

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY DIVISION: CORPORATIONS**

No. VID 562 of 2010

IN THE MATTER OF: SONRAY CAPITAL MARKETS PTY LTD (IN LIQUIDATION)
(ACN 104 482 993)

**RE AN APPLICATION BY GEORGE GEORGES & JOHN ROSS
LINDHOLM**
IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF
SONRAY CAPITAL MARKETS PTY LTD (IN LIQUIDATION) (ACN 104 482
993)

Plaintiffs

LIQUIDATORS' INTRODUCTORY SUBMISSIONS

1. This is an application under s. 511 of the *Corporations Act* 2001 (Cth) (**Act**) and section 63 of the *Trustee Act* 1958 (Vic) for directions to be given to the Plaintiffs (**Liquidators**) in their capacity as Liquidators of Sonray Capital Markets Pty Ltd (In Liquidation) (ACN 104 482 993) (**Sonray**) and other relief prayed for in the Interlocutory Process. The Liquidators refer to the definitions contained in the Interlocutory Process, repeated in the schedule to this introduction.
2. The Liquidators rely on the following affidavits:
 - (a) affidavit of George Georges sworn 15 July 2010 and filed in this matter (**Georges' First Affidavit**) and the exhibits thereto;
 - (b) affidavit of George Georges sworn 28 October 2010 and filed in this matter (**Georges' Second Affidavit**);
 - (c) affidavit of George Georges sworn 26 November 2010 and filed in this matter (**Georges' Third Affidavit**);
 - (d) affidavit of George Georges sworn 3 February 2011 and filed in this matter (**Georges' Fourth Affidavit**); and

Filed on behalf of: The Plaintiffs

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(e) affidavit of George Georges sworn 4 July 2011 and filed in this matter (**Georges' Fifth Affidavit**).

Georges' First Affidavit and Georges' Fifth Affidavit are of greatest relevance to the application for pooling and rateable distribution directions whilst Georges' Second Affidavit and Georges' Fifth Affidavit are of greatest relevance to the application regarding the Liquidators remuneration.

3. The Liquidators and the Court are confronted with facts arguably more exceptional than those faced by the receivers and Court in *ASIC v Letten (No. 7)* (2010) 80 ACSR 401¹ (**Letten**). Not only are there more investors involved in the present matter (approximately 4,000 compared to 916 in *Letten*), but the funds and assets, most of which are or have been the subject of a statutory² trust or trusts of which Sonray is trustee, are spread over a number of Segregated Accounts, denominated in various currencies, and numerous shareholdings and open trading positions held by or with a range of third party institutions (**Providers**) and custodians.
4. The trust funds and assets (save for the Distinguishable Accounts, para. 45 below) (**Property**) have been, from the outset, mixed and the subject of thousands of authorised deposits, withdrawals, transfers and other dealings. Further, the Property has been subjected to substantial unauthorised withdrawals, dealings and trading (sometimes referred to as "hedging") (**Defalcations**) resulting in some \$45.6 million³ in losses. In addition, Sonray's records are incomplete.

Facts

5. Sonray is the holder of an Australian Financial Services Licence (**AFSL**). It earned fees and commissions by providing financial product advice to its clients with respect to trading in financial products; and by providing access to certain trading platforms which enabled clients to trade in financial products. For a fuller description of Sonray's commercial activities: see Georges' First Affidavit, paras 7 to 15. For a fuller description of the trading platforms and financial products: see Georges' Fifth Affidavit, paras 65 to 79.
6. Sonray operated two business models, an 'agency model' and a 'non-agency model'. Under the **agency model**, brokers employed by Sonray provided advice to

¹ *ASIC v Letten (No. 7)* (2010) 80 ACSR 401 at 472[332].

² Section 981B of the Act.

clients about financial products and placed orders on their behalf with Providers. Client money was placed in accounts with the Providers, in the client's name. It was not deposited in one of Sonray's Segregated Accounts and was not mixed with the funds of other clients. Securities and cash held by clients under the agency model were at all times within the control of those clients. At the date of Georges' Fifth Affidavit, no agency investors remained on the books of Sonray, and therefore the directions sought do not involve agency investors. For a fuller description of the agency model: see Georges' First Affidavit, para. 17

7. Under the **non-agency model**, clients of Sonray deposited funds into one or more of Sonray's Segregated Accounts where their funds were mixed with those of other investors. It appears that many, but not all Account Application Forms included a term in the following words:

"Whilst the Client money and property is segregated from Sonray's money and property, it may be co-mingled with the money and property of other Sonray clients".⁴

