IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA348/2021
[2021] NZCA 561

BETWEEN	CHOO BOON LOO Appellant
AND	PHILIP ALEXANDER QUINLAN AND MORGAN JOHN KELLY (IN THEIR CAPACITY AS LIQUIDATORS) First Respondents
	HALIFAX NEW ZEALAND LIMITED (IN LIQUIDATION) Second Respondent
	PHILIP ALEXANDER QUINLAN AND MORGAN JOHN KELLY (IN THEIR CAPACITY AS TRUSTEES) Third Respondents
	ELYSIUM BUSINESS SYSTEMS PTY LIMITED Fourth Respondent
	JASON PAUL HINGSTON Fifth Respondent
	ATLAS ASSET MANAGEMENT PTY LIMITED (AS TRUSTEE FOR THE ATLAS ASSET MANAGEMENT TRUST) Sixth Respondent
	FIONA MCMULLIN Seventh Respondent
	ANDREW PHILLIP WHITEHEAD AND MARLENE WHITEHEAD (AS TRUSTEES FOR THE BEELINE TRUST) Eighth Respondents
	ANDREW PHILLIP WHITEHEAD Ninth Respondent

JEFFREY JOHN WORBOYS
Tenth Respondent

HONG KONG CAPITAL HOLDINGS PTY LIMITED
Eleventh Respondent

Hearing: 23 September 2021

Court: Kós P, Cooper and Goddard JJ

Counsel: I Jackman SC, E A J Hyde and R J Pietriche for Appellant
A Leopold SC, E Holmes and M Kersey for First to Third Respondents
S Couper QC and J V Gooley for Fourth Respondent
Appearances excused for Fifth to Eleventh Respondents

Judgment: 26 October 2021 at 4 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved.

REASONS OF THE COURT

(Given by Kós P)

[1] A cross-border insolvency. Halifax Investment Services Pty Ltd, an Australian corporation, and Halifax New Zealand Ltd were financial services providers.[1] Clients could use Halifax online platforms to acquire exchange traded financial products (such as shares) and enter into derivatives contracts. Client cash contributions, shares and other exchange traded financial products, and money and other property connected with derivatives trading, were held by Halifax on trust. Halifax however used client assets to fund their own activities, in breach of trust, and mingled client funds and assets in a manner inconsistent with those trusts. The deficiency and mingling prevented tracing of most individual customer assets. As a result, it is uncontested

[1] Herein referred to as "Halifax AU", "Halifax NZ" and, collectively, "Halifax".

that client assets were (and are now) held by Halifax on trust, in a single deficient mixed fund. Thereafter the Halifax companies failed.[2]

[2] Halifax customers had "accounts" recording the investments they had chosen to acquire through the various trading platforms operated by Halifax. The deficiency and mingling of trust funds, and the inability to trace, meant that these accounts were, for most investors, bookkeeping fictions that did not correspond with proprietary claims to specific investments of the kind recorded in those accounts. However somewhat unusually, the liquidators permitted customers to keep the nominal market positions shown in their accounts open, and retained investments that corresponded with investors' aggregate open positions.[3] Rather than cashing up in what were seen by many investors, at the end of 2018, as adverse market conditions, liquidators allowed customers to either close out their nominal positions or hold those positions open. The value of the investments retained by the liquidators to reflect those open positions rose substantially from late 2018 to the present day.[4] Correspondingly, the nominal value of the open positions retained by some investors increased – in some cases, very substantially, in others, less so. And the nominal value of the open positions retained by some investors fell over the same period.

[3] As so often occurs, a rise in the value of an asset owned collectively brings with it a dispute. Who was to take the benefit of the overall investment gains resulting from these open positions? All beneficiaries of the trust, or just those beneficiaries whose positions had improved? The answer to that question requires analysis of what these "positions" were, as a matter of law. But let us take Mr Loo's position. On 23 November 2018, the value of the assets shown in his personal account was AUD 361,570 and in his company's account was AUD 856,309.[5] Mr Loo does not contend for a specified date on which entitlements should be calculated (arguing as he

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2 See [7] below.

3 We explain why they did so at [10] below.

4 Investors are divided into classes depending on how "their positions" performed: see [13]–[14] below. It seems the value of investments nominally held by Category 2 investors had fallen by AUD 3 million (as at 31 July 2020). We were informed at the hearing that those investments had now increased in value compared to the administration date. The value of investments nominally held by Category 1 investors was higher than at the administration date both at the time of the High Court hearing, and today.

