaintiff had declined withdrawal requests from the Defendant so that it could not use those funds to meet withdrawal requests from its own clients. But a proprietary injunction would not involve those funds being paid to the Defendant or available for its clients' withdrawal requests. On the contrary it would involve sums being ringfenced in the Plaintiff's hands pending a final determination as to who is entitled to them.

81. It was also relevant, the Plaintiff argued, that the Defendant had waited for some four months before making the application for the proprietary injunction, and then did not pursue it with any alacrity for several weeks once made. This supported the view that the

Defendant was not being and will not be prejudiced by the absence of a proprietary injunction.

82. The Plaintiff accepted that where there was evidence of insolvency, then a proprietary injunction may become important so as to protect the applicant from the risk of competing claims leading to a shortfall in its recovery. But it submitted there was no evidence to suggest any such risk here. On the contrary, the evidence demonstrated that the Plaintiff was in good financial standing (as was the wider group of which it formed part~~)~~ (see Athar 1 at [102], Athar 2 and Athar 3 at [45]).

83. The Plaintiff argued that the same could be said of the Defendant and the Plaintiff's ability to recover against it under the cross-undertaking in damages. While it was difficult to be precise about the damage that the injunction sought would cause to the Plaintiff, given that the order itself is so imprecise, if one assumed contrary to the facts that the Plaintiff would be able to identify a sum of US$25 million as referable to a (disputed) proprietary claim on the part of the Defendant, there could be no doubt that having to ringfence such monies from within what it had legitimately been treating as its own assets would be liable to cause loss to the Plaintiff from its ability to use that money as part of its ordinary commercial operations, and may put it in breach of its obligations to other clients.

84. The Defendant's evidence also conspicuously failed to address the question of whether it could meet an order for damages to compensate the Plaintiff for such loss.

The balance of convenience and considerations of justice support the conclusion that no injunction should be granted

85. The Plaintiff submitted that the fact that the order sought lacked the necessary precision for an injunction, and would or at least might be impossible to comply with, was a powerful reason to refuse the injunction sought.

86. The Plaintiff also argued that more generally the disruption which an attempt to comply with such an injunction would undoubtedly cause to the Plaintiff's trading business, and the likely damage to its reputation as a regulated institution responsible for holding and

administering client money, must be set against the palpable weaknesses in the Defendant's case, even if (contrary to the Plaintiff's submissions) the Court concluded that the threshold of a serious issue to be tried had been met. It was simply not just and convenient to make an order of such a nature against the Plaintiff when the case in support of it was, on any view, very weak.

There was no need for a proprietary injunction in respect of the Balance Amount

87. The Plaintiff said that it was common ground that of the funds (US$7.2 million) deposited by the Defendant (which the Plaintiff treated as collateral) the sum of approximately US$1.2 million remained in the Trading Account and that since the US$1.2 million was deposited with the Plaintiff by the Defendant it was "*client money*" within the terms of the Client Agreement and so was reflected in the overall balance of client money held within the Omnibus Account.

88. The Plaintiff said that this had been explained clearly by the Plaintiff in correspondence through its attorneys and referred in particular to Ogier's letter of 3 July 2026 in which it was stated that:

> "*Our client has accepted that there is approximately US$1.2 million of collateral in your client's account. We confirm that those funds have been appropriately segregated and will remain segregated pending determination of this dispute.*"

89. The Plaintiff said that while it recognised that Ogier's letter had been sent after the Summons had been issued, the Defendant should accept that there was no need for a proprietary injunction in circumstances where the Plaintiff had recognized the Plaintiff's proprietary interest and confirmed that the US$1.2 million will remain segregated.

90. The Plaintiff considered that the Defendant's position on the sum of US$1.2 million was unclear. Virtually no reference had been made to the sum of US$1.2 million in Nisar 3, and no response to the Plaintiff's confirmation that the funds were segregated had been provided. On 17 July 2026, Carey Olsen on behalf of the Defendant had written demanding immediate repayment of the sum of US$1.2 million but the basis for that demand had not been articulated. The Plaintiff had a clearly pleaded basis for withholding

the sum in question and since an order for repayment did not form any part of the Summons before the Court the Plaintiff considered that it was unnecessary to address this aspect further.

Discussion and decision

Overview

91. I have already set out a detailed summary of my decisions and reasoning. What follows provides further detail of my review and assessment of the Defendant's case that it has a proprietary claim in respect of the Trading Profits with references to the relevant regulatory materials.

Has the Defendant shown that its claim to a proprietary interest in the Trading Profits and the Balance Amount has a real prospect of success?

92. The Defendant must show that its claim to a proprietary interest in the Trading Profits and the Balance Amount raises a serious issue to be tried. The test is whether the claim has a real (as opposed to a fanciful) prospect of success which would withstand a reverse summary judgment application.

93. The first issue that needs to be considered is what is the subject matter of the Defendant's proprietary claim. What does the Defendant claim to have a proprietary interest in and what property does it claim the Plaintiff holds on trust? As I have noted, it appeared from the definition of Proprietary Assets in the Summons Draft Order that the Defendant was not claiming a proprietary interest in the Omnibus Account or sums credited to it but the Defendant sought to amend or clarify its position and to refer explicitly in the Revised Form of Order to sums credited to the Omnibus Account as Proprietary Assets which would be subject to the proprietary injunction which it sought.