8. In any event, whether or not a particular account application form contained that term, money belonging to clients was in fact co-mingled with other clients' money.
9. The majority of Sonray's business was conducted under the non-agency model.⁵ For a fuller description of Sonray's non-agency model: see Georges' First Affidavit, paras 18 to 19. For a fuller description of the Account Application Forms and Sonray's contractual arrangements, including terms and conditions: see Georges' First Affidavit, paras 25 to 38 and Georges' Fifth Affidavit, paras 14 to 19.
10. Each of the Segregated Accounts is an account within the meaning of ss 981A and 981B of the Act.⁶ Thus, each of the Segregated Accounts is a statutory trust account in which investor funds, as trust funds, have been mixed and used as a trading and investment pool. For a full description of the Segregated Accounts: see Georges' First Affidavit, paras 16 to 38.
11. Since Sonray was not a market participant on the Australian Securities Exchange or any other exchange, it could not execute, clear or settle trades for its clients. Under the non-agency model, Sonray contracted with Providers to provide liquidity and

³ Georges' Fifth Affidavit, para. 153.

⁴ Georges' First Affidavit, para. 37.

⁵ Georges' Fifth Affidavit, para. 10.

execution, clearing and settlement services in respect of transactions in financial products. Consolidated holding, or omnibus trading accounts were established with Providers and cleared funds in those consolidated accounts were used by the Providers to execute, clear and settle transactions for Sonray clients. Some Providers, such as Saxo, granted Sonray a licence to access their proprietary electronic trading platforms, upon which Sonray and its clients effected transactions in financial products. For a fuller description of the contractual arrangements with Providers: see Georges' First Affidavit, paras 39 and 40 and Georges' Fifth Affidavit, paras 9 to 13. For a fuller description of the Provider Consolidated Accounts and sub-accounts: see Georges' Fifth Affidavit, paras 22 to 36.

12. Sonray would transfer cleared funds from one of its Segregated Accounts (usually ANZ account numbered 013 006-1087-85428) (**ANZ AUD Segregated Account**) to the consolidated account of one of the Providers as required to fund client trading or to meet client margin calls. Clients could also individually transfer or pledge to a Provider collateral in the form of securities or other assets to enable trading or to meet or reduce individual client margin calls. For a fuller description of money flows between Sonray and Providers: see Georges' Fifth Affidavit, paras 80 to 91; 105 to 107.
13. Until March 2009 Sonray transferred funds to Saxo for each client who opened an account on the Saxo platform. The funds went into Saxo's Consolidated Account.. The client's account balance appeared on the Saxo platform showing the funds available for trading. Unlike Interactive Brokers, Saxo permitted clients to trade on the basis of their account balance before cleared funds had been received from Sonray, on the understanding that cleared funds were in transit. After January 2007 Sonray only transferred funds to Saxo on a daily basis nett of amounts due from Saxo (**Daily Netting**).
14. From March 2009, Daily Netting ceased. Sonray made a number of ad hoc transfers to Saxo, usually in round numbers, to meet or reduce margin calls made by Saxo based on Sonray's overall consolidated account balance and the value of all clients' assets held or controlled by Saxo.⁷ The Liquidators' investigations as at the date of Georges' Fifth Affidavit have identified, as examples, deposits by 33 investors into Sonray's Segregated Accounts on 28 January 2010, 1 October 2009 and 17 July

⁶ Assuming for the time being that foreign currency is "money" within the meaning of those sections.

2009, which were not matched by corresponding transfers to Saxo. Transfers to Saxo after March 2009 are not consistent with Daily Netting. Rather, they are consistent with managing margin calls by Saxo on Saxo's Consolidated Account: see Georges' Fifth Affidavit, paras 92 to 114. For an example of what occurred after March 2009 with respect to a single client, see Georges' Fifth Affidavit, paras 98 to 104.

15. In the case of Interactive Brokers, Sonray always transferred 100% of the client funds that were to be uploaded onto the platform⁸. Interactive Brokers would not permit trading by the client until it had confirmed receipt of cleared funds from Sonray. The client's funds were deposited into a Segregated Account before an equivalent amount was transferred by Sonray to Interactive Brokers. However, from 2005 there was always a deficiency in the Segregated Accounts and Defalcations may have occurred between the time of deposit of funds with Sonray and their transfer to Interactive Brokers.

Defalcations

16. From as early as 16 February 2005 a number of unauthorised withdrawals, payments and transfers from the Segregated Accounts, being the Defalcations, were made by Scott Murray. To the best of the Liquidators' knowledge at this time, these comprise some 1049 Defalcations amounting to (approximately):
 - (a) \$3 million in "commissions" withdrawn from the ANZ AUD Segregated Account to which Sonray was not entitled;
 - (b) \$5.9 million unfunded "rebates" deposited into various clients' accounts; and
 - (c) \$35.6 million of net unfunded, unauthorised transactions on 168 client accounts.
17. The commissions were actual cash extractions from the ANZ AUD Segregated Account. The impact of the rebates and net unfunded deposits was initially recorded only at the ledger account level, that is to say that the client's account balance with Saxo was increased without any corresponding cash deposit into a

⁷ Georges' Fifth Affidavit, paras 10 and 95.