5 23 November 2018 being the date Halifax AU entered administration. Figures for 27 November 2018, being the date Halifax NZ entered administration, are not in evidence.

does for a date as close as possible to the date of distribution). But by way of example, on 30 January 2020 the value of the assets shown in his personal account was AUD 639,730, and in his company's account was AUD 1,482,193.

[4] The liquidators sought directions in relation to the distribution of the funds held by Halifax in Australia and New Zealand. The Federal Court of Australia and the High Court of New Zealand conducted a joint hearing, but issued separate judgments.[6] Happily for good order, Markovic J (in the Federal Court) and Venning J (in the High Court) reached the same conclusion. The date of valuation of investor-beneficiary contributions was to be 27 November 2018, being the date Halifax NZ went into administration. That meant all customer-beneficiaries would share in the benefit of increases in value of the fund after that date. To put it another way, Mr Loo's percentage interest in the single deficient mixed fund remained the same regardless of the increase in value of what might be called "his position".

[5] Mr Loo appeals to this Court against the judgment of Venning J. The appeal was heard in conjunction with the Full Court of the Federal Court of Australia, itself hearing Mr Loo's appeal against the judgment of Markovic J. Accordingly we sat, using remote hearing technology, with Middleton, Beach and Moshinsky JJ of that Court. As below, each Court has reached its own decision on its own appeal, but it was agreed by all parties that the two Courts might confer before doing so.[7] That approach was followed.

Background

[6] Halifax AU was a financial services provider through which investors could access several different online trading platforms. Halifax NZ acted as a broker for exchange traded products but also as a broker for Halifax AU and provided access to investors to the Halifax AU trading platforms.[8] Halifax NZ was also a licensed derivatives issuer.

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6 *Re Halifax New Zealand Ltd (in liq)* [2021] NZHC 1113 [High Court judgment]; and *Kelly (Liquidator), Re Halifax Investment Services Pty Ltd (in liq) v Loo* [2021] FCA 531 [Federal Court judgment].

7 See [19] below.

8 For details of the Halifax operations and trading platforms, see High Court judgment, above n 6, at [25]–[37].

[7] On 23 November 2018 Halifax AU entered voluntary administration. That triggered the administration of Halifax NZ on 27 November 2018. On 20 March 2019 Halifax AU was placed in liquidation. On 22 March 2019 Halifax NZ was placed in liquidation. On 18 September 2019 the administrators of Halifax NZ (and also Halifax AU) were appointed by the New Zealand Financial Markets Authority as trustees of a trust created pursuant to reg 246 of the Financial Markets Conduct Regulations 2014.

[8] When the administrators were appointed to Halifax AU, the combined funds across Halifax AU and Halifax NZ totalled AUD 192.6 million but investor assets were recorded in their accounts as totalling AUD 211.6 million — leaving a shortfall of AUD 19 million. Investor funds, save for the funds of those investors in Categories 3 and 5,[9] were intermingled in a single (deficient) mixed fund between Halifax AU and Halifax NZ.[10]

[9] Following their appointment, the administrators — who were later also appointed as liquidators — did not immediately liquidate the fund. Rather, they permitted investors either to close out existing investments or to keep their positions open for the time being. Investors could not otherwise enter new investment transactions.[11] As noted above, the liquidators retained investments that corresponded to the aggregate open positions in investors' accounts.

[10] The liquidators did so for several reasons. Most important was that numerous investors contended their investments were traceable. The contended proprietary rights would entitle them to an in specie distribution. But closing out all positions would prevent an in specie distribution. This consideration was prescient — such a claim was upheld vis-à-vis investors in Categories 3 and 5, to whom in specie distributions were ordered. A second consideration was that the vast majority of investors who expressed a view on closing out opposed such a move. Finally, there were concerns over threats of litigation from investors if the liquidators closed out positions without judicial direction.

9 For present purposes, it suffices to say that Category 3 and 5 investors were those investors whose funds could be traced to particular assets.

10 High Court judgment, above n 6, at [90]–[91]. As to Category 3 and 5 investors, see [146] and [155].

11 At [38].

[11] Concerns of possible litigation from other investors who opposed permitting positions to remain open caused the liquidators to apply for directions from the Federal Court of Australia and High Court of New Zealand as to whether they would be justified in refraining from closing out any and all extant investments until the determination of all substantive issues in the proceeding. The Federal Court and High Court made the direction sought.[12]

[12] The liquidators then applied to the Federal Court for directions as to the distribution of funds held by Halifax AU. Subsequently a similar application was made to the High Court in relation to Halifax NZ.