94. The question arises as to what the Defendant claimed in its pleaded case. The formulation of the proprietary claim in the Counterclaim did not refer explicitly to the Omnibus

Account or make any reference to the Plaintiff's obligations in relation to client money imposed by the regulatory regime including the SIBRs and the Guidance Statement.

95. The relevant paragraphs of the Counterclaim are as follows (my underlining and emphasis):

> *122. Under the parties' trading relationship, the Defendant placed the Trades through the NCM Trading Account. Realised trading profits were credited to the Defendant's account balance as they arose and formed part of the client money held by the Plaintiff for the Defendant.*
>
> .....
>
> *127. At all material times, the Plaintiff held client money for the Defendant in accordance with the Client Agreement. The Client Agreement includes express terms that:*
>
> *127.1. All monies paid by the Defendant to the Plaintiff do not constitute a loan and are held on trust by the Plaintiff.*
>
> *127.2. **All monies deposited by the Defendant are held by the Plaintiff in one or more segregated bank accounts** .*
>
> *127.3. Profits are immediately credited to the Defendant's account and the Defendant's available trading resources will be adjusted accordingly.*
>
> *127.4. The Defendant may request payment by the Plaintiff of such amount from the Defendant's credit balance as the Defendant may specify.*
>
> *128. On the proper construction of the Client Agreement**, the Deposited Funds** [as noted above I assume that this is a reference to the US$7.2 million paid by the Defendant to Mex which is defined as the Deposited Collateral at [39.4] of the defence] **and monies credited to the NCM Trading Account**, including the Profits and the Balance Amount, **were held by the Plaintiff on trust for the Defendant**.*
>
> *[The prayer]*
>
> *A declaration that **the profits in the Defendant's account held with the Plaintiff**, which are in the sum of US$25,309,528.76, and the balance in the Defendant's account in the sum of US$1,201,685.56**, are held on trust** by the Plaintiff for the Defendant;*

96. A reason for the failure by the Defendant to focus on the Omnibus Account and explicitly to claim an interest as a client for whom the Plaintiff held the account on trust for clients, may have been that, as I have noted above, it had not seen Athar 3 before filing the

Counterclaim. Athar 3 was served on 8 July 2026 while the Defence and Counterclaim was filed on 1 May 2026. But as I have also already noted, the Defendant had seen Athar 1 which referred explicitly to the Plaintiff transferring funds into the Omnibus Account and the failure to refer to or rely in the Counterclaim on the Plaintiff's obligations under the regulatory regime with respect to client money suggests that the Defendant had failed to analyse fully how client money is dealt with by regulated entities and the manner in which a trust of client money is created and operated in accordance with that regime (and consequently the nature of the proprietary rights held by the Defendant).

97. In their written skeleton argument on behalf of the Defendant (dated 30 July) the Defendant's counsel did indirectly allude to the regulatory regime and refer to omnibus client accounts in general terms, and at least implied that the Defendant's proprietary claim extended to those accounts or sums credited thereto. At [43] it was said that the Defendant's "*primary proprietary case is that the Trading Profits and the Balance Collateral constituted client monies and/or trust property held by Mex Atlantic for NCM Global's benefit under the Client Agreement <u>and the client money arrangements governing the parties' relationship</u>.*." At [44], it was said that the Defendant asserted "*a proprietary claim to the Trading Profits and the Balance Collateral (and, to the extent the Trading Profits were removed from the omnibus client accounts following the reversal exercise, any traceable substitute assets).*"

98. The Defendant's counsel dealt directly with the Omnibus Account in the written skeleton when responding to the Plaintiff's argument that the Defendant appeared to be claiming a proprietary interest over the amounts of the Trading Profit within the Omnibus Account, separate and distinct from a trust over the Omnibus Account as a whole with the beneficial interests in the Omnibus Account (the debt owed by the relevant bank which was recorded and evidenced by the credit balance in that account) being held by all the relevant clients as co-owners. The Defendant's response was set out at [83]-[88] of the written skeleton as follows (my underlining):

> *83. In opposing the Proprietary Injunction, Mex Atlantic appears to rely heavily on the fact that the Trading Profits and Balance Collateral were held within a client omnibus account and were not segregated in what it has referred to as separate "pots" on a customer-by-customer basis.*

> *84.* *It is submitted that that arrangement does not defeat the existence of a trust or proprietary interest and that, as a minimum, there is a serious issued to be tried in this respect also.*
>
> *85.* *The authorities recognise that segregation is unnecessary where the property consists of fungible intangible assets forming part of a homogeneous fund....*
>
> .....
>
> *86.* *The learned authors of Lewin on Trusts (20th ed) confirm at [3-006] that "the validity [of Hunter v Moss] is now clearly established", although the decision "has not escaped criticism". The principal criticism is that "while there is no conceptual difficulty in a trust of an undivided share... the practical difficulties that such a trust may cause may show a lack of intention to create a trust rather than a lack of certainty of subject matter".*
>
> *87.* *That criticism is of no application here. The clear terms of their agreement show that the parties intended that monies in NCM Global's standing would be held in a segregated trust account. Clause 23.1 of the Client Agreement provides for a pooled trust structure, expressly stipulating that "individual accounts of our clients are not separated from each other within the segregated trust accounts operated by us" without any suggestion that client monies were not as a consequence client monies properly so called. As noted above, the Client Agreement also expressly provided at clause 3.3 that "All moneys deposited by you to the credit of your account is client money ... Client money is held in trust for the clients entitled to it", while the Risk Disclosure Statement at page 4 of the Client Agreement provided that "Net unrealised running profits are also held in trust by us ... and would normally be similarly protected for your benefit as beneficial owner."*
>
> *88.* *Accordingly, the fact that client monies were held within an omnibus account does not prevent NCM Global establishing a proprietary interest capable of supporting proprietary relief. As a minimum, there is a serious issue to be tried on that question.*