⁸ The cash flow arrangements for Interactive Brokers appear to have been the same for all Sonray providers other than Saxo, namely FXCM (see para 140 of Georges' fifth Affidavit), MF Global and Macquarie.

Segregated Account. In some cases clients were able to withdraw funds from a Segregated Account on the basis of their account balance with Saxo, resulting in a cash withdrawal from the Segregated Account not matched by any corresponding deposit of funds. Losing trades based on unfunded account balances would cause a loss in Saxo's Consolidated Account as a result of Saxo settling trades, reducing the amount available to meet client claims on the Segregated Account (winning trades would have the opposite effect).

18. The liquidators' investigations have revealed that from around mid-2008 Mr Murray entered into a number of trades with Saxo, which created positions in an opposite direction to the position of trades taken by Sonray's clients.⁹ Mr Murray has pleaded guilty to a number of criminal offences relating to these transactions and is presently awaiting sentence. The purpose of such trades, which were conducted through a number of different client accounts and in most circumstances, on unfunded account balances, appears primarily to have been to avoid margin calls from Saxo or to respond to margin calls from Saxo.
19. Losing trades entered by Mr Murray, whether or not they were based on unfunded account balances, would cause a deterioration in the value of assets in Saxo's Consolidated Account resulting in an increase in margin cover (whether in the form of cash or collateral) required by Saxo from Sonray. Any funds that Sonray paid to Saxo to improve Sonray's margin position would be paid out of the funds in the Segregated Accounts and reduce the amount available to meet real client's claims. Withdrawals of cash made by real clients, for example as a consequence of closing out the winning position which the trade entered into by Mr Murray had been designed to counteract, would also be paid out of the Segregated Accounts.
20. Winning trades entered by Mr Murray, whether or not they were based on unfunded account balances, would cause an increase in value of the collateral in Saxo's Consolidated Account resulting in a reduction in total margin cover required by Saxo from Sonray. As the total cash component of the margin cover was relevant to whether Sonray clients could continue to trade, Mr Murray would sometimes close out winning trades which would create cash in Saxo's Consolidated Account. The respite from responding to margin calls from Saxo would however only be temporary if a trade by a real client in an opposing direction improved after Sonray had closed out of its winning position.

21. As there were far more losing trades than winning trades entered by Mr Murray the gross deficiency in the Segregated Accounts to meet the total of client claims continued to increase over time.
22. No investors held shares at 22 June 2010 that were purchased or transferred in prior to 16 February 2005. The Defalcations are set out in Georges' First Affidavit, para. 24 and Georges' Fifth Affidavit, paras 151 to 185. The date, amount, type and client account number of each Defalcation so far identified by the Liquidators is set out in exhibit GG-5 vol 16 tab 156.
23. In addition to the above Defalcations, there is one instance of the client's funds of nearly \$2 million being diverted into the general account rather than a Segregated Account.

Appointment of Liquidators

24. The Liquidators were appointed as joint and several administrators of Sonray on 22 June 2010 and as Liquidators on 27 October 2010: see Georges' Fifth Affidavit, paras 4 to 8.

Distinguishable Accounts

25. Two classes of investor have interests in the Property that have, on the facts, at all times been and remain quarantined from the remainder of the Property.
26. There are a number of corporate and individual investors who executed Account Application Forms and transferred shares in a number of companies from their E*Trade accounts to accounts of Sonray or Providers, namely Interactive Brokers or Saxo (**HIN investors**). To date, the Liquidators are aware of 23 HIN investors. Given the information contained in the trading platforms, it is not possible for the Liquidators to identify whether there are any additional HIN investors, which would need to be ascertained by writing to all investors.
27. As an example, two corporate clients, Bon River Pty Ltd (ACN 059 666 750) (Bon River) and Alisante Pty Ltd (ACN 067 268 802) (Alisante) executed Account Application Forms and transferred from their respective E*Trade accounts to Sonray accounts shares in a number of companies. They also opened cash accounts denominated in a number of foreign currencies. Since the shares thus transferred

⁹ See page 24 of Transcript of public examination of Scott Murray (Page 3264 of GG5-Tab 94)

were never purchased with funds deposited into a Segregated Account, and therefore never mixed with other investor funds or tainted by unauthorised dealings, the Liquidators do not seek to include the shares of Alisante, Bon River and other investors in their position in any direction for pooling and rateable distribution. However, it appears that the foreign currencies were loans from Interactive Brokers to Sonray secured by Bon River and Alisante's Australian Dollar deposits into the ANZ AUD Segregated Account. The terms of the Account Application Forms executed by each of these investors may entitle Sonray to sell sufficient shares to repay loans outstanding from Sonray to Interactive Brokers. For further facts concerning Bon River and Alisante: see Georges' Fifth Affidavit, paras 115 to 137.