[13] The appellant, Mr Loo, was appointed to represent all Category 1 Halifax investors. Category 1 investors are those whose proportionate entitlement to the deficient mixed funds will be higher after the realisation of all extant investments than their entitlement was on the date the administrators were appointed.[13] Category 1 includes both investors who closed out positions and investors who chose not to do so — with a higher proportion being the latter.

[14] The fourth respondent, Elysium Business Systems Pty Ltd, was appointed to represent all Category 2 investors. Category 2 investors are those whose proportionate entitlement to the deficient mixed funds will be lower after the realisation of all extant investments than their entitlement was on the date the administrators were appointed.[14] Again, Category 2 includes investors who closed out positions and investors who chose not to — but this time with a higher proportion being the former.

[15] The High Court and Federal Court conducted a joint hearing and agreed on the principal issues raised. The Courts conferred after the hearing, but each Court reached its own decision and provided its own reasons.[15]

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12 *Re Halifax New Zealand Ltd (in liq)* [2020] NZHC 894 [High Court directions judgment] at [35]; and *Re Halifax Investment Services Pty Ltd (in liq) (No 8)* [2020] FCA 533 [Federal Court directions judgment] at [80]–[81].

13 High Court judgment, above n 6, at [14].

14 At [15].

15 At [7]–[9].

[16] Both Courts directed that, apart from the investors falling into Categories 3 and 5, the investments should be pooled for distribution on a pari passu basis.[16] Both Courts then directed the date each investor's entitlement to funds was to be assessed was the date of the administration of Halifax NZ — 27 November 2018.[17]

Jurisdiction

[17] This appeal was heard jointly with the Full Court of the Federal Court of Australia.

[18] The High Court heard the proceedings jointly with the Federal Court of Australia under the Insolvency (Cross-border) Act 2006.[18] That Act does not confer jurisdiction in cross-border insolvency matters on this Court. But this Court has jurisdiction to hear an appeal against the High Court judgment under s 56(1)(a) of the Senior Courts Act 2016. At the parties' request, this Court directed that it would hear the appeal in conjunction with the Full Court of the Federal Court of Australia under its inherent powers to regulate the conduct of proceedings before it. All parties involved consented to the joint hearing.

[19] As noted earlier, the parties agreed that in addition to sitting in joint session, the two appellate Courts might deliberate jointly, with each Court however issuing its own decision.[19] That is the approach we took.

Statutory context

New Zealand

[20] Halifax NZ was a broker subject to pt 3A of the Financial Advisers Act 2008.[20] A broker receiving client money or client property in its capacity as a broker must hold that client money or property on trust for the client, with client money to be held in a

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16 At [225]; and Federal Court judgment, above n 6, at [312]–[324].

17 High Court judgment, above n 6, at [235]; and Federal Court judgment, above n 6, at [339].

18 *Re Halifax New Zealand Ltd (in liq)* HC Auckland CIV-2019-404-2049, 12 December 2019 (Minute No (4) of Venning J). See, relevantly, Insolvency (Cross-Border) Act 2006, s 8 and sch 1, arts 25–29.

19 The issue of consent to being relevant to considerations of natural justice: see *Westpac Banking Corp v Lenthall* [2019] FCAFC 34, (2019) 265 FCR 21 at [2].

20 See Financial Advisers Act 2008, s 77B(1) definition of "broking service".

trust account.[21] Client money is money received in connection with the acquiring, holding or disposal of a financial product received from or on behalf of a client.[22] Client property is a financial product or a beneficial interest in a financial product received from or on behalf of a client.[23] Financial products include financial products under the Financial Markets Conduct Act 2013 — including shares.[24]

[21] But Halifax NZ's conduct as a licensed derivatives issuer was not a broking service covered by the Financial Advisers Act.[25] The holding of derivative investor funds and property are regulated by pt 6, sub-pt 6 of the Financial Markets Conduct Regulations.