99. The Defendant's response was that there can be a trust over part of an intangible (the debt or chose in action owed by the bank). The Defendant argued that the fact that where the funds representing the Trading Profits had been paid into the Omnibus Account they could no longer be separately identified within the Omnibus Account did not prevent there being a valid trust. The Defendant asserted that "*The authorities recognise that segregation is unnecessary where the property consists of fungible intangible assets forming part of a homogeneous fund*" and that "*the fact that client monies were held within an omnibus account does not prevent NCM Global establishing a proprietary interest capable of supporting proprietary relief.*" But the Defendant appears to have

failed to appreciate a key step in the reasoning and the significance of the authorities on which it relied (such as *Hunter v Moss*). As the quoted extract from *Lewin* mentioned, the subject matter of the relevant trust is the whole fund (or in the present case the whole debt or chose in action represented by the Omnibus Account) which is held on trust for all relevant clients as beneficial co-owners, holding an undivided share of the fund (or debt/chose). That means that if and to the extent that the Defendant claims that when the Trading Profits (or sums referable to the Trading Profits) were paid into the Omnibus Account, it held a proprietary interest, the proprietary interest was in the debt/chose in action owed by the relevant bank to the Plaintiff as recorded in the Omnibus Account and the Defendant's interest was as a beneficial co-owner holding an undivided share as a tenant in common. It did not have a proprietary interest in the separate credit balances within or in parts of the Omnibus Account.

100. There is a good deal of authority and academic and textbook literature on this topic which it would be inappropriate for me to review in depth here. Instead, I shall confine myself to two references:

(a). Mr Justice Briggs (as he then was) put the point as follows in his judgment in the High Court in *Re Lehman Brothers International (Europe)* [2010] EWHC 2914 (Ch): "*A trust of part of a fungible mass without the appropriation of any specific part of it for the beneficiary does not fail for uncertainty of subject matter, provided that the mass itself is sufficiently identified <u>and provided also that the beneficiary's proportionate share of it is [the whole mass] not itself uncertain</u>*."

(b). Professor Goode (who has recently died and to whom I would like to pay tribute as a brilliant thought leader in this – as in so many other – areas and a great mentor to me) explained the distinction between proprietary rights to units in a fund held for clients and a proprietary interest in the fund as a whole in his essay "*Are Intangible Assets Fungible*"? (re-published as chapter 8 of *Fundamental Concepts of Commercial Law* at pages 126-127) as follows (my underlining):

> *…. <u>there may be claims to a fund, that is to a collection of units</u> – goods, <u>debts</u> or investment securities – <u>which are under the control of a manager empowered to change the components of the fund. The manager is usually</u>*

> *the legal owner of the units themselves but the fund has a distinct identity and belongs in equity to the clients or beneficiaries for whom it is being managed and must be kept by the manager distinct from its own assets. The fund as such as a single entity and beneficiaries have an interest only in the fund as a single asset not in its individual components. If transferred improperly, the fund is subject to equitable tracing claims which are therefore claims in specie though again not to the individual components of the fund, only to the fund itself. All that the claimant has to show is that the fund held by the defendant can be identified as that in which the claimant had a beneficial interest that has not been displaced by a superior right.…*

101. Until Mr Boeddinghaus' oral reply submissions, the Defendant had failed to assert a claim to (or at least to make clear that it was claiming) an interest in the Omnibus Account. Before then, even when it referred in general terms in the Counterclaim to the Plaintiff having to hold "*monies deposited by the Defendant …. in one or more segregated bank accounts*" it did so for the purpose of quoting the terms in the Client Agreement. When formulating the basis for its proprietary claim it referred to "*funds and monies credited to the [Trading Account]*" as being held on trust (and sought a declaration that it was "*the profits in the Defendant's account held with the Plaintiff*" that were held on trust).

102. Even in the Defendant's written skeleton when it was asserted that "*the fact that client monies were held within an omnibus account [did] not prevent NCM Global establishing a proprietary interest capable of supporting proprietary relief*" and even after the proposed amendment to the form of order sought on the Summons, the Defendant did not explain the nature of that proprietary interest or how and when it was created. I had the impression that the Defendant was arguing that it claimed a derivative interest or interest by substitution arising from the payment into the Omnibus Account by the Plaintiff of monies already held on trust. This was probably based on the Defendant's claim that the Trading Profits were client money and held on trust from the time when they were credited to the Trading Account (or possibly earlier, when the relevant Trade was closed).

103. Leaving these difficulties to one side, it seems to me that the Defendant's proprietary claim relied on two main assertions and propositions:

(a). first, that the Trading Profits represented "*client money*" and were held on trust when, and from the time that, they were credited to the Trading Account (and possibly before then upon the closing of the relevant Trade) (the ***First Proposition***).

(b). secondly, that the US$7.2 million (the Deposited Funds or the Deposited Collateral) paid by the Defendant to the Plaintiff was "*client money*" and held on trust by the Plaintiff for the Defendant when paid or when credited to the Trading Account, so that the Balance Amount (which represents what is left of the US$7.2 million and is credited to the Trading Account) is "*client money*" which is also held on trust by the Plaintiff for the Defendant (the ***Second Proposition***).

104. The Defendant in the Counterclaim and its submissions failed to explain precisely what is meant by "*client money*." As I have noted, the term is defined in the Client Agreement as "*the moneys clients have deposited with us and held by us.*" Clause 3.3 of the Client Agreement (which is headed *Trust Account*) states that "*All moneys deposited by you to the credit of your account is client money within the meaning of the client money handling obligations and which will be held in an account with an approved foreign bank <u>in accordance with the client money obligations</u>. Client money is held in trust for the clients entitled to it or if the money is invested <u>in accordance with the client money obligations</u> the investment is held in trust for the clients entitled to it.*"

105. There are two references to "*the client money obligations*" but this expression is not (so far as I can see) defined in the Client Agreement. It is, as it seems to me, likely to be a generic reference to the obligations regarding the handling and protection of client money imposed on regulated entities such as the Plaintiff by local regulatory laws and regulations. In this jurisdiction, the relevant laws, regulations and CIMA Guidance are, as I have noted above, the SIBA, the SIBRs and the Guidance Statement.

106. Section 10 of the SIBA states that "*a licensee or a registered person shall separately account for the funds and property of each client and for the licensee's or registered person's own funds and property*." Section 11 authorises the Cabinet, after consultation with CIMA, to make regulations, inter alia, specifying "*standards for dealings with clients and clients' assets, including the holding upon trust of clients' assets by the*

licensee." The SIBRs are such regulations. Section 12 permits CIMA to issue guidance notes for the purpose of giving practical guidance with respect to SIBA and the SIBRs and in determining whether a person has complied with any of the requirements under SIBA or the SIBRs the Court is required to take into account any relevant guidance notes issued by CIMA.

107. The following provisions of the SIBRs are relevant (my underlining):

Definitions

"client bank account" means a current or a deposit account at an approved bank that — (a) is in the name of the licensee; and (b) includes in its title an appropriate description to distinguish the money in the account from the licensee's money;

"client money" means money of any currency which, in the course of carrying on securities investment business, a licensee holds for, or receives from or on behalf of, a client, but does not include money specified in regulation 38;

"collateral" means assets which belong to a client and which are held or controlled by the licensee under the terms of a deposit, pledge, charge or other arrangement to secure the client's obligation in connection with securities investment business;

Safeguarding of client assets

27. A licensee shall ensure that it secures adequate protection for assets belonging to a client when it is accountable for them, in accordance with this Part [Part V] and any guidance issued by the Authority.

……..

Client money

37. A licensee shall secure the proper accounting for and handling of client money.

Money not considered "client money"

38. For the purposes of these regulations client money does not include —

(a) money of a professional client or market counterparty who has opted out of segregation by written notification to the licensee;

(b) money due and payable to the licensee;

(c) money of group companies, unless the licensee has been notified that the money belongs to the client of a group company or the group company is a client dealt with at arm's length; or

(d) money received from a client and which is due to settle a transaction within 24 hours, and where the licensee settles the transaction by the close of business on the third day following the date the money is received.

Segregation of client money

39. In order to comply with section 10, when a licensee receives client money it shall either —

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

(b) pay it out in accordance with regulation 46.

Client bank accounts

40. (1) Subject to regulation 42, a licensee shall ensure that client money is held at all times in a client bank account with one or more approved banks.

(2) A licensee shall, no less than once in each financial year, take reasonable steps to confirm that the bank or banks used for client bank accounts remain appropriate for that purpose in accordance with the relevant guidance issued by [CIMA].

……

Client money requirement

44. Each business day, a licensee shall ensure that the aggregate balance on its client bank accounts is, by the close of business that day, at least equal to the client money requirement as defined in guidance issued by the Authority, as at the close of business of the previous business day, and 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 time period.

……

When money is no longer client money

46. Money ceases to be client money if it is paid —

> *(a) to the client, or his duly authorised representative;*
>
> *(b) to a third party on the instructions of the client, unless transferred in the course of a transaction under regulation 42;*
>
> *(c) into a bank account in the name of the client (not being an account which is also in the name of the licensee); or*
>
> *(d) to the licensee itself, where it is due and payable to the licensee.*

108. The Guidance Statement (which has the title *Client Assets, Money and Safekeeping – Securities Investment Business*) states as follows (my underlining):

> *1. Statement of Objectives*
>
> *To clarify what constitutes client money, what is not considered client money and how client assets and money should be kept safe by the securities investment licensee.*
>
> *2. Introduction*
>
> *Provisions for the handling of Client Money and Assets form part of the Conduct of Business Regulations in part IV which seeks to fulfil two objectives:*
>
> *· To seek to protect client assets and money from the claims of creditors in the event of a licensee's insolvency*
>
> *· To prevent licensees from using client funds to finance their own business*
>
> *3. Segregation*
>
> *A key element to how the client money regulations work is the principle of segregation, i.e. the separation of client funds from those of the licensee. As a general rule, client money must be held separately from the licensee's own money. Specific exceptions may arise under the regulations or this guidance.*
>
> *Adequate protection is afforded by segregating client accounts from the licensee's accounts which should prevent liquidators from setting off clients' assets against the debts of the licensee itself as well as preventing the licensee from using clients funds to finance its own business. (See Appendix A for a sample letter that may be used as one step to ensure segregation.)*
>
> *A licensee must, except to the extent permitted by this Statement of Guidance, hold client money separate from the licensee's own money.*

3.1. Where a licensee deems it prudent to do so, to ensure that its clients are protected, it may deposit its own money into a client bank account, and such money will be client money for the purposes of this Statement of Guidance.

3.2. Where a licensee pays its own money into a client bank account on the instructions of the Authority, such money will be client money for the purposes of this Statement of Guidance.

3.3. A licensee must not hold money other than client money in a client bank account unless it is:

a) a minimum sum required to open the account or keep it in being;

b) money temporarily in the account; or

c) interest credited to the account which:

- *exceeds the amount due to clients as interest; and*
- *has not yet been withdrawn by the licensee.*

………

5. Money

5.1 <u>Client Money</u>

<u>The Regulations define client money as "money of any currency which in the course of carrying on securities investment business, a licensee holds or owes to a client</u>"

5.2 <u>In simplistic terms the key features of client money are that the money belongs to the client but is in the licensee's possession for the purpose of entering into a securities investment business transaction with or for the client</u>.

5.3 Collateral

- *Two types of collateral are envisaged<u>; firstly assets held under an agreement that they become the licensee's property if the client defaults in the course of investment business and pursuant to regulation 28 of the SIBL (Conduct of Business) Regulations, must be held according to the normal client asset rules until such time as a default occurs</u>. In statements to the client, however, they must be separately identified as falling under the collateral agreement.*

- *<u>The second type is where a client provides a licensee with collateral to secure the client's obligations. This should be done under a separate agreement and the licensee must keep adequate records to enable it to</u>*

<u>return the same or equivalent assets to the client should it be required to do so</u>.

5.4 Exceptions

5.4.1 Money belonging to professional clients and market counterparties is considered client money unless they confirm in writing that they do not wish it to be treated as such. This is called opting-out and can be done by professional clients and market counterparties. Private clients' money however is always client money.

5.4.2 Any money due and payable to the licensee (e.g. fees, commissions etc).

5.4.3 Money from group companies, major shareholders or other connected clients. (The logic behind this exception is to prevent the client money pool being 'polluted' by money from those with an interest in the licensee.)

5.4.4 Money received from a client and which is due to settle a transaction within 24 hours.

5.6 <u>Payments to and from Client Money Accounts</u>

5.6.1 <u>Where client money is received by the licensee in the form of an automated transfer, the licensee must ensure that</u>:

a) <u>where possible, the money is received directly to a client bank account</u>; and

b) <u>in the event that the money is received directly to the licensee's own account, the money is paid into a client bank account in accordance with Regulation 40 (COB) Regulations</u>.

c) Where a licensee receives a "mixed remittance" that is part client money and part other money, it must pay the full sum into a client bank account in accordance with Regulation 40. Then the money that is not client money must be paid out of the account as soon as practically possible:

5.6.2 <u>Where a licensee is liable to pay money to a client, either in respect of an investment agreement entered into with or for that client in the course of the licensee's investment business, or by way of interest on client money, it must as soon as possible and no later than one business day after the money is due and payable</u>:

a) *pay it into a client bank account in accordance with above; or*

b) *pay it out in accordance with regulation 47 of the (Conduct of Business) Regulations.*

….

6. Approved banks

6.1 Client Money must be held at approved banks as defined in the (COB) Regulations.

……

6.5 Use of an approved bank outside the Cayman Islands:

A licensee must not hold client money on behalf of a client in a client bank account outside the Cayman Islands, unless that fact is disclosed to the client in writing

………

9. Amounts to be held in client money accounts

9.1 Each business day, a licensee must ensure that the aggregate balance on its client bank accounts is, by the close of business that day, at least equal to the "client money requirement" in accordance with 9.3 below as at the close of business of the previous business day. In order to satisfy this requirement a licensee may be required to pay money into a client bank account, and such money will be client money.

9.2 For the purposes of 9.1 above, a licensee should use the values contained in its accounting records, e.g. cash book, rather than values contained on statements received from its banks.

9.3 The "client money requirement" is the sum of:

- *the "individual client balances" calculated in 9.4 below, excluding "individual client balances" which are negative (i.e. receivable); and clients' equity balances; and*
- *the "total margined transaction requirement", which is calculated in 9.5 below.*

9.4. The "individual client balance" for each client is the sum of:

(a) free money where there are no trades;

> *(b). <u>in respect of principal deals, sale proceeds due to the client where the client has delivered the securities</u> (except that if received prior to the settlement date agreed with the client for that trade, a licensee may segregate the securities instead of the money).*
>
> *(c) in respect of agency deals, sale proceeds due to the client where either the sale proceeds have been received by the licensee and the client has delivered the securities, or the licensee holds the client's securities, (except that in both cases the licensee may segregate the securities instead of the money);*
>
> *(d) in respect of principal deals, the cost of purchases which have been paid for by the client but the licensee has not delivered the securities to the client (except that a licensee may segregate the securities instead of the money); and*
>
> *(e) in respect of agency deals, the cost of purchases which have been paid for by the client where either the licensee has not remitted the money to, or to the order of, the counterparty, or the securities have been received by the licensee but have not been delivered to the client (except that a licensee may segregate the securities instead of the money),*
>
> *less:*
>
> *(f) money owed by the client in respect of unpaid purchases where delivery of such securities has been made to the client; and*
>
> *(g) proceeds remitted to the client in respect of sales transactions where the client has not delivered the securities.*

109. As I have noted, the Client Agreement refers to "*client money*" and to "*the client money obligations*" without referring to SIBA and the SIBRs but in my view the Client Agreement is to be interpreted having regard to the relevant and related laws, regulations and CIMA guidance that apply to the Plaintiff in the operation of its regulated business where the regulated status of the Plaintiff ("*regulated by [CIMA]*" – see clause 1.1) is clearly set out in and is clearly a critical context of the Client Agreement and where that agreement refers to "client money" and "*the client money [handling] obligations*."

110. As I have also noted, clause 3.3 of the Client Agreement states that (my underlining):

> *All moneys deposited by you to the credit of your account is client money within the meaning of the client money handling obligations and which will be held in an account with an approved foreign bank in accordance with the client money obligations. Client money is held in trust for the clients entitled to it or if the money is invested in accordance with the client money obligations the investment is held in trust for the clients entitled to it.*

111. The reference to an approved bank account appears to relate to Regulation 40 and an account with a bank approved by CIMA, and to [6] in the Guidance Statement. Clause 3.3 refers to a "*foreign bank*" and presumably connotes that the relevant account will be held outside the Cayman Islands (although I suppose the foreign bank could hold accounts in Cayman) and is intended to constitute a disclosure to the Defendant in accordance with [6.5] that client money will be held in a bank account outside the Cayman Islands.

112. It seems to me that clause 3.3 of the Client Agreement should be interpreted as stating that "*moneys deposited by [the Defendant] to the credit of [the Trading Account]*" will be treated as client money for the purpose of the legislation, regulation and guidance relating to and regulating the holding of client money by the Plaintiff and to which the Plaintiff is subject as a regulated (licensed) entity. Accordingly, pursuant to the Client Agreement the Plaintiff has accepted that it must and assumed an obligation to the Defendant to act in accordance and compliance with those laws, regulations and guidance.

113. As I have noted above, I did not receive any submissions, save for those made during the oral submissions and then mainly in response to questions from me, as to the proper interpretation and effect of SIBA, the SIBRs and the Guidance Statement. I am therefore hesitant to seek to provide a detailed analysis of how they operate in respect of client money (and as I mentioned during the hearing I am also conscious that the operation of the regulatory regime is something on which the Court would value the views of CIMA before setting out a detailed and final view). Nonetheless, it is necessary to consider, as best I can, how these laws, regulations and guidance operate for the purpose of assessing the merits of the Defendant's claim to a proprietary interest in the Trading Profits and the Balance Amount.

114. Having considered the correct meaning of client money, we can return to the issue of whether the Trading Profits were to be treated as client money and could be and were held on trust for the Defendant, and whether the First Proposition is correct. In my view it is not. The Trading Profits only amounted to liabilities owed by the Plaintiff to the Defendant and without more could not form the subject matter of a trust. No funds were created or transferred by the Plaintiff into an account with a third party (thereby giving rise to an asset of the Plaintiff, namely its claim against and the debt owed by the bank). The Trading Profits merely resulted in book entries in the Trading Account, an account opened by the Plaintiff to record the state of its account with the Defendant.

115. The crediting of the Trading Profits to the Trading Account merely recorded and acknowledged the liability of the Plaintiff to the Defendant in respect of profits accrued on the closing of each Trade (entered into by the Defendant and Plaintiff on a principal to principal basis). Until funds were transferred and paid by the Plaintiff into the Plaintiff's client bank account held for all clients (the Omnibus Account), there was no transfer of funds (which could be the subject matter of and assets held on trust) by the Plaintiff to a client bank account with a third party bank of the amount owing (such that the Plaintiff's rights against the bank were held on trust for the Defendant).

116. As a result, the Plaintiff did not hold or receive "*money*" in relation to the Trading Profits. Therefore, the Trading Profits did not fall within or satisfy the definition of "*client money*" in the Client Agreement or the SIBRs. Upon the Trading Profit accruing on the closing of a Trade, there were no monies or funds in existence which could form the subject matter of a trust.

117. However, the Guidance Statement makes it clear that the Plaintiff, as a licensee, is expected to take steps after a Trading Profit has accrued and a sum is owing by the Plaintiff to appropriate funds to the liability either by transferring funds from the Plaintiff's own account to a client bank account (in this case the Omnibus Account) or making a payment directly to the Defendant. [5.6.2] of the Guidance Statement states that:

> *<u>Where a licensee is liable to pay money to a client</u>, either <u>in respect of an investment agreement entered into with or for that client in the course of the licensee's investment business</u>, or by way of interest on client money, <u>it must as</u>*

> *<u>soon as possible and no later than one business day after the money is due and payable</u>:*
>
> *a) <u>pay it into a client bank account</u> in accordance with above; or*
>
> *b) pay it out in accordance with regulation 47 of the (Conduct of Business) Regulations [I could not find regulation 47 in the 2003 Revision of the SIBRs but from the description of regulation 47 elsewhere in the Guidance Statement it appears to relate to the means by which payment can be made to a client].*

118. I note that CIMA states (in a statement on its website containing an index of measures that contains a checklist for Rules, Statements of Guidance, Regulatory Policies, Regulatory Procedures and Forms that pertain to the Securities sector) that while the SIBRs create binding obligations on all licensees (a breach of which may lead to the imposition of a fine or regulatory action being taken against the licensee), guidance is "*intended to assist licensees to comply with relevant acts, regulations, rules and statements of principles or to describe standards for conduct of business. Guidance contains recommendations on how licensees should operate and represent a measure against which [CIMA] will assess compliance by licensees*."

119. It seems to me that even though [5.6.2] of the Guidance Statement does not contain a binding obligation on the Plaintiff to transfer a sum equal to the amount of a realised and accrued Trading Profit to the Omnibus Account (assuming that the Plaintiff has not opened any other client bank accounts) it provides relevant context for interpreting the effect of the funds transfers that the Plaintiff did make to the Omnibus Account relating to the Trading Profits. It supports the conclusion that the funds transfers into the Omnibus Account were intended to provide the same protection to the Defendant in relation to Trading Profits as would arise and be given when client money was paid into the Omnibus Account.

120. This view is consistent with the statement made by the Plaintiff in the first paragraph of the Risk Disclosure Statement I have quoted above (my underlining):

> *Our insolvency or default may lead to your positions being liquidated or closed out without your consent. <u>As all deposits lodged with us are held in a segregated client account or accounts, in such circumstances those deposits would attract all legal protections afforded under applicable laws. Net unrealised running profits are also</u>*

> *<u>held in trust by us (in excess of our contractual and regulatory requirements) and would normally be similarly protected for your benefit as beneficial owner, unless a Court were not to uphold the trust in relation to the net unrealised profits</u>, in which event you would rank as an unsecured creditor of ours in relation to such net unrealised profits. It should also be noted that keeping your funds in a segregated account does not offer or guarantee absolute protection of your funds in the event of our insolvency or default where there is a deficit in the segregated client account.*

121. The Risk Disclosure Statement, which is stated in clause 38 of the Client Agreement~~,~~ to be part of the agreement between the parties, represents that the Plaintiff will take steps to arrange for even the unrealised running Trading Profits to be held in trust even though this is beyond ("*in excess of*") the Plaintiff's contractual or regulatory obligations. There is no explanation of how the unrealised running Trading Profits would be held in trust, but the statement is clear that they will be protected and held in trust. There is also no mention of realised Trading Profits but it would not be an unreasonable inference that if unrealised running Trading Profits are held in trust, realised Trading Profits will be as well.

122. The Guidance Statement sets out that licensees are expected to ensure that at the end of each business day, they have transferred to and the balance in their client bank account is at least equal to the "*client money requirement*" (see [9.1]) and the client money requirement is defined to include "*individual client balances*" ([9.3]) and individual client balances are stated to include "*in respect of principal deals, sale proceeds due to the client where the client has delivered the securities"* ([9.4(b)]).

123. I appreciate that, as I have said, I have not had the benefit of detailed submissions as to how the guidance is interpreted and given effect by licensees and CIMA or indeed expert evidence on these questions but, for the purposes of this interlocutory application, I must form a view based on the evidence and a fair reading of the SIBRs and the Guidance Statement. I do have Mr Athar's (admittedly brief) evidence (as already noted above). In particular, in Athar 3 at [17] he said that "*the Plaintiff maintains an 'omnibus' client account, which, at the end of each day, is adjusted by the transfer in or out of sums of money so that the total sum held in that account matches the total in the Plaintiff's client's trading accounts. As explained in paragraph 56 of Shah 1, this is for regulatory reasons*

as opposed to a contractual requirement." At the hearing, Mr Sheehan helpfully took me through the print out of the entries in the Trading Account and confirmed that the Plaintiff did include in its daily reconciliation and calculation of the sums required to be held in the Omnibus Account (the aggregate of all clients' equity balances) amounts for realised Trading Profits on closed Trades and estimates of the unrealised Trading Profits on open Trades.

124. It seems to me that this shows that the Omnibus Account was operated by the Plaintiff and intended to be operated by the Plaintiff to conform to and comply with the requirements of the SIBRs and the Guidance Statement.

Balance of convenience and whether it is just and convenient to grant an injunction in all the circumstances

125. I have discussed these issues already in the summary of my conclusions and reasons. But I wish to add a few further points by way of a brief elaboration.

126. As I have noted above, I do not accept the Plaintiff's argument that damages would not be an adequate remedy because this case does not concern real property or a unique chattel but only payment of debts recorded in the Trading Account resulting from the principal to principal dealings between the parties. As the Plaintiff said, if the Defendant turns out to be right, it will be entitled to payment of the Trading Profits and should be indifferent as to the source from which those profits were paid. But if the Defendant could identify funds paid out of the Omnibus Account which should not have been transferred if the Trading Profits had been taken into account in the calculation of its client money requirement, then it would be entitled to relief that would protect its rights to have a sum equal to the Trading Profits so taken into account and to have the funds credited to the Omnibus Account, a trust account, reflecting the amount of those profits.

127. It follows, in my view, that the mere fact that requiring the Plaintiff to transfer to the Omnibus Account sufficient funds to rectify the position (and so ensure that sufficient funds are credited to that account so that the Defendant has the protection provided for by the Client Agreement and the regulatory regime) would put pressure on the Plaintiff's

cashflow or damage its business, would not be a reason of much weight that would justify refusing to grant suitably tailored relief.

128. I did not find the evidence regarding the financial standing and position of the Plaintiff or Defendant to be satisfactory. While the Plaintiff did file some financial statements these were consolidated group accounts which were of very limited value in assessing the separate financial position of the Plaintiff. As regards the Defendant, as the Plaintiff pointed out, it failed to address the issue of its financial standing and whether it was able to meet an order for damages to compensate the Plaintiff for any losses caused by the granting of the injunction. In Nisar 3 at [57] Mr Nisar only stated that the Defendant was willing to provide the cross-undertaking as to damages as set out in Schedule 2 of the Summons Draft Order. Had these issues been live, I would have required further supplemental evidence from the parties to provide sufficient materials from which the Court could take a view as to their financial standing and position.

Costs and consequential matters

129. I shall invite the parties to seek to agree an appropriate form of order to give effect to this judgment and to deal with costs and any other consequential matters. If the parties are unable to agree the form of the order they should file within 14 days of the date on which this judgment is handed down a draft order identifying what is agreed and what is in dispute with brief submissions on the issues in dispute and the Court will deal with the matter on the papers.

Postscript

130. Following the circulation of this judgment in draft the Defendant's attorneys, Carey Olsen, wrote to the Court on 26 August 2026 requesting that I clarify my reasoning and decision on one particular issue. Ogier for the Plaintiff responded on 28 August 2026.

131. Essentially, as I understood it, the Defendant questioned why, having noted that a client who could show that funds had been improperly withdrawn from a client bank account such as the Omnibus Account would in principle have a remedy (in the form of an

order requiring the balance in the Omnibus Account to be restored to the amount that would have been held in that account had the wrongful debiting not taken place), I had not gone on to grant such a remedy (or the interlocutory equivalent of such a remedy) to the Defendant in this case. The reason is simple. The Defendant had not applied for such a remedy or even made submissions setting out the basis on which it would be available. Before granting such a remedy, the basis on which relief could be granted at the final and interlocutory stages of proceedings would have needed to have been argued and assessed and the impact of the balance of convenience on any such application considered.

132. In their letter Carey Olsen stated as follows (my underlining and emphasis):

> 5. *At paragraph [126] of His Lordship's draft judgment, the operative words "if the Defendant could identify" appear to indicate that the Defendant failed to establish that funds which should not have been transferred out of the Omnibus Account if the Trading Profits* ***had been taken into account*** *in the calculation of the Plaintiff's client money requirement, were in fact paid out of the Omnibus Account. In light of the determinations and comments made by His Lordship elsewhere in the draft judgment which are identified below, we respectfully seek on behalf of the Defendant clarification as to whether that was His Lordship's intention.*
>
> 6. *The Plaintiff's own evidence was that the reversal of the Trading Profits would have resulted in a reduction in the amount retained in the Omnibus Account, and this evidence was cited and referred to by His Lordship in the draft judgment at [48] and [123].*
>
> 7. *The evidence in question was given in Mr Athar's 3rd Affidavit (sworn on behalf of the Plaintiff on 8 July 2026) at [17], in the penultimate sentence: "… when the Plaintiff rescinded the Client Agreement, Credit Facility Agreement and the Trades, there would (subject to other adjustments for the movement on other client accounts) have been a reduction in the sum retained in the omnibus client account."*
>
> 8. *Reference is also made to Mr Athar's 3rd Affidavit at [39], final sentence, which was in the same vein: "If sums were transferred to the [segregated*

'omnibus' client account] in order to meet the requirements in respect of the Defendant's purported profits, they would not have been retained in the segregated account following the reversal of those profits."

9. *In summary, the Plaintiff's own evidence, which was explicitly referred to in His Lordship's draft judgment, confirmed that the reversal of the Trading Profits would have resulted in a reduction in the amount retained in the Omnibus Account and thus formed part of the basis on which funds would thereafter be transferred into or out of that account. That evidence was not contradicted.*

10. *The clarification sought is, in our respectful submission, material because His Lordship observed at [126] of the draft judgment that, if it has been established that funds were paid out of the Omnibus Account which should not have been transferred if the Trading Profits had been taken into account in the calculation of the Plaintiff's client money requirement, the Defendant "would be entitled to relief that would protect its rights to have a sum equal to the Trading Profits so taken into account and to have the funds credited to the Omnibus Account, a trust account, reflect the amount of those profits." At [127] of the draft judgment, His Lordship further contemplated "requiring the Plaintiff to transfer to the Omnibus Account sufficient funds to rectify the position", and [16] of the draft judgment (cited above) appears to us be to similar effect.*

133. I have held that the Defendant failed to establish that any funds had been, or failed to identify particular funds, transferred from the Omnibus Account which could be the subject matter of a proprietary claim by it. I accepted that the effect of a wrongful debiting of the Trading Account would be a reduction in the sums retained in the Omnibus Account and that in principle a remedy would be available to a client with a beneficial but unsevered joint interest in the Omnibus Account in the form of an order requiring the balance in the Omnibus Account to be restored to the amount that would have been held in that account had the wrongful debiting not taken place. But, as Ogier have pointed out, the Defendant did not seek such a remedy. Indeed, the Defendant did not set out the legal analysis that would support, and did not seek to justify the availability of, such relief. In such circumstances, there could be no proper basis for making such an order on the Defendant's application or for considering the relevant

legal analysis in greater detail (without the benefit of submissions from the Defendant or the Plaintiff). The fact that the Plaintiff's uncontested evidence showed that the reversal of the Trading Profits would have resulted in a reduction in the amount retained in the Omnibus Account (and have affected the subsequent calculation of the amount that would thereafter be transferred into or out of that account) is not in my view sufficient in this case, absent a specific application and submissions by the Defendant (to which the Plaintiff would have an opportunity to respond), to justify making an interlocutory order protecting the Defendant's (unarticulated) claim to an order "*requiring the Plaintiff to transfer to the Omnibus Account sufficient funds to rectify the position.*"

The Hon Justice Segal
Judge of the Grand Court, Cayman Islands
4 September 2026