28. The Liquidators have conducted investigations into foreign currency deposits into Segregated Accounts (**Foreign Currency Segregated Accounts**) and have been unable to discern any consistent cash management protocol for the way in which Foreign Currency Segregated Accounts were used.¹⁰ Most of the Foreign Currency Segregated Accounts have been mixed with other client funds or have been affected by the Defalcations because:
- (a) clients deposited Australian dollars into the ANZ AUD Segregated Account, which were then converted into the relevant foreign currency dollars and transferred into a ANZ Segregated Account for that currency (e.g. US dollars: see Georges' Fifth Affidavit, paras 54 to 58); or
 - (b) clients deposited foreign currency into one of the Foreign Currency Segregated Accounts which was then converted into Australian dollars and transferred to the ANZ AUD Segregated Account (e.g. US dollars: see Georges' Fifth Affidavit, paras 54 to 58); or
 - (c) clients pledged or otherwise utilised funds in a Foreign Currency Segregated Accounts as security for trading and margin calls conducted in funds from other, mixed and Defalcations-tainted, Segregated Accounts; and
 - (d) it was possible to trade utilising a particular Foreign Currency Segregated Account despite not depositing funds in that currency in that Foreign Currency Segregated Account (e.g. Pounds Stirling (**GBP**): see Georges' Fifth Affidavit, para. 60(e)); and

¹⁰ Georges' Fifth Affidavit, para. 53.

(e) numerous clients deposited or had funds transferred into one of the Foreign Currency Segregated Accounts which was thereafter subject to numerous further deposits, withdrawals and transfers, including to and from the ANZ AUD Segregated Account.

29. However, the Segregated Account denominated in Canadian dollars, being ANZ account number 120824-00001 (**ANZ CAD Segregated Account**) was the subject of only one client deposit of \$CAD25,000, on 29 April 2009, which was uploaded into the client's trading account and never traded. Nor were the funds sent to the relevant Provider. Accordingly, **the Liquidators do not seek to include the ANZ CAD Segregated Account investor in any direction for pooling or for a rateable distribution.** For a full description of the investigations into the Foreign Currency Segregated Accounts: see Georges' Fifth Affidavit, paras 51 to 64.

Current Status of the Property

30. As at the date of swearing of Georges' Fifth Affidavit, the total balance of the Segregated Accounts was \$6,350,310.29.¹¹ As at 25 June 2011, Saxo held, in the name of a custodian, the shares listed at exhibit GG-5 vol 13 tab 125. Saxo claims that these shares are held by it as collateral that it is entitled to use as margin cover for the total amount owed by Sonray to Saxo from time to time. The value of this shares, as at 29 June 2010, was \$USD 16,135,896.¹²
31. Interactive Brokers, holds cash and approximately 270 different types of shares on Sonray's Interactive Brokers Consolidated Accounts. As at the date of swearing of Georges' Fifth Affidavit, the value of the holdings was approximately \$11.1 million.¹³
32. In addition, at the date of swearing of Georges' Fifth Affidavit, Sonray held \$3,479,330.92 in its Macquarie cash management account, which relates to the realisation of trading positions both prior to and shortly after the appointment of the Liquidators. There currently are no open trading positions at Macquarie.¹⁴
33. Other Providers, such as FXCM and MF Global, have, since the Liquidators' appointment, transferred to the liquidators' control all funds held on behalf of Sonray

¹¹ Georges' Fifth Affidavit, para. 150.

¹² Georges' Fifth Affidavit, para. 96.

¹³ Georges' Fifth Affidavit, paras 108 and 109.

¹⁴ Georges' Fifth Affidavit, para. 138.

or its clients. There are no open trading positions with these Providers in the name of Sonray or its clients (as clients of Sonray).¹⁵

Complexity of the Circumstances and the Directions Sought

34. Over and above the permutations created by individual authorised and unauthorised dealings in the Property, different classes of investors have possibly been created by, inter alia:
- (a) the period in which funds were deposited, withdrawn or transferred (e.g. pre or post March 2009);
 - (b) the identity of the Provider (e.g. Saxo or IB);
 - (c) the currency in which a Segregated Account is denominated;
 - (d) the terms of individual contracts (e.g. whether a clause permitting Sonray to treat funds as beneficially owned by it); and
 - (e) the existence or otherwise of adequate records (e.g. for the periods April and December 2006 or otherwise).
35. Those classes in turn intersect to create smaller classes. For example, given the way cash management between Sonray and Saxo was conducted prior to March 2009 (see paras 12 to 14 above), the sums transferred by Sonray from the Segregated Accounts to Saxo's Consolidated Account are referable to individual clients, although
- a. from January 2007 the actual sum transferred to Saxo on any given day was the product of Daily Netting) (para. 12 above) (**Pre-March 2009 Saxo Class**), and
 - b. extensive manual investigation of Sonray's cash transfer records would be necessary for each money transfer to determine the clients to which the transfer is referable.
36. For each member of Pre-March 2009 Saxo Class, there was an appropriation to a Saxo sub-account in their name of funds transferred by Sonray to Saxo which then represented the client's account balance with Saxo. The funds transferred sat in

¹⁵ Georges' Fifth Affidavit, paras 143, 144, 146 and 147.