[22] Regulation 240 provides that a derivatives issuer holds derivatives investor money and derivatives investor property — broadly, money and property received from an investor in connection with a derivative[26] — on trust for the derivatives investor.[27] For this purpose, derivatives investor money is to be paid promptly into and held in a trust account separately from money held by the derivatives issuer, the offeror, or the person who holds the money.[28]

[23] Regulation 246 provides that if a derivatives issuer is subject to an insolvency event — including the appointment of an administrator[29] — the following are subject a single trust in favour of all of the investors on whose behalf the money or property is being held:

(a) derivatives investor money;

(b) derivatives investor property;

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21 Section 77P(1).
22 Section 77B(2) definition of "client money".
23 Section 77B(2) definition of "client property".
24 Financial Advisers Act, s 5; and Financial Markets Conduct Act 2013, ss 7 and 8.
25 Financial Advisors Act, s 77C(1)(d).
26 Financial Markets Conduct Regulations 2014, reg 239.
27 Regulation 240(1) and (2).
28 Regulation 241.
29 Regulation 238(1) definition of "insolvency event"; and Financial Markets Conduct Act, s 6(4).

(c) any money or property held by a hedging counterparty on behalf of the derivatives issuer as a result of the use of derivatives investor money or property in authorised hedging activities under regs 242(1)(d) or 243(1)(d) (less any obligations owed by the derivatives issuer to the hedging counterparty that have arisen from this use); and

(d) any obligations owed by a hedging counterparty to the derivatives issuer that have arisen from the use of derivatives investor money or property under regs 242(1)(d) or 243(1)(d).

[24] In summary:

(a) any investor money held by Halifax NZ in relation to its services as a broker and assets such as shares it held as a broker were held on trust separately for each investor — though investor money may have been held in the same trust account. Nothing in the Financial Advisors Act changes that position at law on the appointment of administrators. It is common ground that a single deficient fund is now held subject to a single trust for the benefit of all investors. But that arises by equity, not statute.

(b) Any investor money or property held by Halifax NZ in relation to its services as a derivatives issuer were held on trust separately for each investor — though again investor money may have been held in the same trust account. On the appointment of administrators, all investment funds related to derivatives already held on individual trust became subject to a single trust for all relevant investors.

Australia

[25] Strictly the appeal relates only to investor funds held by Halifax NZ. Nevertheless, we set out, very briefly, the corresponding statutory context in Australia given the existence of intermingled funds with Halifax AU. The treatment of client money and client property is regulated by the Corporations Act 2001 (Cth) and the Corporations Regulations 2001 (Cth).

[26] Neither the Act nor Regulations distinguish between derivatives and other financial products. Client money paid in connection with a financial product must be paid into a qualifying account pursuant to s 981B. That account must be operated as a trust account, and all money deposited in it must be held on trust for the benefit of the client entitled to the money.[30] Client money in a trust account enjoys similar protections to those provided for in New Zealand.[31] Client property — property such as a share certificate given by or on behalf of a client in connection with a financial service[32] — must also be held on trust for the benefit of the client entitled to it.[33]

[27] In the event of insolvency — including the appointment of an administrator — client money in a s 981B account, or assets acquired by investing that money, are held on trust in favour of the person entitled to it or them.[34] But where money in the account is insufficient to pay all investors their entitlements, the money in the s 981B account must be paid in proportion to the amount of each person's entitlement.[35] Where it is not possible to trace particular investor entitlements to particular money, the money in the s 981B account will be pooled — that is, there will be single common fund.[36] As counsel acknowledged, the statutory scheme leaves at large the timing of entitlement.

Judgment under appeal

[28] The Judge noted all parties agreed there should be a single date for ascertaining investor entitlements.[37] This is not appealed.

[29] Before setting out his reasons for choosing the administration date as the appropriate date for quantification of entitlement, the Judge noted the appellant's submission that the liquidators had acknowledged the possibility entitlements could be calculated at the date positions were closed out in a report dated 12 March 2019.[38]

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30 Corporations Act 2001 (Cth), s 981H(1); and Corporations Regulations 2001 (Cth), reg 7.8.01(5).
31 Corporations Act, s 981E.
32 Section 984A.
33 Corporations Regulations, reg 7.8.07(2).
34 Regulation 7.8.03(4)–(5).
35 Regulation 7.8.03(6)(d).
36 *Georges (in his capacity as joint and several liquidator of Sonray Capital Markets Pty Ltd (in liq)) v Seaborn International (as trustee for the Seaborn Family Trust)* [2012] FCA 75, (2012) 288 ALR 240 [*Sonray*] at [82]–[86].
37 High Court judgment, above n 6, at [226].
38 At [230].

He also noted the appellant's submission that the liquidators had sought confirmation from the Court that they were not required to close out investors' open positions on the basis the Court might order an in specie distribution.[39]

[30] Central to the Judge's adoption of the administration date were his observations that:

> [232] In *Courtenay House*, Bell P acknowledged the date advocated by some of the parties was not a principled date.[40] The date was the date that an ex parte freezing order had been made. By contrast, the date of administration is a principled date. Black J noted in *Re MF Global*:[41]
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> > In my view, the adoption of the Appointment Date as the date for the quantification of entitlements finds strong support in the approach adopted in trust law generally and in insolvency.

The Judge next considered worked examples from the liquidators' updated report of 31 August 2020 comparing the return to Category 1 and 2 investors if entitlements were fixed at the administration date and at 31 July 2020. In that report the liquidators' analysis showed that the estimated dollar return to investors with entitlements calculated on asset values as at 31 July 2020 (taking account of estimated costs) for a Category 2 investor was between 87 and 89 cents. By contrast for a Category 1 investor it was between 119 and 122 cents. That compared with the entitlements calculated as at 23 November 2018 of between 99 and 102 cents for a Category 2 investor and between 98 and 102 cents for a Category 1 investor.[42] The Judge held the appropriate — more equitable — date for quantification was the administration date of Halifax NZ, there possibly being activity in the Halifax NZ accounts after Halifax AU entered administration.[43]

Issue on appeal

[31] This appeal raises a single substantial issue: whether the Judge erred in directing the liquidators adopt the Halifax NZ administration date of 27 November

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[39] At [231].

[40] *Caron v Jahani (in their capacity as liquidators of Courtenay House Pty Ltd (in liq) and Courtenay House Capital Trading Group Pty Ltd (in liq)) (No 2)* [2020] NSWCA 117, (2020) 102 NSWLR 537 [*Courtenay House*] at [168].

[41] *Re MF Global Australia Ltd (in liq)* [2012] NSWSC 994, (2012) 267 FLR 27 at [114].

[42] High Court judgment, above n 6, at [233].

[43] At [233]–[235].

2018 as the date at which the proportionate entitlements of investors are to be calculated.

An appeal from a discretionary decision

[32] The parties agree this is an appeal against a discretionary decision meaning the appellant must show (1) an error of law or principle; (2) the taking account of irrelevant considerations; (3) a failing to take account of a relevant consideration; or (4) that the decision is plainly wrong.[44] This Court might rather have regarded the decision below as evaluative in nature, applying the principles expressed in *Taipeti v R*, and noting also that this is not a case where the Judge enjoyed any forensic advantage over this Court.[45] In the end, however, we are satisfied the distinction makes no difference to the outcome of the appeal.

[33] The appellants argue the Judge made two errors:

(a) That the Judge failed to consider the fact that the liquidators permitted investors to maintain open positions following their original appointment as administrators of Halifax.

(b) That the Judge erred in law by misapplying the dicta of Black J in *Re MF Global Australia Ltd (in liq)*[46] to justify the adoption of the administration date as the "more principled" date for valuation.

Did the Judge err in directing the liquidators adopt 27 November 2018 as the date at which the proportionate entitlements of investors are to be calculated?

Submissions

[34] For the appellant, Mr Jackman SC submits the Judge acknowledged some investors left their positions open but did not take into account the implications of that fact — namely, that this choice carried vastly different risks and potential (now actual)

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44 *May v May* (1982) 1 NZFLR 165 (CA) at 170; and *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].
45 *Taipeti v R* [2018] NZCA 56, [2018] 3 NZLR 308 at [49]. See also *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) at [37]; and *Kacem v Bashir*, above n 44, at [32].
46 *Re MF Global Australia Ltd (in liq)*, above n 41.

returns. He argues this is significant because, though in conventional cases fluctuations in entitlements are due to factors beyond investors' control, here Category 1 investors actively chose to permit the fluctuations that occurred. This should be recognised by quantifying entitlements at a later date. The maintaining of open positions also distinguishes the facts from those in *Sonray*[47] and *Re MF Global*[48] where all positions were closed out by or shortly after the date of administration. Though open positions were present in *Lehman Brothers International (Europe) (in admin) v CRC Credit Fund Ltd*, that case is distinguishable due to differing legislative contexts, and the fact that case involved investors who involuntarily maintained open positions.[49] Finally, non-consideration of this factor means funds will be drawn disproportionately from Category 1 investors' actual positions to fund liquidator costs and ensure all other investors are made whole, contrary to a true pari passu distribution.

[35] Mr Jackman does not assert that Category 1 or 2 investors hold any proprietary rights in specific assets corresponding to the investments shown in their accounts. That is, he does not submit the nominal "positions" equate to proprietary interests. Rather, his submission is that Category 1 and 2 investors have an equitable charge over the whole fund, but entitlements to that fund should be calculated using a fair methodology taking into account the choice to maintain open positions[50] — a choice characterised by Mr Jackman as a "term of the trust". In other words, the argument is that Category 1 investors should be rewarded for their greater skill in portfolio selection, and risk-taking in closing out later. Fairness simply means a later date should be taken — as close as possible to the date of closing out. It is not, he accepts, a matter of a proprietary right being given effect to. But the continued involvement of investors in managing their positions, advantageously, means a later distribution date would be more consistent with the original purpose of the investment and not

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47 *Sonray*, above n 36, at [112].

48 *Re MF Global Australia Ltd (in liq)*, above n 41, at [145].

49 *Lehman Brothers International (Europe) (in admin) v CRC Credit Fund Ltd* [2009] EWHC 3228 (Ch).

50 Relying on *Courtenay House*, above n 40, at [18]: "There is room for debate as to which approach is the fairest and most consistent with principle or, as Williams J perhaps more aptly put it in [*Re International Investment Unit Trust* [2005] 1 NZLR 270 (HC) at [73]], which approach is 'the least unfair result for the investors, bearing in mind that, regrettably, no method of distribution will result in perfect justice for all'".

inconsistent with the overall purpose of the fund absent all positions being closed, upon insolvency of the trustee.

[36] Turning to the second ground, Mr Jackman submits the Judge erred in law in adopting Black J's dicta in *Re MF Global* in the circumstances of this case. First, Black J's reasoning relies on insolvency concepts of divesting property and prompt valuation and distribution to creditors which are not applicable to the New Zealand statutory context. Moreover, the liquidators clearly contemplated distribution at a future date by allowing investors to maintain open positions. It is more logical to set a date closer to the date of actual distribution of the funds maintained in open positions. Secondly, while the creation of a trust upon entry into administration means the date of administration may be appropriate for quantification where investors' entitlements are fixed as at that same date, that is not true where investors' entitlements change post-appointment and can only be finally known when the positions are closed out. Ignoring contributions made after the administration date is inconsistent with ascertaining investor entitlements by reference to contributions.

[37] Mr Couper QC, for Elysium, submits on the first ground that the Judge did consider the choice that investors were given not to close out their positions earlier in his judgment.[51] Secondly, Category 1 investors have only an equitable charge over the whole of the single deficient mixed fund — the investments that increased in value are not their separate property, meaning they took no personal risks. Yet the approach the appellant contends for treats those investors as if they do have beneficial entitlements to specific parts of the funds. Thirdly, being permitted to maintain open positions did not give control of the investment assets to Category 1 and 2 investors. Investors were warned early on that funds may be comingled, and entitlements may be set as at the date of administration — there was no intention for market fluctuations to affect entitlements. Nor did the Category 1 investors take any different risk to other investors; they were just managing part of a communal fund. Fourthly, the ability to maintain open positions does not distinguish this case from earlier cases. As in *Sonray*, active trading ceased at the date of administration. *Lehman Brothers*, irrespective of different statutory frameworks, similarly concerns a single deficient mixed fund.

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51 Relying on High Court judgment, above n 6, at [215]–[216].

[38] As to the second ground, Mr Couper submits the Judge rightly followed *Re MF Global* in characterising the administration date as a principled date. The administration date may not be the only principled date, but a later date is not more principled simply due to delay in distribution. The nominal investment account balances are the best proxy by which to assess contributions given the existence from that date (and earlier) of a single deficient mixed fund. A later date is unsuitable given the lack of control and proprietary interests canvassed above. As he puts it, "what happens to the components of the deficient mixed fund happens to everyone".

[39] Mr Leopold SC, for the liquidators, broadly echoes the submissions for Elysium. At the hearing, he emphasised the liquidators' decision to not close out all positions was for the reasons we set out above at [10]. As he put it, though at the time investors did not see themselves as only having an equitable charge over the mixed fund, that was and continues to be the reality.

Discussion

[40] It is, we think, convenient to consider the appellant's arguments — summarised above at [33] — in reverse order. That is, alleged error before alleged oversight.

[41] We start with some points devoid of controversy. It is common ground that a single valuation date for entitlements should be selected. It is accepted that delay in distributing the fund is not itself a reason to adopt a different date for valuation of the investors' contributions. The administrators/liquidators permitted investors to keep their (book) positions open in part to preserve the ability to argue for tracing and/or distribution in specie. Some investors, namely those in Categories 3 and 5, succeeded in their claim to trace into specific assets and will receive their investments in specie. But it is common ground that the remaining investors, including those in Categories 1 and 2, cannot trace. Their money was paid into a deficient mixed fund and subsequently dealt with in a manner that precludes tracing. And it cannot in our view be contested that it is a principled approach to use the date of appointment of the administrators as the valuation date. That is, either 23 or 27 November 2018. This offers a reasonable proxy for the amount each investor had contributed to the fund as it stood on that date, when it came under the control of the administrators. The relative

contribution each had made, as at that date, to what was now a jointly owned fund, is clear enough. On this approach, the proportionate entitlement of each investor would be fixed as that date. That is the approach adopted by the Judge.

[42] The arguably relevant factor the appellant identifies, which he says the Judge overlooked, and which he says as a matter of fairness requires a different answer, is the choice permitted to each investor by the liquidators to close out, or refrain from closing out, the nominal positions shown in their accounts. For that reason, the appellant says the valuation date should be the last possible date before distribution.

[43] We disagree, however, for the reasons that follow.

[44] First, the "accounts" (or "positions") of the investors are a book-keeping fiction that does not correspond with any proprietary claim of each investor to specific investments of the kind recorded in their accounts. The investors are not beneficial owners of the investments shown in their accounts. Rather, each investor has an equitable charge over the (deficient) mixed fund.[52] In order to distribute the fund, it is necessary to value the relative contributions of each of these investors to the fund. They will then have a proportionate claim to the fund as it stands at the time of distribution. As a matter of first principle, distribution is usually according to entitlements to the deficient mixed fund at the date it was created. That was recognised in *Re MF Global*.[53] The authorities relied on by Black J concerned deficient funds in an insolvency context. But the same principles are true of mixed funds in trust law generally.[54] As noted above at [41], entitlements as at 27 November 2018 represent a reasonable proxy for the relative contributions as at the date the mixed fund was created. This approach is not inconsistent with the New Zealand and Australian statutory frameworks we set out above. Again, as a matter of first principle, increases

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52 *Sonray*, above n 36, at [83]; *Re French Caledonia Travel Service Pty Ltd (in liq)* [2003] NSWSC 1008, (2003) 59 NSWLR 361 at [183]; *Australian Securities and Investments Commission v Letten (No 7)* [2010] FCA 1231, (2010) 190 FCR 59 at [282]; and *Re British Red Cross Balkan Fund* [1914] 2 Ch 419 (Ch) at 421. See generally Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) vol 2 at [44-073].

53 *Re MF Global Australia Ltd (in liq)*, above n 41, at [114]–[115], citing *Re Lines Bros Ltd (in liq)* [1983] Ch 1 (CA) at 14 per Lawton LJ and 17–18 per Brightman LJ; and *Re European Assurance Society Arbitration* (1872) 17 SJ 69 (European Assurance Society Arbitration) [*Wallberg's case*] at 70 per Lord Westbury.

54 Tucker, Le Poidevin and Brightwell, above n 52, at [44-099]; and *Edinburgh Corp v Lord Advocate* (1879) 4 App Cas 823 (HL).

in the value of a jointly owned fund, including gains from market movements, ordinarily enure for the benefit of all owners of the (undifferentiated) fund.[55]

[45] Secondly, no assurance was given by the liquidators that entitlements would be calculated on the basis of nominal positions as at a date after administration. This is not a case founded on representations or estoppel, or even legitimate expectation. Nor could it be. On 12 March 2019, the liquidators (then administrators) provided a report to Halifax AU creditors. That report stated that 23 November 2018 was likely to be accepted by the (Federal) Court as "the appropriate date for crystallising the value of all investments, even in respect of … positions that remained open on the appointment date". On 20 March 2019, the second meeting of Halifax AU's creditors took place. Mr Kelly, one of the liquidators, told creditors in answer to a question that it was "possible" entitlements would be calculated as at 23 November 2018, even if some positions were kept open. He continued: "That's not to say that 23 November 2018 is definitely going to be the date to value investor claims moving forward, that'll be up to the court". In a circular sent to creditors on 17 April 2019, the liquidators noted a dividend estimate may be impacted by the (Federal) Court's decision on the date to value investor claims. On 14 June 2019, the liquidators provided a statutory report stating 23 November 2018 was "likely" to be the date claims were crystallised on, but that this would be determined by the Court. Evidently, there was no representation that entitlements could be expected to be assessed as at a date after the appointment of administrators.

[46] Thirdly, the appellant's best argument is that the gains in the value of the fund are the result of the choices the Category 1 investors made to not close out their accounts, and the corresponding decisions made by the liquidators in relation to which assets to retain, and which positions to close out. He asserts a combination of skill — the selection of superior portfolios prior to the administration date — and risk-taking — not closing out after the administration date — mean they made a greater contribution to the trust assets, justifying recognition by way of a later valuation date. We are unpersuaded. Category 1 investors do not individually own the assets that increased in value, nor do they individually "own" the gains. The appellant may be

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55 Tucker, Le Poidevin and Brightwell, above n 52, at [44-099], citing *Edinburgh Corp v Lord Advocate*, above n 54.

right to say that the gains are as a matter of fact attributable to a combination of the make-up of the shares and products notionally attributed to Category 1 investors and the choices they made to close out at a later date. However, the portfolio content as at the date of administration was what it was, and the subsequent risk-taking argument is overstated, in our view. New trading (that is, opening new positions) was not permitted after administration. The only decisions made were when to close out any particular holding, a matter readily assessable in a varying market. Mr Loo's argument also treats all Category 1 investors alike. But optional close-out dates may vary. Some Category 1 investors have closed out; many have not done so. The liquidators themselves might have opted to close out positions over time following the determination of substantive issues in the Courts at first instance — Venning and Gleeson JJ approved such action in their respective 5 May 2020 and 23 April 2020 judgments.[56] Instead the liquidators effectively delegated that decision to investors whose "positions" remained open, while the legal consequences of doing so were never clear. Neither Court gave directions, let alone determinations, as to the effect of holding positions open.

[47] Fourthly, and relatedly, the investors who did not close out their positions were not required to, and did not, make any irrevocable commitment to accept valuation of their entitlement by reference to the later balance of their account. In particular, they did not commit to accepting a later valuation date if their nominal balances fell. They were not taking the risk of adverse movements — in that event, they could have contended for valuation as at 23 November 2018. It is possible the appellant's argument might have been stronger had it been a condition of holding their positions open that Category 1 investors accept any loss attributable to those positions. Mr Jackman submits Category 1 investors committed by their act of keeping their positions open. That may be so, but that affects the assets of the whole fund; they did not commit to wearing the loss individually if their continued speculation went sour.

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56 Venning and Gleeson JJ directed the liquidators were justified in refraining from closing out all positions pending resolution of substantive issues in the later substantive hearing: High Court directions judgment, above n 12, at [35] and [44]; and Federal Court directions judgment, above n 12, at [80]–[81]. Following the determination of substantive issues in the High Court and Federal Court, there being no appeal other than that presently before this Court, there would be no reason why liquidators could not begin the process of closing out positions.

[48] Fifthly, we note the possibility that there were investors who did not close out their accounts, and whose nominal balances may have fallen to a level that (at least as at 31 July 2020) results in their receiving less on the appellants' preferred approach than if the fund had been closed out in November 2018, even though the fund has increased in value. The evidence is equivocal on whether this possibility would eventuate by the time any distribution is finally made. If it were to be the case, these investors could not be said to have accepted the risk of that outcome, on the basis of the information provided to them by the liquidators and the steps they took (or, more precisely, did not take) in light of that information. It would be difficult to justify paying them a reduced share of the more valuable fund, and a reduced absolute amount, compared with that to which they were entitled as at 23 November 2018.

[49] Finally, it follows that it is unnecessary for us to address the remaining appeal ground, i.e. that the High Court failed to consider the fact that the liquidators permitted investors to keep positions open. Had it been necessary to do so, we would have found the Judge did consider the choice to retain open positions as part of his decision. The Judge explicitly noted Mr Loo's submission regarding that choice, and the difficulties with it, in considering the appropriate form of distribution to Category 1 and 2 investors.[57] He was clearly alive to this argument when determining the date on which entitlements for that distribution should be set. The brevity of his reasoning on the selection of the date for quantification of entitlement is no doubt attributable to the context in which an array of issues — no longer contested — were before him. This judgment has had the luxury of only a single issue to address.

Result

[50] The appeal is dismissed.

[51] As indicated ahead of the hearing, and in accordance with the wishes of the parties, costs are reserved. If need be, further directions will be given as to costs submissions.

57 High Court judgment, above n 6, at [215]–[216].

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