Saxo's Consolidated Account as a mixed fund that was augmented or depleted according to the wins and losses from all trades executed and settled by Saxo. Each client's account balance was separately recorded by Saxo and increased or decreased according to the success or otherwise of the client's trading. In addition to cash at bank held in the Consolidated Account, Saxo held shares and other products purchased by clients and not liquidated.

37. All clients as at 22 June 2010 have deposited their funds with Sonray or purchased assets since the commencement of the Defalcations. There will be several views as to how the Defalcations might affect them: the application of *Claytons Case* to determine whose money has been applied in which transactions;¹⁶ a rolling charge adopting the so-called but hardly ever applied "North American" model;¹⁷ or a pro rata distribution¹⁸. For reasons of both principle and common sense the first two solutions appear to be quite impractical having regard to the complexities of this administration.
38. It may also be argued that the appropriation of part of the mixed fund to a particular client has the consequence that the client is entitled to the money transferred to Saxo, and any property into which the funds were invested through the client's trading on the Saxo account, free from any competing claims by other clients
39. With sufficient time, money and resources it is theoretically possible that the rule in *Clayton's Case* or some other solution could be applied to identify exactly according to the applicable rule what Property each client was entitled to, other than those clients who would be affected by the absence of the April and December 2006 cash management records. The Liquidators' view is that (save for clients with Distinguishable Accounts (para. 45 below)) it is practically impossible to do so in this case and that a rateable solution is inevitable if there is to be a significant return to creditors.
40. As mentioned in para. 14 above, after March 2009 Sonray transferred amounts to Saxo's Consolidated Account referable not to individual clients but to actual or anticipated margin calls by Saxo. The amounts deposited by clients (**Post-March 2009 Saxo Class**) into a Segregated Account were uploaded as ledger balances on

¹⁶ But see *Letten* at 457[276] – [277]; *Sutherland Re; French Caledonia Travel Services Pty Ltd (in Liq)* (2003) 59 NSWLR 361 at 413-414[160]-[161]; and J D Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (6th edn), para. [2708] - [2709].

¹⁷ But see *Letten* at 458[280].

the Saxo platform but there was no corresponding transfer of funds by Sonray to Saxo appropriated to the client. Consequently, no particular purchase of shares, instruments or positions can be attributed to any particular client on the basis that their funds were used to purchase the shares, instruments or positions.

41. For example, in January 2010 Client G deposited over \$3 million into a Segregated Account (see para 99 of Georges' Fifth Affidavit). Its account with Saxo was credited accordingly but there was no corresponding transfer of funds by Sonray to Saxo appropriated to Client G. In April 2010 Client G placed orders for BHP shares and trades were in fact executed by Saxo for such shares and settled by Saxo. The Liquidators do not as yet know what funds were used by Saxo but assume that the funds came from the Consolidated Account, a mixed fund that did not then include any funds traceable by Client G. Those BHP shares are currently held by a custodian for Saxo and are the subject of agreed undertakings. No transfer of funds and no appropriation referable to that client or that transaction ever took place.
42. Client G claims that its funds were used to purchase the BHP shares and that Client G has a proprietary interest in, or in specie entitlement to, those shares. Alternatively, it appears to assert that the settlement arrangements between Sonray and Saxo were not its concern, but being satisfactory between those parties, the fact that the BHP shares were purchased and paid for in accordance with the standing arrangements between Sonray and Saxo, pursuant to an order placed by Client G, is sufficient to vest title in the shares in Client G.
43. The Liquidators view is that Client G cannot assert a tracing claim to the BHP shares, but the alternative argument is by no means clear cut and the outcome of Client G's claim has potential application to all clients in the Post-March 2009 Saxo Class whose shares or other securities are presently held by Saxo, except those clients with Distinguishable Accounts (para. 45 below).
44. The Liquidators view is that even with unlimited time and resources it would not be possible through the application of any tracing rule to determine the entitlements of the Post-March 2009 Saxo Class.
45. The Liquidators' view is that, with the exception of the:
 - (a) HIN Investors' accounts (para 26 above); and

¹⁸ As in *Keefe v Law Society of New South Wales* [1998] 44 NSWLR 451 at 461

(b) ANZ CAD Segregated Account;

(together, the **Distinguishable Accounts**), it is either practicably or theoretically impossible to distribute the Property according to any ascertainable entitlement on the part of each of Sonray's clients.

46. With the exception of the Distinguishable Accounts, the Liquidators' view is that all of the funds now held in the Segregated Accounts and all of the proceeds of liquidation of the shares and open positions held by Providers such as Saxo, Interactive Brokers, and Macquarie and their connected custodians and purchased on the non-agency model (para. 7 above), should be pooled and distributed rateably to the remainder of Sonray's clients.

47. Regulation 7.8.03(6)(d) of the *Corporation Regulations 2001 (Cth)* provides that:

“if the money in the account [of a financial services licensee maintained for section 981B of the Act] is not sufficient to be paid in accordance with paragraph (a), (b) or (c), the money in the account must be paid in proportion to the amount of each person's entitlement”.

48. Whilst circumstances to which this regulation is directed exist in this case, determining “each person's entitlement” is extremely problematic. What does that phrase mean? Had Parliament intended that “each person's entitlement” in the case of a deficient s 981B trust account be a *pari passu* distribution, that could have been expressly and simply stated. If the phrase cannot be given meaning by application of the rules of statutory construction, the remaining options are either that:

- (a) r 7.8.03(6)(d) cannot be applied because “*each person's entitlement*” cannot be ascertained, such that the doctrines and rules of equity will apply; or
- (b) the phrase necessarily imports the relevant equitable doctrines and rules in order that “*each person's entitlement*” can be ascertained.

Either way, equity applies. Recent Australian cases such as *Letten* indicate that, where a mixed trust fund cannot be practically or possibly be subject to the rule in *Clayton's Case* (and it may even be that the rule in Clayton's case is not appropriate even in principle, leaving practicality aside – see *Jacobs' Law of Trusts* (6th edn), paras [2708] and [2709]), a pooling and rateable distribution of trust assets is to be applied. If the rolling trust has ever been applied outside North America, this is not a case for its application.

49. The Liquidators do not consider this is a situation like *Re Magarey Farlam Lawyers Trust Accounts (No.3)* [2007] SASC 9 because, for amongst other reasons, in the present case:
- a. nearly every investor, with the exception of those who fall in the category of the Distinguishable Accounts, is affected by the deficiency in the Segregated Accounts to meet all clients claims;
 - b. the books and records are in a very poor state; and
 - c. the cost of determining the tracing claim of particular trades of particular investors is so prohibitive that it would effectively make the exercise uncommercial.
50. Given the multi-million dollar deficit in the Segregated Accounts and the difficulty, if not impossibility, of tracing funds from the Segregated Accounts into shares or instruments held by Providers or custodians, for the reasons expressed by this Court in *Letten* (Gordon J), *ASIC v Tasman Investment Management Ltd* (2006) 59 ACSR 113 (Austin J), and by the Supreme Court of New South Wales in *Sutherland Re; French Caledonia Travel Services Pty Ltd (in Liq)* (2003) 59 NSWLR 361 (Campbell J),¹⁹ whether by direct application or by importation through r 7.8.03(6)(d) of the Act, the Liquidators consider that the Property should be pooled and distributed rateably (Interlocutory Process, paras 1, 2, 4, 5 and 6).
51. If a rateable distribution were to be decided upon, it would still be necessary to work out how to determine each client's rateable entitlement. Rateability itself is probably best governed by the account balances (cash and value of shares or instruments held by or for Providers) of each client as at 22 June 2010. The Liquidators seek a direction to that effect.
52. The Liquidators also seek a direction as to the date or dates on which the entitlement to participate in the distribution is to be calculated in view of the absence of certain records and the dates at which the various Defalcations took place (Interlocutory Process, para. 3).
53. Further, the Liquidators seek a direction that their Remuneration and Expenses, to the extent that they exceed the assets of Sonray beneficially owned, be paid from

the funds held in the Segregated Accounts and that a lien operate over the Segregated Accounts to secure such payment (Interlocutory Process, para. 9). If there is an order to the effect that any particular category of investor is to be treated as outside the class of the body of investors who the Court directs must share rateably or otherwise in a deficient fund or funds then those investors should pay the remuneration and expenses of the liquidators involved in preserving and creating the fund designated for that class of creditor.

54. Further, the Liquidators seek a direction as to the proper account into which to deposit funds recovered by them. For example, \$457,818.91 has been recovered from RJ Capital Pty Ltd in relation to certain alleged improper withdrawals from the Sonray's General (company) Account. However, the funds so withdrawn were themselves mixed in with funds withdrawn from a Segregated Account pursuant to one or more Defalcations. Should the \$457,818.91 recovered by the Liquidators be deposited in the General Account or a Segregated Account?

“No rational person” would unscramble the funds and assets

55. The investigation into net unfunded transactions referred to in Georges' Fifth Affidavit required 5 of the Liquidators' staff to conduct forensic work over 6 weeks and incurred professional fees of approximately \$300,000.²⁰
56. The Liquidators estimate that it would take 36,100 hours and cost \$9 million in professional fees to attempt to perform a complete cash tracing exercise in respect of each transaction on every Sonray client account from 1 January 2007 (cash management records for April and December 2006 have not been found).²¹ Whilst this is only half of the cost estimated by the receivers in *Letten* to conduct a similar exercise, the Court should relieve the Liquidators of such a burden for the same reasons as in *Letten*. As Finkelstein J noted in response to a brief description of the money flows between the Segregated Accounts and Saxo, “it would be very hard to trace”.²² For further details of the difficulty, time and expense required to attempt to unscramble the funds and assets, including the Segregated Accounts: see Georges' Fifth Affidavit, paras 178 to 185.

¹⁹ Also *ASIC v Enterprise Solutions 2000 Pty Ltd* [2001] QSC 082 (Chesterman J), referred to with approval in *Letten* at 459[284].

²⁰ Georges' Fifth Affidavit, para. 178.

²¹ Georges' Fifth Affidavit, para. 182.

²² Transcript of proceedings, 16 July 2010, p. 5.

57. The Liquidators consider that, save for the investors in the Distinguishable Accounts, Sonray's clients suffered a "common misfortune":

"Given the manner in which [the Segregated Accounts] were operated, [the scale and frequency of the unauthorised dealings and trading] and the difficulties identified in unscrambling the affairs of [Sonray], no rational person would undertake or engage in the task".²³

Remuneration and Expenses

58. The mediation is continuing and the funds provided by Saxo pursuant to the Mediation Funding Deed have been exhausted: see Georges' Second Affidavit, paras 9 to 22. There will remain a substantial deficiency in Sonray's general account to pay the Liquidators' Remuneration and Expenses: see Georges' Second Affidavit, paras 43 to 53 and exhibit GG-2 tab 7. The table below sets out the Liquidators' fees and expenses incurred until 30 June 2011 in relation to general liquidation matters and also Segregated Account and related matters:

Description	General voluntary administration and liquidation matters	Segregated Account and related matters
Fees	874,942.00	1,879,993.00
Disbursements (including legal fees)	237,696.87	931,937.75
	1,112,638.87	2,811,930.75
General liquidation funds	730,972.32	
Mediation funding		503,158.21
Segregated accounts		7,884,790.58
Recovered money		1,827,229.14
	730,972.32	10,215,177.93
Surplus / (Deficiency)	(381,666.55)	7,403,247.18

59. The table above includes an amount of \$1,827,229.14 for amounts recovered during the course of the liquidation, which consists largely of recoveries from the sale of the Sorrento Property, the repayment of a related party loan to Swann Global, and payments negotiated with Jill Murray and Scott Murray. For the purposes of the table above the recovered money total has been included under the Segregated

Accounts heading, however it is currently uncertain as to whether the recovered money (all or part thereof) should be treated as being recovered for the benefit of the company or to the beneficiaries of the Segregated Accounts.

Appointment of Contradictors

60. Notwithstanding the views of the Liquidators above, and given the incomplete nature of the investigations and claims by a number of Sonray clients to a proprietary interest in certain shares held by Providers, the Liquidators propose that clients making particular proprietary claims and/or falling in particular classes of investor be appointed by the Court or joined as contradictors to enable the Court to arrive at the appropriate directions.²⁴ The Liquidators will inform the Court on 2 August 2011 of the current status of discussions with potential contradictors.

IAN MARTINDALE

PAUL VOUT

²³ *Letten* at [335].

²⁴ As envisaged by Finkelstein J last year: 16 July 2010, T10.

Schedule - Definitions

In this Interlocutory Process and in these introductory submissions, the following words have the following meanings:

Administration means the administration of Sonray by the Plaintiffs, pursuant to Part 5.3A of the Act, commencing 22 June 2010.

Expenses means expenses incurred by the Plaintiffs in the Administration of Sonray and Liquidation of Sonray relating to the Segregated Accounts, including:

- (a) the ascertainment of the nature and value of the position of the assets and liabilities relevant to the Segregated Accounts;
- (b) the investigation of the financial relationship between Sonray and the Segregated Accounts;
- (c) the identification of the creditors who may claim in respect of the Segregated Accounts and any matters necessary to determine appropriate action to be taken in relation to the Segregated Accounts on behalf of Sonray including action to preserve and protect the Segregated Accounts;
- (d) identifying or attempting to identify the source of money held in the Segregated Accounts;
- (e) recovering or attempting to recover funds or other assets the proceeds of which should have been held in the Segregated Accounts on or before 22 June 2010;
- (f) protecting or attempting to protect funds or other assets the proceeds of which should have been held in the Segregated Accounts on or before 22 June 2010;
- (g) distributing funds held in the Segregated Accounts to the persons beneficially entitled to them;
- (h) identifying claims which may be brought to benefit the Segregated Accounts or reduce other claims against it, being in either case claims relating to funds or other assets which should have been held in the Segregated Accounts on or before 22 June 2010;

- (i) reviewing and dealing with claims by any person to any entitlements in respect of the Segregated Accounts;
- (j) instructing lawyers to:
 - (i) advise in relation to any of the matters referred to above; and
 - (ii) commence this application.
- (k) the Plaintiffs' costs in respect of the procedure referred to in paragraph 5 of the order made by Justice Finkelstein on 8 December 2010;
- (l) the Plaintiffs' costs and expenses of this application on an indemnity basis.

FXCM means Forex Capital Markets LLC.

HIN means holder identification number (or similar) for the purposes of a clearing house system for financial products.

Interactive Brokers means Interactive Brokers LLC.

Interactive Brokers Platform means the internet based trading system owned by Interactive Brokers and used by customers of Sonray to direct the execution of trades in financial instruments by Interactive Brokers. The platform is also referred to as the Sonray Global Platform.

Liquidation means the liquidation of Sonray by the Plaintiffs, pursuant to Part 5.5 of the Act, commencing 27 October 2010.

Macquarie means Macquarie Equities Limited ABN 41 002 574 923.

Macquarie Bank Cash Management Account: means Macquarie Cash Management Account number 961006129.

MF Global: means MF Global Australia Limited ABN 50 001 662 077.

Plaintiffs means George Georges and John Ross Lindholm (whether acting as administrators in the Administration of Sonray or Liquidators in the Liquidation of Sonray from time to time).

Remuneration means such remuneration of the Plaintiffs as the Court will approve in respect of their Administration of Sonray and Liquidation of Sonray relating to the Segregated Accounts including:

- (a) the ascertainment of the nature and value of the position of the assets and liabilities relevant to the Segregated Accounts;
- (b) the investigation of the financial relationship between Sonray and the Segregated Accounts;
- (c) the identification of the creditors who may claim in respect of the Segregated Accounts and any matters necessary to determine appropriate action to be taken in relation to the Segregated Accounts on behalf of Sonray including action to preserve and protect the Segregated Accounts;
- (d) identifying or attempting to identify the source of money held in the Segregated Accounts;
- (e) recovering or attempting to recover funds or other assets the proceeds of which should have been held in the Segregated Accounts on or before 22 June 2010;
- (f) realising or attempting to realise funds or other assets the proceeds of which should have been held in the Segregated Accounts on or before 22 June 2010;
- (g) protecting or attempting to protect funds or other assets the proceeds of which should have been held in the Segregated Accounts on or before 22 June 2010;
- (h) distributing funds held in the Segregated Accounts to the persons beneficially entitled to them;
- (i) identifying claims which may be brought which may directly or indirectly benefit the Segregated Accounts or reduce other claims against it, being in either case claims relating to funds or other assets which should have been held in the Segregated Accounts on or before 22 June 2010;
- (j) reviewing and dealing with claims by any person to any entitlements in respect of the Segregated Accounts; and
- (k) instructing lawyers to:

- (i) advise in relation to any of the matters referred to above; and
- (ii) commence this application.

Saxo means Saxo Bank A/S.

Saxo's Consolidated Account – means the account held by Saxo and otherwise referred to as the Master Omnibus Account representing the total of all net exposures, unrealised profits and losses, and balances across all accounts and sub-accounts held by Sonray.

Segregated Accounts means:

- (a) Australia and New Zealand Banking Group account numbers 013006-1087-85428, 120824CAD00001, 120824USD00001, 120824NZD00001, 120824JPY00001, 120824GBP00001, 120824EUR00001, 120824CHF00001;
- (b) Hong Kong Shanghai Banking Corporation account numbers 001-225333-002, 001-225333-003, 001-225333-901, 001-225333-160, 001-225333-904, 001-225333-900, 001-225333-902, 001-225333-903, 001-225333-159; and 260-696760.

Segregated Account means each individually numbered account within the Segregated Accounts.

Sonray means Sonray Capital Markets Pty Ltd ACN (In Liquidation) (ACN 104 482 993).

Sonray's Consolidated Account means the two undisclosed master introducing broker accounts, otherwise referred to by Interactive Brokers as "I accounts", established in the name of Sonray at Interactive Brokers and including the multiple numbered subaccounts attributed to clients of Sonray.

Saxo Platform means the internet based trading system owned by Saxo and used by customers of Sonray to direct the execution of trades in financial instruments by Saxo Bank A/S. The Saxo Platform is also referred to as the Sonray Trader Platform.

Trading Platform means any of Interactive Brokers Platform, Saxo Platform, TT Platform, Web Trader Platform.

TT Platform means an internet based trading system which is linked to Sonray's Web Trader platform for use by customers of Sonray to direct the execution of trades in futures by MF Global Australia Ltd.

Web Trader Platform means the internet based trading system owned by Sonray and used by the clients of Sonray to direct the execution of trades in financial instruments by third party providers contracted with Sonray to provide such services. The third party providers were Saxo, Interactive Brokers, MF Global, D2MX, FXCM and Macquarie.

Date: