In The Supreme Court of Bermuda

COMPANIES (WINDING UP) JURISDICTION

COMMERCIAL COURT

2020: Nos. 304 and 305

IN THE MATTER OF NORTHSTAR FINANCIAL SERVICES (BERMUDA) LTD (IN LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACT 1981
AND IN THE MATTER OF THE INSURANCE ACT 1978
AND IN THE MATTER OF THE INVESTMENT BUSINESS ACT 2003
AND IN THE MATTER OF THE SEGREGATED ACCOUNTS COMPANY ACT 2000
AND IN THE MATTER OF ITS PRIVATE ACTS

AND

IN THE MATTER OF OMNIA LTD (IN LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACT 1981
AND IN THE MATTER OF THE INSURANCE ACT 1978
AND IN THE MATTER OF THE INVESTMENT BUSINESS ACT 2003
AND IN THE MATTER OF ITS PRIVATE ACTS

APPLICATIONS FOR DIRECTIONS BY THE JOINT PROVISIONAL LIQUIDATORS

Before: **MARTIN J** in Chambers

Appearances:
Michael Todd KC of Erskine Chambers and *Lewis Preston* of Marshall Diel & Myers Limited on behalf of the Joint Provisional Liquidators ("the JPLs")
David Chivers KC of Erskine Chambers and *Conor Doyle* of Conyers Dill & Pearman Limited on behalf of United Nations Federal Credit Union ("UNFCU") and acting as the non-JPL party
Henry Tucker of Harneys Bermuda Limited for Bankoh Investment Services Inc. ("BISI")

Dates of Hearing: 21, 22, 23 and 24 July 2025
Date of Ruling: 25 September 2025

RULING AND DIRECTIONS

Introduction

1. This is the Court's ruling on the application by summonses issued on 13 October 2023and 10 March 2025 by the joint provisional liquidators ("the JPLs") of Omnia Ltd (in liquidation) ("Omnia") and Northstar Financial Services (Bermuda) Ltd (in liquidation) ("Northstar") for directions in relation to the future conduct of the liquidations of each these companies.

2. The central reason for the application in relation to Northstar is that the JPLs need the Court to make a determination as to the proper approach for the JPLs to take in admitting the proofs of claim of the creditors. The full facts and circumstances that give rise to the uncertainty are set out in detail in the body of this Ruling, but the essential difficulty facing the JPLs is how to interpret and apply correctly the provisions of the Segregated Accounts Company Act 2000 ("SACA") when read against the provisions of the Investment Business Act (Client Money) Regulations 2004 ("the CMR") which were made under the Investment Business Act 2003 ("the IBA"). This issue arises because even though Northstar had originally been exempted from the application of the IBA under the terms of the private Act of its incorporation, in 2018 Northstar was registered as an investment provider under the IBA because the investment products it sold were reclassified as investment products, and Northstar's private Act was amended to remove the original exemption.

3. On one interpretation, the effect of the segregation provisions of SACA would have the result that one class of creditors who invested in an investment product sold by Northstar as a "fixed" investment will receive almost nothing out of the liquidation because specific assets *were not* linked to their investments under SACA, while another group of creditors who invested in an investment product sold as a "variable" investment will recover almost all of the value of their claims because specific assets *were* linked to their respective investments under SACA.

4. On the other interpretation, if the CMR are applied to all the assets held by Northstar as "*client monies*", then all the assets would be "*pooled*" across all classes of investment creditors and would be available to meet the claims of all investment creditors, irrespective of the nature of the investment, on a *pari passu* basis.

5. The effect of the Court's determination will have an enormous impact on the conduct of the Northstar liquidation: if the provisions of SACA prevail over the CMR (or the CMR are held not to apply to Northstar) the creditors who invested in "fixed" investments will be likely to recover very little from the liquidation, and the creditors who invested in the "variable" investments will recover almost all the value of their investments[1]. Conversely, if the CMR are held to apply or the provisions of SACA are subject to the application of the CMR on Northstar's assets then (in round terms) all creditors will share rateably in the assets available for distribution and recover something in the order of 25% of the value of their claims.

[1] The JPLs predict that the recovery for fixed and indexed policyholders will be almost nothing (see paragraph 60 of the JPLs' submissions), while UNFCU suggest that the recovery will be 16% (see paragraph 58 UNFCU's submissions).

6. Another principal issue is whether the JPLs should treat the investment creditors as "insurance" creditors under section 36A of the Insurance Act 1978, which would have the effect of displacing all the non-insurance creditors who would then (in all likelihood) make little to no recovery in the liquidation.

7. Because Omnia was not registered under the IBA, the CMR do not apply to Omnia, and the questions concerning the effect of the CMR do not arise in relation to Omnia's assets. However, directions need to be given with respect to the admission of the fixed and indexed investment policyholders' claims in that liquidation.

8. In addition, there are a number of other important "sub-issues" to be considered, but almost all of these will be influenced or determined by the answer to the central question which the Court has to determine. A few of the sub-issues may have to be deferred to a further directions hearing, in the light of the outcome of the Court's decision on the principal issues described above.

Summary and Disposition

Overview

9. For the reasons explained in the ruling below, the Court has reached the conclusion that the CMR do not displace or affect the statutory protections afforded by SACA. Therefore, the assets which have been linked to the variable segregated accounts in Northstar's records are not to be "pooled" as client monies and are not available to meet the claims of the policyholders who have claims against the fixed and/or indexed investment segregated accounts. There are several distinct reasons for the Court's conclusion.

10. The first reason is that this result is consistent with the analysis given by Hargun CJ in the Segregation Judgment[2] (which is considered in more detail below) in which it was held as a finding of primary fact that the segregated accounts for both the fixed and the variable policyholders had been established, notwithstanding the defective implementation of the segregation of the assets for the benefit of the fixed investment policyholders.

11. The second reason is that once established as segregated accounts, the provisions of SACA expressly prohibit and prevent the application of the assets in the variable segregated accounts from being applied against the liabilities of any other account (i.e. the fixed and/or indexed investment accounts) and the liquidators are expressly enjoined and prohibited from doing so by sections 24 and 25 of SACA (as well as the corresponding provisions of the private Acts which apply to each of these specific companies).

12. The assets that were received by Northstar by way of investment in the respective policies that were issued by each of those companies to the policyholders never formed part of the general assets of the relevant segregated accounts company and could not be reallocated or redesignated as "client monies" for the purposes of the CMR. Accordingly, those assets are not capable of being pooled at the commencement of the winding up, which triggers a pooling event under the CMR.

[2] [2023] SC (Bda) 57 Civ 28 July 2023.

13. The third reason is that although the contractual framework adopted by Northstar does not match the requirements of SACA, in that a policyholder must close the segregated account upon making a surrender of the policy, the statutory provisions of SACA require the liquidator to apply the assets to the account to satisfy the liabilities of the relevant segregated account exclusively. Even after a segregated account is 'closed', the proceeds of the realisation of the assets remain linked to the relevant segregated account and can only be applied to meet the liabilities attaching to that account, including the liability to pay the proceeds of the surrender or the termination of the policy to the policyholder/account owner.

Variable investment segregated accounts

14. The Court has concluded that a liquidator can only apply the assets linked to the variable segregated accounts in satisfaction of the liabilities that relate to the particular variable segregated account to which they are linked, notwithstanding the fact that the monies that will satisfy Northstar's obligations to the variable investment policyholders will be transferred through Northstar's bank accounts for payment to the ultimate policyholder/account owner.

15. Therefore, the monies received by Northstar for onward investment in variable investment policies , the investments held in or for the benefit of the policyholder's segregated account that were purchased with those monies, and the proceeds of the surrender or termination of the variable investment policies do not become "client monies" within the meaning of regulations 5 and 14 of the CMR just because they flow through Northstar's bank accounts.

16. On its true construction, the CMR has a limited effect and applies only in relation to uninvested cash held by an investment provider at the date of the commencement of the liquidation, which the Court has determined is the date of the presentation of the winding up petition.

17. In the Court's judgment, the purpose and effect of the CMR is not to impose a regime on the winding up of investment providers but is only intended to provide a mechanism for the return of client monies held by the investment provider as at the date of the presentation of the winding up petition. This is on the basis that these monies are to be treated as falling outside the assets of the investment provider on a liquidation because the beneficial interest in the uninvested monies is treated as having been retained by the client. The CMR does not apply to the assets held by the investment provider that are linked to segregated accounts which back the obligations of Northstar to its policyholders. To the extent that the CMR apply at all, their effect is limited.

18. The result is that the conclusions of Hargun CJ in the Segregation Judgment are unaffected by the CMR. This means that the assets which have been linked to the variable segregated accounts in each of Northstar and Omnia are available only to meet the claims of the policyholders/account owners in relation to their individual variable investment policies, and are not available to meet the claims of the fixed and/or indexed investment policyholders.

19. The Court has therefore given the Court's sanction to the JPLs and has authorised and directed the JPLs (i) to proceed to admit the claims of the variable segregated account

policyholders without submitting formal proofs of debt under Rule 64 (1) of the Winding Up Rules 1982 (ii) to value those claims at the date of realisation of the assets that relate to the relevant variable segregated account and (iii) to proceed to distribute the assets of the variable segregated accounts to discharge the liabilities under the policies that relate to each respective variable segregated account in accordance with the directions sought.

Fixed and indexed investment segregated accounts

20. Hargun CJ has found that there are no assets linked to the fixed and indexed segregated investment accounts, which means that in the liquidations of both Northstar and Omnia the recovery by the policyholders whose claims are linked to those segregated accounts will be extremely limited. For the reasons explained in the Segregation Judgment and set out in the Ruling below, the fixed and indexed investment policyholders do not have a claim on the assets that are linked to the variable segregated accounts of each respective company.

21. Accordingly, the Court has acceded to the JPLs' application for a direction to admit the fixed and indexed investment policyholder claims without the need for proof as claims in the liquidations of Northstar and Omnia respectively on the basis of an implied term (the details of which are set out in the Ruling). This is in order to enable the fixed and indexed investment policyholders to make claims against the general accounts of Northstar and Omnia against any assets which Northstar and Omnia have presently available or may recover in the future.

22. However, if fixed and indexed investment policyholders prove in the liquidations as creditors against the general account, they will be precluded from proving against the fixed and indexed investment segregated accounts.

23. The Court has also given directions for the valuation of the fixed and indexed investment policyholders' claims. These valuations will be subject to an appeal process under the Winding Up Rules 1982 if there is a dispute. The initial valuation will be for the purposes of voting at the first meetings of creditors. The permanent liquidators may adopt the same approach to valuation for the purposes of valuing claims for dividend purposes, but that will be the subject of a future application for directions.

24. The JPLs have been authorised to proceed to convene the first meetings of creditors and contributories and the Court has also given directions for voting in respect of the ultimate economic interest holders of policies which were issued under a trust structure.

25. The Court fully acknowledges that this result will be a disappointment to the fixed and indexed investment policyholders. It is understandable that they may well feel that they have suffered a loss which was as a result of "happenstance", and that this seems unfair.

26. However, the Court must apply the law as it stands. The language of the provisions of SACA is unambiguous and the policy objectives behind SACA are clear. The Court cannot undermine the statutory language and its policy objectives by giving way to sympathy based on the particular facts of an individual case, nor apply a more generous interpretation to the CMR than is justified by the CMR's express provisions. The effect of segregating the assets backing each individual policy into segregated accounts for the exclusive benefit

of their respective account owners under SACA was clearly explained in the contractual documentation, which all policyholders must be taken to have understood and to which they all expressly agreed.

27. It is to be hoped that the full liquidation of these companies may result in additional recoveries being made to reduce the deficiency in the recoveries made by the fixed and indexed investment policyholders.

Priority under section 36A of the Insurance Act 1978

28. The Court agrees that the effect of section 36A of the Insurance Act 1978 is to accord statutory priority to the policyholders' claims against the general accounts of Northstar and Omnia in respect of claims based upon the implied term, because these claims arise out of and flow from the policies which fall within the definition of "insurance debts" in the Insurance Act 1978. However, other claims for equitable compensation (or based on other theories of liability) which are not within this definition would not be entitled to priority over general unsecured creditors.

General creditors' claims

29. The ordinary general unsecured creditors of each of Northstar and Omnia against the general accounts of each company will rank behind the claims of the policyholders based on the implied term which qualify for priority payment as insurance debts, but will rank *pari passu* with all other claims, to the extent that any assets remain available to meet these claims after the priority claims have been paid.

Segregated Accounts Companies

30. Each of Northstar and Omnia are segregated accounts companies, both of which were incorporated by private Act of the Bermuda legislature with their own bespoke provisions, albeit in very similar form as to the requirements for the segregation of the assets and liabilities of each account from one another and from the assets and liabilities of Northstar and Omnia.

31. Each private Act also contains specific provisions which deal with a liquidator's duties to apply the assets of each account to the payment of the liabilities that and the distribution of the assets owned by the account to the account owner. These provisions will be examined in greater detail below, but the general principle that lies behind the segregation is to create individual accounts which retain their own individual integrity, rather like cells within the honeycomb structure of the hive, which is (by analogy) the segregated accounts company.

32. SACA was passed by the legislature in 2000 to enable segregated account companies to be incorporated by registration instead of requiring an individual private Act of the legislature, which was the only way a segregated accounts company could be created before SACA.

33. SACA replicates the general structure adopted in the Northstar and Omnia private Acts but also requires that its provisions will apply to any segregated accounts company incorporated by private Act and where any inconsistency arises, the provisions of SACA

will prevail[3]. SACA did not replace the private Acts. Therefore, it is necessary to read the Northstar and Omnia private Acts alongside the provisions of SACA.

Northstar Financial Services (Bermuda) Limited

34. Northstar was incorporated in Bermuda in February 1998 under the name Nationwide Financial Services (Bermuda) Ltd ("Nationwide") under the Nationwide Financial Services (Bermuda) Act 1998 ("the Nationwide Act"). Nationwide changed its name to Northstar Financial Services (Bermuda) Ltd in 2006 and amalgamated with MetLife Insurance Ltd ("MetLife") in 2007 and assumed liability for the insurance business written by MetLife under the Citicorp International Insurance Company Act 1999 ("the Citicorp Act").

35. In 2008 Northstar adopted additional or revised specific segregated account powers under the Northstar Financial Services (Bermuda) Act 2008 ("the Northstar Act") and registered as a segregated accounts company under the Segregated Accounts Companies Act 2000. Northstar amalgamated with NFSB Investment Ltd in 2012.

36. Northstar amended its private Act in 2018 under the Northstar Financial Services (Bermuda) Ltd Amendment Act 2018. The terms of the amended Northstar Act will require more detailed consideration below, but the essential point to note at this stage is that as a result of the changes to the Northstar Act in 2018, Northstar registered as an investment business and was licensed under the IBA, bringing it within the regulatory regime of the IBA and the CMR made thereunder.

37. In brief, Northstar's business included (i) long term insurance business written under the powers conferred by the Nationwide Act, and included fixed and variable annuities which were designated as insurance business (a number of which remain "active") (ii) business written under the Citicorp Act which related to the MetLife contracts (a small number of which remain "active") which are designated as insurance business and (iii) investment business by written Northstar under the Northstar Act[4]. A more detailed explanation of the liabilities attributable to Northstar's business will be given below.

38. In 2018 Northstar marketed itself as a life insurance company within the Eden Rock group that had been in business since 1998 and had a worldwide client base of more than 2500 individuals and total assets of over US$500 million. It said that it offered a range of fixed rate, index-linked and variable investment plans, with products sold in over 100 countries via a network of banks, securities dealers and financial intermediaries[5].

39. In relation to fixed income investment plans Northstar said that the investments backing the contracts were predominantly investment grade bonds, held in custody at HSBC Bank Ltd and managed by BlackRock. In relation to index-linked plans it said that 100% of the principal was protected and linked to the S&P 500 Index with a selection of A-rated banks. In relation to variable plans, Northstar said that these plans were fully liquid, flexible

[3] Section 8 SACA.
[4] Northstar Report paragraphs 57-61 exhibited to the second affidavit of Edward Willmott Core Bundle (CB) 2 page 65.
[5] Northstar brochure 2018 Hearing Bundle (HB) M7 pages 124-6, 129, 134-8.

premium variable investment plans offering a selection of low-cost funds from leading asset managers.

40. In relation to investor protection, Northstar said it maintained a strong capital position and holds the assets in a segregated account to ensure that the investments backing the contracts cannot be used to satisfy any other liability, and to isolate current contract holders from legacy business, and to preserve the operation of the contracts in an insolvency scenario[6].

41. Northstar's investment "products" were sold principally through distributors (i.e. broker-dealers or wealth management units in banks or regulated financial institutions). Although the relationships with the distributors of these policies are still active there is a body of policies for which there is no distributor listed, so these policies have been classed as being "orphaned" for the purposes of the administration of those policies. The majority of Northstar's policies were issued through a trust structure involving four master trusts, and two separate trust structures were established for the MetLife business[7].

42. In broad summary, in order for Northstar to match the income guaranteed by the fixed investment policies, Northstar retained investment control over the assets that were purchased so that the appropriate income could be allocated to the particular policy in the particular policyholder's account. By contrast, the investments that were classed as variable investments were invested in specific investment funds, where the policyholder took the risk of the ups and downs of the particular variable class of investments that had been selected, and Northstar did not retain investment control over these investments.

43. For the reasons explained below, this difference resulted in a very sharp distinction in the management of the assets backing the policies. The losses sustained in relation to the assets backing the fixed investments have been catastrophic, leaving little present value from which to satisfy the claims of the holders of fixed investment policies. But the assets backing the variable investment policies are substantially intact.

Omnia Limited

44. Omnia was incorporated in May 2000 under the name Sage Life (Bermuda) Limited under the Sage Life (Bermuda) Ltd (Separate Accounts) Act 1999 as a segregated accounts company. Sage Life (Bermuda) Limited has changed its name several times in the meantime and later amended its private Act by the Omnia (Bermuda) Ltd (Segregated Accounts) Consolidation and Amendment Act 2004. Between 2003 and 2016 Omnia was part of the Old Mutual (Bermuda) Ltd group of companies. Unlike Northstar, Omnia never registered as a segregated accounts company under SACA, nor did it register as an investment business under the IBA, and so the CMR never applied to Omnia.

45. The bulk of Omnia's business involved the sale and management of investment and annuity policies, including fixed rate investment options, variable investment options and indexed investment options[8]. It appears that the large majority of the policies were sold by distributors (mainly wealth management units within banks and broker dealers or other regulated financial institutions) to investors. Distributors representing just under 60 % of

[6] HB M7 at pages 142-3.
[7] CB 2 pages 68-72 of the Northstar Report exhibited to the second Affidavit of Edward Willmott (Northstar).
[8] CB 3 pages 66-7 of the Omnia Report exhibited to the second affidavit of Edward Willmott (Omnia).

the book of business are still in active contact with the JPLs, while the remainder have terminated their relationship, leaving a body of "orphaned" policies[9].

46. The policies sold by Omnia were not legally held by the policyholders themselves but by trustees or sub-trustees pursuant to trusts settled by Omnia, the trustees of which appointed an administrator to manage the policies and the assets that related thereto. Omnia appointed separate custodians to hold the assets backing the variable and fixed investments. Omnia transferred the assets relating to the variable investments to HSBC Institutional Trust Services (Bermuda) Limited as custodian and these assets remain (to a large extent) intact. Omnia also transferred assets relating to the fixed investments to Wilmington Trust as custodian, but the assets relating to the fixed investments were transferred back to Omnia in 2020 when Wilmington Trust closed Omnia's accounts.

47. The JPLs have only been able to trace the ownership of these assets partially, but have been able to confirm that the assets making up the majority of the value of the assets are shares in entities that are now in liquidation and have been confirmed to be valueless[10].

BMX Holdings Ltd

48. In June 2017 Omnia was acquired by BMX Bermuda Holdings Ltd ("BMX Bermuda"), a company ultimately owned and controlled by Mr. Greg Lindberg. In August 2018 Northstar was also acquired by BMX Bermuda.

49. The facts set out in the petition presented by the Bermuda Monetary Authority ("the BMA") to wind up Northstar and Omnia each state that within six months of the change of control to BMX Bermuda, there was a reallocation of the assets of the companies, with significant assets belonging to the companies being invested in illiquid equity and debt instruments, mainly special purpose vehicles, under the control of Mr. Lindberg in the US. This led to regulatory compliance breaches (which it is not necessary to summarise) and enhanced supervision by the BMA and ultimately resulted in the presentation of petitions by the BMA to wind up both companies on the grounds of insolvency.

50. Mr. Lindberg was convicted by a federal jury in Charlotte, North Carolina in March 2020 on charges of conspiracy to commit honest services wire fraud and bribery concerning programs receiving federal funds. He awaits sentencing.

51. The Court is not in a position to make any findings as to the exact reasons why each of Northstar and Omnia became insolvent, or to attribute responsibility to any individuals. However, it is undisputed that the "reallocation" of the assets which backed the fixed investment policies was made possible by the absence of proper controls over the management of those assets. This element of discretionary power allowed those in control of Northstar and Omnia to transfer the existing high grade investment assets that backed the fixed investment policies away from Northstar and Omnia, and to replace the investment grade investments with "assets" associated with Mr. Lindberg's companies which had little or no value.

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[9] CB 3 pages 70-1.
[10] CB 3 page 73

52. This has had the consequence that only one group of investors' investment holdings was affected by the actions of those in control of the companies.

The Segregation Judgment[11]

53. After their appointment, the JPLs investigated the background of the operations of both Northstar and Omnia to establish the extent of the assets, take steps to preserve and gather in the assets, and determine the liabilities owed by the companies to known policyholders and other actual or potential creditors. This involved understanding the the segregation status of the various accounts established by Northstar and Omnia and identifying what assets were linked to which accounts.

54. Due to the nature of the legal structure of a segregated accounts company, the JPLs sought to determine (i) whether segregated accounts had been validly established for the benefit of some or all of the policyholders (ii) whether assets had been validly linked to those accounts and (iii) what claims segregated accountholder may have against the companies (otherwise than against any segregated accounts established for their benefit).

55. An application was launched for the Court's determination of these issues, with representation orders being made for each class of policyholder and the general creditors. In a detailed and comprehensive judgment, Hargun CJ determined the issues and came to a number of important conclusions, which can be stated in broad terms for the purposes of the present proceedings.

56. First, the learned Chief Justice held (based upon the sample transactions analysed by the JPLs which were considered to be representative of the way policies were issued and administered in each class) that on the facts each of the companies had established segregated accounts where they had purported to do so, including pursuant to the terms of the relevant policies[12].

57. Second, that in relation to the variable investment policies, the assets which backed those policies had been linked to and did form part of the segregated account established for the relevant policyholder[13].

58. Third, that in relation to the fixed investment policies, the assets which backed those policies had not been linked to and did not form part of the segregated account established for the relevant policyholder[14].

59. Fourth, that policyholders could not claim against the general account of each of the companies in respect of any shortfall in a segregated account under SACA. However, Hargun CJ held that policyholders might be able to formulate and assert a claim under the general law against the companies' respective general accounts (for example, in respect of the breach of an express or implied term or negligent breach of contract by reason of the companies' failure to segregate assets properly)[15].

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[11] [2023] SC (Bda) 57 Civ 28 July 2023.
[12] Paragraphs 112 and 125.
[13] Paragraphs 170-1.
[14] Paragraphs 148 and 172-3.
[15] Paragraph 224.

60. Hargun CJ held that the maintenance of separate funds is not required for the establishment of a segregated account, but rather that the establishment of a segregated account depends on whether the records maintained by the companies satisfied the relevant legislative requirements[16].

61. Hargun CJ said those requirements were the accounting entries which record matters pertaining to an account and establishing the necessary linkage between the item in the account and the account. The touchstone for linkage is the identification of an asset or liability with a given segregated account by writing or conclusive indication rather than the segregation of funds[17]. The learned Chief Justice held that there is no prescribed test or standard of proof, but that it is merely necessary that the JPLs are satisfied that sufficient record keeping exists which establishes the necessary "linkage" between an item and an account[18].

62. Hargun CJ went on to examine the records presented (by way of representative sample transactions and records of account opening and surrenders) and held that the assets backing the variable investments in each company formed part of the variable segregated accounts in each case[19]. However, as a result of the absence of records connecting any fixed or indexed assets to any policies, it was not possible for there to have been effective segregation of those assets for the benefit of the fixed or indexed investments[20].

63. The learned Chief Justice held that the primary consequence of linkage is that the assets of that segregated account are held exclusively for the benefit of the beneficial owner or counterparty of the account and can only be applied to the liabilities of that account[21].

64. Hargun CJ also held that (in respect of Northstar) section 17 (5) of SACA precluded any policyholder with a segregated account from having recourse to Northstar's general assets in the event of a shortfall in the relevant policyholder's segregated account[22].

65. Importantly for the purposes of the present application, Hargun CJ held that a segregated account comes into existence as soon as the policy is entered into and funds are committed in respect of that policy, provided that the funds are connected to the policy in the relevant company's accounts and records[23].

66. Hargun CJ went on to say that the fact that assets are not linked, or cease to be linked, to a particular segregated account does not result in that account ceasing to be a segregated account[24]. Accordingly, the fixed investment policyholders must be treated as policyholders with a segregated account[25]. Moreover, Hargun CJ held that the fact that the segregated account was not operated properly and the arrangements for segregation were defective in respect of the fixed investments, such that there was no linkage of the assets

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[16] Paragraph 132.
[17] Paragraph 63.
[18] Paragraph 64.
[19] Paragraph 167.
[20] Paragraph 173.
[21] Paragraph 191.
[22] Paragraph 215.
[23] Paragraph 226.
[24] Paragraph 233.
[25] Paragraph 228.

after the funds were initially committed did not mean that the segregated account was never established[26].

67. Hargun CJ expressed the view that the fixed investment policyholders may have claims against the respective company's general assets due to a failure to maintain effective segregation, without prejudice to any other claims a policyholder may have[27].

68. In practical terms, the result of the Segregation Judgment means that the variable policyholders will be able to make recoveries against the assets held or linked to their respective segregated accounts, but the fixed investment holders will be unable to make any effective recovery because the assets which backed those investments were not linked to their respective accounts.

69. The Court also notes that if the statements of fact set out in the petitions for the winding-up of each of these companies are correct, the investment grade assets were "reallocated" by the new management team after BMX Bermuda took control of the companies and were *replaced* by assets which were valueless. This means that even if the assets had been properly linked to the fixed investment policyholders' segregated accounts, those assets would have been insufficient to meet the fixed investment policyholders' claims in any event[28]. However, the Court is not in a position to draw any conclusions from the facts as they are presently known, and it is not necessary to do so.

The present position as to the assets and liabilities for each class of policyholder

70. The background to the incorporation the companies and their history is set out in the Segregation Judgment[29] which the Court gratefully adopts for the purposes of explaining the background to the present application.

Northstar

71. As briefly explained above, Northstar's financial products fell into three broad categories:

    i. "Variable investments" which were investment plans which enable policyholders to acquire investment options which corresponded to different mutual fund assets, with the return being "variable" in that the return would depend on the performance of the underlying mutual fund investment.

    ii. "Fixed investments" which were investment plans which sought to guarantee a particular defined return to policyholders over a set period. The policyholder would provide funds to Northstar and Northstar would invest those funds, with a view to using the proceeds of that investment to pay policyholders a guaranteed return as a set interest rate over a defined period. The fixed investment options did not offer policyholders a choice of underlying mutual funds. The important feature of this class of investment on the facts of the case

[26] Paragraph 231.
[27] Paragraph 224.
[28] This gave rise to the solvency concerns raised by the BMA that the assets were insufficient to meet the policyholders' surrender claims: paragraph 27 of Northstar petition HB5 2.8 page 42 and paragraph 14 of Omnia petition HB6 CD1.8 page 385.
[29] Paragraphs 4 -28.

was that Northstar retained control over the funds invested by policyholders to enable Northstar to invest those funds to match the returns guaranteed by the policy instruments.

iii. "Indexed investments" were those which were designed to track the performance of a particular index, offering protection of the principal amount invested alongside an additional "index return amount" which was derived from movements in a specified index (i.e. the S & P 500).

72. Northstar did not issue policies directly to policyholders but through a complex structure involving trusts and sub-trusts, with the relevant trust acting as the contractual counterparty. The policies issued by Northstar are held under four trusts namely the NFSB Master Trust, the NFS Bermuda Trust, the Citicorp International Insurance Master Trust and the Citicorp International Insurance Trust.

73. There are also two other trusts which are relevant: the MetLife Trust I and the MetLife Trust II. The MetLife trusts were not trusts through which policies were issued to policyholders but formed part of reinsurance arrangements put in place in relation to part of the MetLife business. The trust property held by those trusts were not the policies themselves but comprised a pool of assets from which the claims of policyholders designated beneficiaries of these trusts were to be paid.

74. Northstar divided its business into three main "blocks" corresponding to the original source of the business which derived from (i) Nationwide (ii) MetLife and (iii) Northstar's respective books of business. The business written under the Nationwide and MetLife books of business were classified as long-term insurance business (as annuity business) and were licensed as such. The policies written by Northstar were classed as "event linked financial instruments" ("ELFIs") and were originally exempted from regulation as investment business for the purposes of the IBA. The significance of the categorisation of Northstar's ELFI business is considered in more detail below.

75. Northstar issued 104 iterations of policies under 33 broad categories refereed to as "products". As of May 2025, Northstar had 1761 "active" policies (i.e. those in respect of which the policyholder had not been paid in full and which continue in accordance with their terms). The policyholders reside in 133 different countries, do not all speak English as a primary language, and vary significantly in their sophistication and the amounts invested.

76. In summary, the total value of the liabilities attributable to each block of business described above are broken down as follows (all figures are expressed in US$):

	Fixed	Variable	Total
Nationwide	12,501,191.23	33,540,680.49	46,041,871.71
MetLife	58,387,308.48	3,442,062.38	60,829,370.86
Northstar	244,431,773.12	82,911,521.95	327,343,295.07
Total:	**315,320,272.82**	**118,894,264.82**	**434,214,537.64**

77. Northstar also has 41 trade creditors who are owed **US$465,932.84.**

78. Against these claims, Northstar has assets backing each class of business or product as follows (also expressed in US$):

Variable segregated accounts	
Mutual Fund Holdings	54,970,658
Cash held on surrender and redemptions	63,590,015
Sub total:	**118,821,009**
Fixed and indexed segregated accounts	**258,993**
Northstar's general account (cash)	70,025,252
Total:	**189,105,254**

79. From this summary, it can be seen that out of the total liability of US$118,894,264.82 owed to variable segregated account holders there are available assets in the variable segregated accounts ofUS$118,821.009 and out of a total liability of US$315,320, 272.82 the fixed segregated account holders there are available fixed segregated account assets of US$258,993.00.

80. If the variable segregated accounts are held to meet only the claims of the variable account policyholders' claims, then there will be a slight shortfall, but most variable policyholders will recover virtually the whole of their investments (about 99.9%), while the fixed investment policyholders will recover almost nothing of the value of their investments (0.08%).

81. It is to be recalled that the Segregation Judgment concluded that the assets in the general account are not available to the fixed investment policyholders unless they can establish a claim in the liquidation for damages in respect of the failure to properly segregate the fixed account assets.

Omnia

82. The position in relation to Omnia is less complicated. Omnia carried on business by issuing investment products through a series of trusts and sub-trusts and the economic interest of the investment was held through those trusts for the benefit of the ultimate policyholder.

83. Omnia issued both fixed and variable investment policies that were classified as ELFIs in similar terms to those issued by Northstar (the full details of which it is not necessary to set out for present purposes). Omnia also offered an indexed investment option, but this option was simply a way of measuring the interest that accrued on the policy (unlike Northstar which linked its policies to the S&P 500).

84. So far as is relevant to the present proceedings, Omnia issued four products, three of which remain "active". These are:

i. a Guaranteed Index Plan (GIP) product comprising fixed and indexed investment options.
ii. a Guaranteed Rate Plan (GRP) comprising only a fixed investment option.
iii. a Universal Investment Plan (UIP) product comprising variable and/or fixed investment options.

85. Omnia had 880 active policies, and like Northstar's clients, Omnia's policyholders varied considerably in sophistication and reside in 75 different countries, such that it is likely that many do not speak English as a first language.

86. Omnia issued its policies through a structure of master trusts, namely the Sage Global Investment Plan Master Trust and the Omnia Bermuda Trust, and sub-trusts created thereunder to hold the assets for the benefit of the policyholders.

87. The total sums reflected as liabilities to Omnia's policyholders under the active policies are broken down as follows (expressed in US$):

	Fixed	Variable	Total
GRP	20,346,316.62	nil	20,346,316.62
GIP	7,278,670.21	nil	7,278,670.21
UIP	14,757,762.01	106,485,140.14	121,242,902.15
Total:	**42,382,748.85**	**106,485,140.14**	**148,867,888.99**

88. Omnia's non-investor general creditors comprise 12 creditors owed a total of **US$1,355,524.00.**

89. Omnia's assets can be broken down in the following categories related to fixed and variable and indexed investment policies (expressed in US$):

Variable segregated accounts	
Mutual Fund holdings	66,959,713
Cash on surrenders and redemptions	31,302,880
Sub total	**98,162,593**
Fixed and indexed segregated accounts	nil
Omnia's general account (cash)	6,368,776
Total:	**104,556,280**

90. As with the analysis of Northstar's accounts, if the claims of Omnia's variable policyholders are admitted exclusively against the assets held in the variable segregated

accounts, the variable policyholders will recover almost all of the value of their investments (about 92%) but the fixed investors will recover nothing (except to the extent that a claim can be made under the general law for breach of a duty to segregate the assets backing the fixed investments properly).

The JPLs' application for directions

91. It is in this context and against these background facts that the JPLs have applied to the Court for directions as to the progression of the liquidations. There are a number of separate aspects of the application which need to be considered.

Variable investment policyholder claims

92. The first set of directions that are sought relate to the admission of the Variable Segregated Claims (defined as the claims of policyholders in respect of the variable investment policies in respect of each of Northstar and Omnia) without further proof. This is as a direct result of the Segregation Judgment which confirmed that the claims in relation to the variable investments can be treated as being exclusively related to the assets held in the variable segregated accounts, and neither the policyholders of the fixed investment policies nor the general creditors of Northstar and Omnia can make any claim on the variable segregated account assets in respect of the liabilities due to them.

93. The reasons for dispensing with the need for further formal proofs are both practical and administrative. Each company has records which set out in specific detail the exact amounts due under each policy, and it would be administratively time-consuming, expensive and redundant to require all policyholders to submit formal proofs of debt in the normal way provided for under the Winding Up Rules 1982[30]. In brief, there are a very large number of policyholders, many of whom do not speak English and many of whom may be unsophisticated investors. However, the JPLs wish to reserve the right to require a proof of debt in any particular case where there is doubt or difficulty.

94. A second direction sought in relation to the admission of the claims without proof goes to valuation: the JPLs propose to admit the claims of variable investments against the variable segregated account assets at the realised value of the variable assets linked to the segregated account (after deduction of any liabilities or expenses) and subject to a cut off date for claims to be valued once and for all.

95. An issue arising under this heading is the relevant date for the valuation of claims in a liquidation, because the realisation will take place long after the date of the Winding Up Order (26 March 2021) which is the normal date for the valuation of claims. The JPLs wish to be able to take into account the changes in circumstances since 26 March 2021 and the date of the realisation to take account of the ongoing fluctuations in value of the assets.

96. The JPLs wish to include in the valuation mechanism a corresponding right to object to the valuation of the Variable Segregated Claim, failing which the JPLs' valuation will stand as the value of their claim.

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[30] See second affidavit of Edward Willmott (Northstar) paragraphs 57-65 and second affidavit of Edward Willmott (Omnia) paragraphs 47-55 at HB C 2/1/11 and HB C 3/1/8.

97. In order to give effect to the process, the JPLs seek a direction permitting the JPLs to realise the Variable Assets and to make a distribution of the proceeds of the Variable Assets to the Variable Segregated Account Holders.

98. In summary, to give effect to the JPLs' proposed plan in relation to the variable investments (i) the Court must be satisfied that it is appropriate to dispense with the need for proofs of debt (ii) the Court must set the date for valuation of the claims of the variable segregated policyholders' claims (iii) the Court must provide for a mechanism for objection or appeal against the admission of the proofs at the value set by the JPLs and (iv) the Court must permit the JPLs to realise the assets and make the distributions of the assets to the policyholders at the values admitted.

Fixed and indexed investment policyholder claims

99. The JPLs take the view that the result of the analysis of the assets held in the segregated accounts that relate to fixed investment and indexed policyholders is that the fixed and indexed investors will receive nothing by way of distribution from the liquidations of Northstar and Omnia, because no assets were in fact linked to their accounts.

100. However, Hargun CJ indicated that the fixed investment policyholders may be able to assert a claim against the general account of each of Northstar and Omnia on the basis that each company had failed to segregate the assets properly in breach of an implied term in the policies that each company would segregate the assets linked to their respective accounts. The failure to segregate the fixed investment policy assets would result in a claim that would be admissible to proof in the liquidations of each company against the assets held by each company in their respective general accounts.

101. Accordingly, the JPLs consider that it would be appropriate for the Court to give directions to the JPLs to admit the fixed and indexed investment policyholders' breach of the implied term claims without proof. The JPLs have devised a method of attributing a value to fixed investment policy claims, which would be subject to a mechanism to allow for objection.

102. The JPLs then propose to convene the first meetings of creditors (and contributories) and allow the fixed and indexed investment policyholders to vote as creditors at the first meeting to appoint permanent liquidators in the conventional way. These policyholders would not be entitled to vote in respect of any claim against the fixed investment segregated account or claim based on a trust or proprietary claim to assets.

103. On this approach, the policyholders' claims would rank as ordinary unsecured claims against the general account of each company alongside all other unsecured creditors. However, the JPLs consider that the policyholder claims are insurance debts as defined under section 36A of the Insurance Act 1978 and are entitled to priority as against non-insurance debts, and the result of the admission of the policyholders' claims in this way would (in effect) extinguish the assets so that there would be no assets left against which the non-insurance debts could recover.

104. In summary, to give effect to this aspect of the JPLs' proposed plan, the Court must be satisfied that it is appropriate to dispense with the need for proofs from fixed and indexed investment policyholders in relation to their breach of implied term claims (ii) approve the

JPLs' methodology for valuing these claims and any objections or appeals (iii) direct the JPLs to convene the first meetings of creditors and contributories.

The threshold issue

105. The fundamental premise behind the application for directions is that the assets held in each of the segregated accounts are held exclusively for the benefit of and/or to meet the liabilities that relate to each segregated account and that the assets linked to each segregated account cannot be used to meet the liabilities of any other segregated account or the general liabilities of the segregated accounts company (i.e. Northstar or Omnia respectively). The JPLs say that is the natural consequence of the Segregation Judgment.

106. Against this, however, it is said by UNFCU (on its own behalf and as the non-JPL party) that the Segregation Judgment has to be read in the context that the application of the CMR to the funds held by Northstar was not considered by Hargun CJ in his analysis of the relevant legal principles. It is said that the CMR apply to Northstar because it was registered as an investment business under the IBA in 2018 and therefore the CMR apply to the monies held by Northstar which relate to the investments in all categories.

107. If this is correct, then, it is said, the effect of the CMR is that all assets held by Northstar in all of the segregated accounts (whether fixed, indexed or variable) are to be pooled to meet the liabilities of all policyholder claims. The result of this would be that all policyholders would share in all the segregated assets on a *pari passu* basis, regardless of whether they were fixed, indexed or variable class policyholders.

108. According to UNFCU's analysis, the Segregation Judgment cannot be relied upon to determine the rights of the fixed investment policyholders' claims in relation to Northstar. Instead, it is said that the Court must apply the CMR to the assets held by Northstar in all its segregated accounts on the basis that those assets either represent the proceeds of "client monies" (within the meaning of the CMR) or will become "client monies" when the investments are realised and flow through Northstar's accounts before they are transferred to policyholders upon redemption, surrender or termination. If this is the correct legal analysis, then it is argued that all client monies are to be pooled when an interruption event occurs, which in the present case was the presentation of the petition by the BMA to wind up Northstar. This means in turn that the claims of all creditors as at the date of the winding up[31] are to be treated as falling within the pool of assets determined as at the date of the pooling event.

109. It is therefore fundamental to the determination of the JPLs' application for directions in relation to Northstar for the Court to decide whether the CMR apply to the assets held in the segregated accounts of Northstar before considering what are the appropriate directions to be given.

Segregated accounts companies

110. Both Northstar and Omnia were incorporated by private Acts of the Bermuda Legislature and they each have bespoke provisions that set out the terms on which the assets and

[31] There is an issue as to whether the relevant date for these purposes is the date of the winding up petition or the winding up Order, which will be considered below.

liabilities of each segregated account are established and the legal basis on which the assets of each segregated account are to be applied against the liabilities of each respective account. These structures were drafted in similar terms, following an early model for segregated accounts companies approved by the Registrar of Companies and the Ministry of Finance.

111. SACA was enacted to allow segregated accounts companies ("SACs") to be incorporated by registration without the need for a specific private Act of the legislature. It followed the same approved model with additional provisions made for general application to companies registered as SACs. SACA provides that its terms apply to all segregated accounts companies registered under SACA and to the extent that there is any inconsistency between the provisions of a private Act segregated accounts company and SACA, the provisions of SACA will prevail[32]. It was common ground that there were no provisions of SACA which are inconsistent with Northstar's incorporating Act in 1998 or its amendment Act in 2008.

112. In the case of an ordinary company, as a matter of general principle, all of the company's assets are available to meet all of its the liabilities, and the profits made by the company from all of its business activities are available to be declared as dividends to all its shareholders (leaving aside any special types of preference shares or coupons which may carry a priority rate). By contrast, the concept behind a segregated accounts company is that a separate account can be created within the corporate structure into which assets may be contributed for a specific investor or class of investor on terms that the assets in that account (or assets linked to it) are held exclusively for the account owner(s) and any liabilities that relate to that investment are to be satisfied only from those assets, not from the assets of the company or any other segregated account. The Court has already drawn the analogy between a beehive (the SAC) and the cells of the honeycomb within the hive (the segregated accounts).

The Nationwide Act

113. Northstar carried on business as a long-term insurer when it was incorporated. The Nationwide Act provided various exemptions and exclusions from the general provisions applicable to insurance companies under the Insurance Act 1978[33]. The policies issued and the assets that related to the policies that were issued were linked to a segregated account[34] in relation to each policy. A segregated account could contain more than one policy and assets recorded to that policy or policies in any way the company thought fit, including commingling with the company's property provided that proper records were kept to identify the mixed property in the account[35].

114. All income and gains derived from the segregated account were to be allocated to the segregated account and the property standing to the credit of the segregated account was to be held for the sole purpose of paying any and all claims arising from or other amounts owing under the policy related to that account and it was provided that no other person shall have any right or interest in the property of that account[36].

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[32] Section 8 (1) (a) of SACA.
[33] Section 3 (2) (3) (4) Nationwide Act.
[34] In the Nationwide Act the term used was a "Separate Account" but for consistency the Court has used the term 'segregated account'.
[35] Section 4 (1) to (4) Nationwide Act.
[36] Section 4 (8) Nationwide Act.

115. It was expressly provided that notwithstanding any other provision of law to the contrary, on the commencement of a liquidation, the liquidator shall be bound to recognize the separate nature of each segregated account and shall not apply the property identified in the records of the company as the property of a segregated account to pay the claims of creditors of the company or any policy not related to the segregated account[37]. These provisions apply to the MetLife policies which were acquired or assumed by Nationwide in the amalgamation with MetLife International Insurance Ltd in 2007.

Northstar Financial Services (Bermuda) Ltd Amendment Act 2008.

116. Nationwide changed its name to Northstar Financial Services (Bermuda) Ltd in April 2006. Northstar petitioned the legislature to amend its private Act in April 2008 and registered as a SAC under SACA at about the same time as the amendment Act was passed. It is relevant to set out some of the detailed provisions of the amendment Act.

117. Section 2 (1) provides

> *(j) "Event Linked Financial Instrument" means any contract to pay or not pay a sum of money or render or not render money's worth upon the happening of an event, irrespective of whether or not the payee suffers a loss or becomes liable to loss, directly or indirectly, as a result of the happening of the event provided such contract is expressed to be designated as an Event Linked Financial Instrument in accordance with subsection 5(1) hereof and shall not include a Policy.*
>
> *(p) "Insurance Business" means the business of effecting and carrying out one or more Policies and shall include the administration of funds pursuant to any Policy;*
>
> *(x) "Policy" means any contract specifying conditions under which a party to such contract will pay or not pay a sum of money or render or not render money's worth upon the happening of an event, irrespective of whether or not the payee suffers a loss or becomes liable to loss, directly or indirectly, as a result of the happening of that event provided that such contract is expressed to be designated as a Policy in accordance with subsection 5 (1) hereof and shall not include an Event Linked Financial Instrument and, for the avoidance of doubt, shall include a Life Policy;*

118. Section 4 (1) provides:

> *This Act applies to Insurance Business and Event Linked Financial Instrument Business carried on by the Company and to every Financial Instrument and to each and every Policy issued or effected by the Company, whether or not such commenced, became effective or existed prior to the commencement of this Act.*

119. Section 5(1) provides:

> *By an express term thereof, each Risk Contract shall state that it is designated as either an Event Linked Financial Instrument or a Policy and such express term shall not be*

[37] Section 8 (a) Nationwide Act.

amended so as to change the designation of such Risk Contract without the prior approval of the Authority. By an expense term thereof, each Event Linked Financial Instrument shall state that it is not subject to the Insurance Act and that it is not a contract of insurance or reinsurance and shall be so treated for the purposes of any statutory provision or any law. By an express term thereof, each Policy shall state that it is a contract of insurance or reinsurance (as the case may be) and shall be so treated for the purposes of the Insurance Act and the other laws notwithstanding any statutory provision of any law to the contrary.

120. Section 12 provides:

Notwithstanding any statutory provision or any law to the contrary, on the commencement of proceedings to wind up or dissolve the company and during such winding up or dissolution:

(a) the Liquidator shall be bound to recognise the separate nature of each Segregated Account and the related Risk Contract or Financial Instrument pursuant to this Act and shall not apply the property identified in the records of the Company as the property of a Segregated Account (including any interest in a mixed fund or converted or combined property where property may have been commingled) to pay the claims of creditors of the Company, including, without limitation, the claims of a Counterparty or of a Risk Party other than a Risk Party to the Risk Contract to which each segregated account relates and a Counterparty to a Financial Instrument to which that Segregated Account relates, and accordingly the property recorded, allocated or credited to such segregated account shall be applied in accordance with the terms of the relevant Risk Contract and/or the relevant Financial Instrument;

(b) if required under the terms of a Risk Contract, or in the absence of any such terms, if required under the terms of a Financial Instrument, the liquidator shall preserve the property or any part thereof in the relevant Segregated Account and ensure, where applicable, that such property matures in the ordinary course for the benefit of the relevant Risk Party or Counterparty (as the case may be)

(c) the Liquidator shall be bound to observe and have no power to render void or cancel or vary the terms of any risk contract, financial instrument, or any deed, contract or agreement between the company and any other person with respect to any risk contract, segregated account or financial instrument;

121. Section 20 provides:

An Event Linked Financial Instrument will not be construed as an "investment" under the Investment Business Act.

122. By section 21 the original version of the Nationwide Act was repealed in its entirety, with consequential savings for the validity of policies written and actions taken under the previous version of the Act.

123. Northstar operated its business under the so framework of the 2008 private Act thereafter and was not subject to the provisions of the IBA 2003 because Event Linked Financial Instruments ("ELFIs") were specifically deemed not to constitute investment business and therefore Northstar did not need a licence under the IBA.

124. The Bermuda Monetary Authority (the BMA) is responsible for regulatory supervision of entities who conduct investment business in or from Bermuda under the IBA. Over time, the BMA had growing concerns about ELFI business being conducted outside the regime of the IBA and beyond the BMA's regulatory control. Therefore, after some years of negotiation, Northstar accepted that its ELFI business would need to fall within the regulatory control of the BMA and agreed to support various amendments to Northstar's 2008 private Act. These amendments were adopted by the legislature in 2018 under the Northstar Financial Services Bermuda Ltd Amendment Act 2018.

125. The recital to the Northstar Amendment Act 2018 explained its purpose as follows:

> *Whereas a petition has been presented to the Legislature by Northstar Financial Services Ltd, the holding company of Northstar Financial Services (Bermuda) Ltd ...praying that legislation may be enacted to amend the Northstar Financial Services Bermuda Act 2008 to replace an outdated clause to ensure that Northstar Financial Services Bermuda Ltd is compliant with the Investment Business Act 2003 (as amended and re-enacted from time to time)...*

126. Section 3 of the Northstar Amendment Act 2018 repealed section 20 of the Northstar 2008 Act so that Northstar's EFFI business fell within the regulatory regime of the IBA.

127. Section 4 provides:

> *(1) Any event linked financial instrument issued prior to the commencement of this act, which was not construed as an investment under the Investment Business Act shall, from the commencement of this act, be construed as an investment under the Investment Business Act 2003.*
> *(2) From the commencement of this Act, any Event Linked Financial Instrument Business carried on by the Company in relation to Event Linked Financial Instruments issued prior to the commencement of this Act shall be subject to the minimum criteria specified in the second schedule of the Investment Business Act (including, for the avoidance of doubt, the criteria to comply with certain laws, regulations, codes of conduct or sanctions prescribed in paragraph 5 (2) therein).*
> *(3) Any issue of a Financial Instrument from the commencement of this Act shall be governed by the Investment Business Act 2003 and the Segregated Accounts Companies Act 2000.*

128. Northstar was registered under the IBA and was issued a license to conduct investment business on 9 August 2018. The position was summarised by the JPL as follows:

(i) prior to the registration under the IBA, Northstar's business comprised insurance the noninsurance business: (a) Northstar wrote long-term insurance business under the Nationwide Act and by virtue of the amalgamation with MetLife, was also responsible for the MetLife policies which were also long-term insurance business (b) Northstar wrote investment business (ELFIs) which had been exempted from the IBA.

(ii) Although the Insurance Act 1978 was amended in 2013 to prohibit certain insurers from engaging in non-insurance business, the effect of the Northstar 2008 private Act was

that Northstar could continue to write insurance business alongside its ELFI investment business.

(iii) After the 2018 amendment to Northstar 2008 Act, Northstar was required to be licensed under the IBA, and became subject to the regulations issued thereunder including the CMR 2004.

(iv) Northstar's management appear to have considered that the existing structure of the investment business would comply with the CMR, but do not appear to have considered the impact of the CMR on Northstar's insurance business.

Sage Life (Bermuda) Ltd (Separate Accounts) Act 1999

129. Under the Sage Life (Bermuda) Ltd (Separate Accounts) Act 1999 Sage Life Re (Bermuda) Ltd (later called Omnia) was also incorporated as a segregated accounts company and received the same statutory protections to those reflected in the original Nationwide Act described above. These provided for legal separation of assets and liabilities of each account from the others and Omnia's general account and the requirement that upon liquidation a liquidator must apply the assets of each account exclusively against the liabilities of each respective account. Omnia was never registered under the IBA and so the CMR never applied to Omnia's business.

130. Omnia was excluded from long-term business under the Insurance Act 1978 but was subject to the Life Insurance Act 1978 (except for certain provisions i.e. section 34). Omnia was registered as an insurer under the Insurance Act 1978 but did not write insurance business. Omnia wrote ELFI business which was exempted from the requirements of the Insurance Act.

SACA

131. SACA was passed by the Bermuda legislature in 2000, following some years of the development of the model used in many of the private Act companies which had been incorporated as SACs.

132. SACA makes general provision for the incorporation of SACs by registration, and sets out a detailed regime which (i) sets out the legal nature of a segregated account, how it is created, its minimum requirements, lays down general rules that govern how a SAC is to be operated and (ii) creates a legal system that determines how the assets and liabilities of a segregated account are to be kept separate one from the other and the SAC's general account and how the liabilities of a segregated account are to be are to be discharged exclusively out of the assets of that account and no other.

133. Although there are many provisions of SACA which can be qualified or amended by the governing instrument in any particular case, there are some central provisions which apply to all SACs and from which it is not possible to depart. It is important for the purposes of these proceedings to set out some of the main provisions which are engaged in the determination of the issues on this application (so far as material and relevant to the questions the Court has to decide).

134. In order to assist in identifying the most important provisions in what is regrettably a long but necessary citation of the relevant provisions, they have been highlighted in bold text.

Section 2

"account owner" in relation to a segregated account means any person who is—
(a) the registered holder of shares or any LLC interests which are—
issued by the segregated accounts company, and
linked to that segregated account;
(b) ***expressly identified in the governing instrument linked to a segregated account as being an account owner for the purposes of this Act in respect of that segregated account****; or*
(c) ***expressly designated in the records of the segregated accounts company as being an account owner in respect of that segregated account****;*
and the interests of an account owner in any of the foregoing capacities in relation to any segregated account are referred to in this Act as "account holdings";

"counterparty" means any party (other than the segregated accounts company itself, save where section 17A(1) applies) to a transaction to which the segregated accounts company is a party, and ***under which assets or liabilities are wholly or partly linked to a segregated account****, but an account owner shall not (in that capacity) also be a counterparty;*

"creditor" means, ***in respect of any segregated account (and in that regard may respectively, any person to whom any liability is owed by the segregated accounts company and such liability is linked to that segregated account*** *or is a liability of the general account, as the case may be; but, except as provided for in section 18(14), an account owner shall not (in that capacity) also be a*
creditor;

"general account" means an account comprising all of the assets and liabilities of a segregated accounts company ***which are not linked to a segregated account of that company****;*

"governing instrument" means one or more written agreements (including LLC agreements), instruments, bye-laws, prospectuses, resolutions of directors or managers of a limited liability company, registers ***or other documents (including electronic records), setting out the rights, obligations and interests of account owners in respect of a segregated account****;*

"insurance business" means insurance business as defined in section 1(1) of the Insurance Act 1978;

"linked" means referable by means of—
an instrument in writing including a governing instrument or contract;
an entry or other notation made in respect of a transaction in the records of a segregated accounts company; or
an unwritten but conclusive indication,

which identifies an asset, right, contribution, liability or obligation as belonging or pertaining to a segregated account;

"segregated account" means a separate and distinct account (comprising or including entries recording data, assets, rights, contributions, liabilities and obligations linked to such account) of a segregated accounts company pertaining ***to an identified or identifiable pool of assets and liabilities of such segregated accounts company which are segregated or distinguished from other assets and liabilities of the segregated accounts company for the purposes of this Act****;*

Section 11

Governing instruments and contracts

(1) The rights, interests and obligations of account owners in a segregated account shall be evidenced in a governing instrument and the rights, interests and obligations of counterparties shall be evidenced in the form of contracts.

(2) The governing instrument in relation to any segregated account shall be deemed to be governed by the laws of Bermuda and the parties thereto shall be deemed to submit to the jurisdiction of the courts of Bermuda and, in relation to such governing instrument—

(a) a person shall become an account owner and shall become bound by the governing ***instrument if such person complies with the conditions, if any, for becoming an account owner*** *as set out in the governing instrument;*

(b) an account owner ***shall take such interest in a segregated account as may be stipulated in respect of him in accordance with the terms of the governing instrument*** *and, absent such stipulation or other compelling indication (in the discretion of the directors or LLC managers, as the case may be, of the company, exercised reasonably), the extent of the interest of such account owner shall be nil;*

(c) if no other provision for management is specified in the governing instrument, the segregated accounts company shall manage the segregated account and may—

(i) appoint and supervise the officers, managers, employees and other persons who have management of the segregated account; and
(ii) enter into financial arrangements for payment for services including the charging of fees, disbursements and other charges which the manager shall be authorized to withdraw from the segregated account;

(d) unless otherwise provided in the governing instrument, the segregated accounts company may take any action, including—
(i) the amendment of the governing instrument;
(ii) the appointment of one or more managers;

for the benefit of the segregated account only, the sale, lease, exchange, transfer, pledge or other disposition of all or any part of the assets of

the segregated account, or the orderly winding-up of the affairs and termination of the segregated account,

or may provide for the taking of any action to create under the provisions of the governing instrument a class, group or series of account holdings that was not previously outstanding, without the vote or approval of any particular manager or account owner, or class, group or series of managers or account owners;

(e) the segregated accounts company may, if and to the extent that voting rights are granted under the governing instrument, set forth provisions relating to—

(i) notice of the time, place or purpose of any meeting at which any matter is to be voted on;
(ii) waiver of any such notice;
(iii) action by consent without a meeting;
(iv) the establishment of record dates;
(v) quorum requirements;
(vi) voting in person, by proxy or in any other manner; or
(vii) any other matter with respect to the exercise of any voting rights;

(f) unless otherwise provided in the governing instrument in relation to a segregated account, the segregated accounts company may in respect of that account grant to, or withhold from, all or certain managers or account owners, or a specified class, group or series of managers or account owners, the right to vote, separately or with any or all other classes, groups or series of managers or account owners, on any matter, such voting being on a per capita, number, financial interests, class, group, series or any other basis;

(g) unless otherwise provided in the governing instrument in relation to a segregated account, ***the segregated accounts company in respect of that account may create further segregated accounts to which all or any part of the assets, liabilities, profits or losses linked to any existing segregated account may be transferred****, and for the conversion of the interest (or any part thereof) of all or certain account owners in an existing segregated account into interests of account owners in the separate segregated account; and*

(h) unless otherwise provided in the governing instrument in relation to a segregated account, the segregated accounts company in respect of that account may set forth provisions therein regarding—

(i) the governance of the business (or any aspect thereof) of the segregated account and the rights, powers and duties of the company, any manager and the account owner and their respective servants, agents, employees, successors or assigns;
(ii) the identity of the segregated account to which the transaction and any assets or liabilities are linked; and
(iii) the extent of the interest of the account owners and others (if any) therein and subordination thereof (if any).

(3) Any contract governing a transaction with a counterparty, including those

executed outside Bermuda, shall include the name of the counterparty, and, unless otherwise provided therein, shall include an implied term that the parties select the law of Bermuda as its governing law and submit to the jurisdiction of the courts of Bermuda.

(4) Unless otherwise expressly agreed in writing by the parties to the transaction—

(a) by virtue of a governing instrument or contract which is binding on those parties in relation to the affected segregated accounts or general account, as the case may be, and which is executed by parties having authority in relation to those accounts; and
(b) in the case of a mutual fund only where the document or documents mentioned in paragraph (a) clearly indicate an intention of the parties to extend liability to more than one segregated account or the general account as permitted by this section and contain a specific reference to this subsection and to subsection 17(5),

any contract pertaining to a transaction shall be deemed to contain a statement that the rights of the counterparty shall not extend to, and the counterparty will not have recourse to, the assets which are linked to any other segregated account *or to the general account.*

(5) For the avoidance of doubt, ***it is hereby declared*** *that any provision of a contract or governing instrument relating* ***to the segregation of assets or liabilities of a segregated account shall be governed by and construed in accordance with this Act, and the parties may not contract otherwise in such regard.***

Section 17

Nature of segregated accounts, application of assets and liabilities

(1) Notwithstanding any other provision of this Act, the establishment of a segregated account does not create a legal person distinct from the segregated accounts company.

(2) Notwithstanding any enactment or rule of law to the contrary, but subject to this Act, ***any liability linked to a segregated account shall be a liability only of that account and not the liability of any other account and the rights of creditors in respect of such liabilities shall be rights only in respect of the relevant account and not of any other account.***

(2A) For the purposes of subsection (2) and for the avoidance of doubt, any asset which is linked by a segregated accounts company to a segregated account—
(a) ***shall be held by the segregated accounts company as a separate fund*** *which is—*

(a) not part of the general account ***and shall be held exclusively for the benefit of the account owners of the segregated account and any counterparty to a transaction linked to that segregated account****; and*
(ii) ***available only to meet liabilities to the account owners and creditors of that segregated account****; and*

(b) ***shall not be available or used to meet liabilities to, and shall be absolutely and for all purposes protected from, the general shareholders or general interest holders and from the creditors of the company who are not***

creditors with claims linked to segregated accounts.

(3) For the purposes of this Act, the Companies Act 1981, the Limited Liability Company Act 2016 and otherwise at law, the assets recorded in the general account shall be the only assets of a segregated accounts company available to meet liabilities of the segregated accounts company that are not linked to a segregated account.

(4) No assets of the general account may be transferred from the general account to a segregated account unless, on the date from which the transfer is to be effective, and taking into account that transfer—
(a) the general account is solvent; or
(b) all the shareholders or LLC interest holders (as the case may be) and creditors of the general account on that date have expressed in writing their concurrence to the transfer.

(4A) For the purposes of subsection (4), in the event a transfer is made to a segregated account in breach of that subsection, on an application by an affected party, the court may declare that the transfer is void, without prejudice to the rights of bona fide purchasers for value without notice.

(5) Unless otherwise expressly agreed in writing by the affected parties—

(a) by virtue of one or more contracts, governing instruments or other documents which are binding on those parties in relation to the affected segregated accounts or general account, as the case may be, and which are executed by parties having authority in relation to those accounts; and

(b) in the case of a mutual fund only where the documents mentioned in paragraph (a) clearly indicate an intention of the parties to extend liability to more than one segregated account or the general account as permitted by this section and contain a specific reference to this subsection and to subsection 11(4),

where a liability of a segregated accounts company to a person arises from a transaction or matter relating to, or is otherwise imposed in respect of or attributable to, a particular segregated account, that liability shall—

(c) ***extend only to, and that person shall, in respect of that liability, be entitled to have recourse only to, the assets linked to that segregated account;***

(d) ***not extend to, and that person shall not, in respect of that liability, be entitled to have recourse to, the assets linked to any other segregated account; and***

(e) not extend to, and that person shall not in respect of that liability, be entitled to have recourse to, the general account.

(6) Where a liability of a segregated accounts company to a person—

(a) ***arises otherwise than in respect of a particular segregated account; or***
(b) is imposed otherwise than in respect of a particular segregated account,

that liability shall extend only to, and that person shall, in respect of that liability, be entitled to have recourse only to, the general account.

(7) In the event that a segregated account has insufficient assets to pay all of its obligations in full, ***the order and priority of the rights in relation to assets linked to a segregated account shall (without prejudice to the rights of any parties holding valid security interests against assets linked to that segregated account and any valid preferential claims in respect of that segregated account) be determined by the terms of the governing instrument and any contracts pertaining to that account,*** *and any ambiguity in respect of the order and priority rights shall be resolved as follows:*

(a) the claims of creditors shall rank ahead of the claims of account owners;
(b) the claims of creditors inter se shall rank pari passu; and
(c) the claims of account owners inter se shall rank pari passu.

(8) A segregated accounts company may, with the consent in writing of all account owners of, or counterparties who are creditors with claims linked to, a given segregated account, transfer to the general account or another segregated account an asset from the segregated account to which it is linked, if the segregated account to which such asset is linked, taking into account the proposed transfer, remains solvent, and, in the event a transfer is made to the general account in breach of this subsection, on an application by an affected party, the court may declare that the transfer is void, without prejudice to the rights of bona fide purchasers for value without notice.

(9) Any asset transferred in accordance with subsection (8) shall cease to be linked to the segregated account from which it was transferred on the date of the transfer.

(10) Subject to the terms of the governing instrument relating to a given segregated account, on dissolution of the segregated accounts company or termination of the segregated account and after paying creditors of the segregated account, any property linked to that segregated account shall be paid pro rata to the account owners of such segregated account or, if there are no account owners, shall be deemed to fall into the general account.

(11) Without prejudice to the rights of parties to resolve disputes by reference to arbitration or to the court, where—

(a) there is, on grounds that are reasonable, uncertainty as to whether any given interest in a segregated account is an interest as a counterparty or an interest as an account owner, that interest shall be deemed to be an interest as a counterparty;

(b) a given liability is not linked to a particular segregated account, or where there is, on grounds that are reasonable, uncertainty as to whether the liability is linked to a segregated account, that liability shall be deemed to be the liability of the general account.

Section 17B

Creditor enforcement rights limited to account assets

(1) There shall be implied (except in so far as the same is expressly excluded in writing) in every contract and governing instrument entered into by a segregated accounts company the following terms:-

(a) that no party shall seek, whether in any proceedings or by any other means whatsoever or wheresoever, to establish any interest in or recourse against any asset linked to any segregated account to satisfy a claim or liability not linked to that segregated account;

(b) that if any party succeeds by any means whatsoever or wheresoever in establishing any interest in or recourse against any asset linked to any segregated account of the company in respect of a liability not linked to that segregated account, that party shall be liable to the company to pay a sum equal to the value of the benefit thereby obtained by him; and

(c) that if any party shall succeed in seizing or attaching by any means or otherwise levying execution against any assets linked to any segregated account of the company in respect of a liability not linked to that segregated account, ***that party shall hold those assets or their proceeds on trust for the company and shall keep those assets or proceeds separate and identifiable as such trust property****.*

(2) All sums recovered by a segregated accounts company as a result of any such trust as is described in subsection (1)(c) shall be credited against any concurrent liability pursuant to the implied term set out in subsection (1)(b).

(3) Any asset or sum recovered by a segregated accounts company pursuant to the implied term set out in subsection (1)(b) or (1)(c) or by any other means whatsoever or wheresoever in the events referred to in those subsections shall, after the deduction or payment of any costs of recovery, be applied by the company so as to compensate the segregated account affected.

(4) Notwithstanding subsections 17(4) and (8), in the event of any assets linked to a segregated account being taken in execution in respect of a liability not linked to that segregated account, and in so far as such assets or compensation in respect thereof cannot otherwise be restored to the segregated account affected, the company shall—

(a) cause or procure its auditor, acting as expert and not as arbitrator, to certify the value of the assets lost to the segregated account affected; and
(b) in priority to all other claims against the account transfer or pay, from the assets of the account to which the liability was attributable to the segregated account affected, assets or sums sufficient to restore to the segregated account affected the value of the assets lost.

Section 18

Rights and obligations with respect to segregated accounts

(1) ***Notwithstanding any enactment or rule of law to the contrary, any asset of a segregated accounts company which is linked to a particular segregated account is deemed to be owned by the company as a separate fund which does not form part of the general account.***

(2) [Repealed]

(3) To the extent provided in the governing instrument any person (including an account owner) may give directions to the segregated accounts company or other persons in the management of the segregated account and the managers shall have regard to such directions.

(4) Except to the extent otherwise provided in the governing instrument but subject to subsection (7)(b), neither the power to give directions to the segregated accounts company or other persons nor the exercise thereof by any person (including an account owner) shall cause the person giving directions to be a trustee or officer of the company.

(5) Except to the extent otherwise provided in the governing instrument, the account owners are entitled to the same limitation of personal liability as is enjoyed by members of companies limited by shares under section 158(d) of the Companies Act 1981 and by members of limited liability companies under section 105(c) of the Limited Liability Company Act 2016.

(6) [Repealed]

(7) A segregated accounts company may—

(a) sue and be sued in respect of a particular segregated account, and service of process upon the company in accordance with subsection (9) shall be sufficient;
(b) be sued for debts and other obligations or liabilities contracted or incurred by the company in respect of a particular segregated account, and for any damages to persons or property resulting from the negligence of the company acting in the performance of duties with respect to that account;
(c) exercise the same rights of set-off (if any) as between accounts as apply under the general law in respect of companies, including, on an insolvent liquidation of the company, the same rights of set-off which arise in an insolvent liquidation of a company.

(8) ***The property of a segregated account is subject to orders of the court as it would have been if the segregated account were a separate legal person (and notwithstanding that it is not a separate legal person).***

(9) A segregated accounts company may be served with process in the manner prescribed in section 62A of the Companies Act 1981 or section 26(4) of the Limited Liability Company Act 2016 (as the case may be) in all civil actions or proceedings involving or relating to the activities of a segregated account or a breach by the company of a duty to the segregated account, or to any account owner thereof or to a counterparty to a transaction linked thereto.

(10) Except to the extent it may be agreed otherwise by virtue of the governing instrument or contract, as the case may be, ***an account owner of a segregated account and any counterparty who is a creditor in respect of a transaction linked to that segregated account shall have an undivided beneficial interest in the assets linked to a segregated account, and, after satisfying in full the claims of creditors of the segregated account, account owners shall share in the profits and losses of the segregated account in such proportions of the residual undivided beneficial interest in the segregated account owned by that account owner as may be specified in any governing instrument*** *relating to such segregated account.*

(11) An account owner's or counterparty's beneficial interest in a segregated account is personal property notwithstanding the nature of the property of the segregated account.

(12) Except to the extent it may be agreed otherwise by virtue of the governing instrument or contract, as the case may be, ***an account owner or counterparty has no interest in specific segregated account property.***

(13) Except to the extent it may be agreed otherwise by virtue of the governing instrument or contract, as the case may be, but subject to the provisions of the Exchange Control Act 1972, an account owner's or counterparty's beneficial interest in the segregated account is freely transferable.

(14) Subject to the segregated accounts company complying with section 15, and except to the extent it may be agreed otherwise by virtue of the governing instrument or contract, as the case may be, ***at the time an account owner or counterparty becomes entitled to receive a payment, distribution, allocation or dividend pursuant to any governing instrument, he has the status of, and is entitled to all remedies available to, a creditor of the segregated account with respect to the payment, distribution, allocation or dividend,*** *and the governing instrument or contract may provide for the establishment of record dates with respect to such payment, distribution, allocation or dividend.*

(15) To the extent that, at law or in equity, a segregated accounts company or manager has duties (including fiduciary duties) and liabilities relating to a segregated account or to an account owner or to a counterparty—

(a) that company or manager acting under a governing instrument or contract is not liable to the segregated account or to any account owner or counterparty for the company's good faith reliance on the provisions of that governing instrument or contract to which that account owner or counterparty is a party; and
(b) the company's or manager's duties and liabilities may be expanded or restricted by provisions in a governing instrument to which the person is a party.

(16) Subject to section 17B(1)(c) and (2), ***the provisions of this section and section 11 operate to the exclusion of any rule of law relating to trusts treating with the same subject matter, and no rule of law relating to trusts may be pleaded by any person to augment or modify the operation of this Act, but nothing in this section shall be construed so as to deny—***

(a) the remedy of tracing in law and in equity the assets or the proceeds of the assets of any segregated account where such assets or proceeds have been commingled with the assets of any other segregated account or the general

account; or
(b) any remedies available under the doctrine of constructive trusts or similar equitable remedies where those remedies would otherwise be available.

(17) To the extent permitted in the governing instruments of the affected segregated accounts, a company in respect of a segregated account may be an account owner of one or more other segregated accounts of the same segregated accounts company.

Section 24

Winding up of segregated accounts companies

(1) ***Subject to this section, a segregated accounts company shall be wound up in accordance with the provisions of this Act****, the Companies Act 1981 or the Limited Liability Company Act 2016 (as the case may be) and any other Act or rules which apply to the winding up of a company, save that in the event of any conflict, the provisions of this Act shall prevail.*

(1A) For the purposes of determining whether a segregated accounts company may be wound up on the ground of insolvency—

(a) the test of insolvency which applies under section 162 of the Companies Act 1981 or section 109 of the Limited Liability Company Act 2016 (as the case may be) and (in the case of an insurance company) section 33 of the Insurance Act 1978 shall apply; and
(b) ***assets and liabilities linked to segregated accounts shall not be taken into account****.*

(2) Where—

(a) a petition for the winding up of a segregated accounts company is presented pursuant to Part XIII of the Companies Act 1981 or Part 13 of the Limited Liability Company Act 2016 (which relate to winding up); and
(b) the segregated accounts company is solvent under section 2(2) of this Act,

the court shall not proceed on the petition on any ground provided for in paragraph (a), (b), (c) or (d) of section 161 of the Companies Act 1981 or section 108(a), (b) or (d) of the Limited Liability Company Act 2016 (as the case may be) and shall not proceed unless the court is satisfied that to proceed would be just and equitable in all the circumstances.

(3) A segregated accounts company shall not be voluntarily wound up without the consent of the Registrar.

Section 25

Application of assets

(1) ***Notwithstanding any statutory provision or rule of law to the contrary, in the winding up of a segregated accounts company the liquidator shall deal with the assets and liabilities which are linked to each segregated account only in accordance with this Act and accordingly the liquidator shall ensure that the assets linked to one segregated account are not applied to the liabilities linked to any other segregated account or to the general account,*** *unless an asset or liability is linked to more than one segregated account, in which*

case the liquidator shall deal with the asset or liability in accordance with the terms of any relevant governing instrument or contract.

(2) The remuneration to be paid to the liquidator shall be apportioned by the liquidator to each segregated account and the general account in such amounts as would best reflect the duties performed by the liquidator and approved by the court

(3) The liquidator, or any person affected by a decision of the liquidator, may apply to the court for directions in relation to the remuneration of the liquidator.

Section 25A

General application of Companies Act 1981

(1) Subject to this Act and any other enactment, the Companies Act 1981 applies with respect to a segregated accounts company that is a company within the meaning of section 2 of the Companies Act 1981, and such segregated accounts company shall comply with the provisions of that Act.

(2) To the extent possible, where they relate to a segregated accounts company that is a company to which the Companies Act 1981 applies, the provisions of this Act shall be construed consistently with the relevant provisions of the Companies Act 1981.

(3) In the event of an ***irreconcilable conflict between this Act and the Companies Act 1981, the provisions of this Act shall prevail.***

The Court's summary of the relevant SACA provisions

135. Northstar became subject to SACA (in addition to the less comprehensive terms of the Northstar 2008 Act) when it registered as a SAC in April 2008 and all assets held by Northstar in segregated accounts for its insurance business and its ELFI business were governed by its terms. As can be seen from the points highlighted in the text reproduced above, the key points of importance (in the present context) are:

(i) Once assets are linked to a segregated account that has been established for the benefit of an account holder, those assets cannot be applied to discharge the liabilities of another segregated account or the liabilities of the SAC[38].

(ii) After the discharge of any applicable liabilities attaching or linked to a segregated account, the assets in that account can only be distributed to the account holder[39].

(iii) No party can seek by any means to have recourse to any asset linked to any segregated account in respect of a liability that is not linked to that account[40], and if they do so, they hold any such asset on trust for the account holder[41].

(iv) Any trust obligations arising in equity or by operation of law are disapplied in relation to assets in a segregated account except for the purposes of recovering assets that have been wrongly misapplied or paid out from the segregated account

[38] Section 11 (2) (a) (b) Section 11 (4) SACA and Section 17 (2) SACA
[39] Section 18 (10) SACA
[40] Section 17B (1) (a) SACA
[41] Section 17B (c) SACA

when the account owner (or the SAC) may apply equitable tracing principles to restore those assets to the correct segregated account[42].

(v) A liquidator is bound to recognise and give effect to the segregation of the assets for the benefit of each segregated account owner, after discharge of all relevant liabilities that relate to the respective segregated account[43], and the provisions of the Companies Act 1981 requiring distribution of assets on an insolvency to the creditors of the SAC on a *pari passu* basis (after applying the statutory priority waterfall) are expressly overridden and disapplied[44].

136. In **UBS Fund Services Cayman Ltd v New Stream Capital Ltd[45]**, Kawaley J (as he then was) referred to the SACA statutory scheme as providing a means to "ring fence" assets for the payment of specific liabilities behind (what he later referred to in **Re CAI Master Allocation Fund Ltd[46]**) as an "iron curtain" which separated the assets of one account from another and from those of the SAC.

137. As has been noted above, Hargun CJ held in the Segregation Judgment that as a matter of fact segregated accounts were established for Northstar's policyholders, and assets were linked to those accounts, and that when segregation of the assets for the fixed investment policyholders failed, that failure did not destroy the segregated account for the relevant policyholder, but the result was that linkage of specific assets to that account became impossible[47]. This Court does not need to re-examine that issue for the purposes of this application.

138. In 2018, Northstar amended its private Act and was issued a license as an investment business provider and became subject to the provisions of the IBA and the CMR made thereunder.

The IBA 2003 and the CMR 2004

A bird's eye view of the IBA

139. The IBA 2003[48] is the principal legislation that governs investment business activity by investment providers who provide investment services in or from Bermuda. It is necessary to describe in broad overview some of the main provisions (so far as material) with which the Court is concerned to give the background to the statutory framework.

140. The IBA requires all persons who conduct investment business (as defined) in or from Bermuda to be licensed by the BMA. In order to obtain a licence, an applicant must demonstrate that the controlling persons (and ultimate beneficial owners) are fit and proper persons who have the appropriate experience, integrity and skill to manage the type and scale of the licensed business. The licensed entity must meet the minimum capital and liquidity requirements and maintain adequate and appropriate record keeping and

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[42] Section 18 (16) SACA.
[43] Section 25 (1) SACA.
[44] Section 17 (10) and Section 25A (3) SACA.
[45] [2009] Bda LR 74 para 21
[46] [2011] Bda LR SC (Bda) 45 Com (26 September 2011) at paragraph 18.
[47] Paragraph 173 of the Segregation Judgment.
[48] The IBA 2003 replaced the IBA 1998.

administrative systems to operate the business within "minimum criteria" set by the BMA and are set out in the Second Schedule to the Act[49].

141. The "minimum criteria" includes a duty to conduct of business in a prudent manner, and in assessing whether a business is being (or will be) conducted in a prudent manner the BMA is required to take into account whether the licensed entity is (or will) comply with the IBA (and any rules made thereunder), any other rule (including anti-money laundering and anti-terrorism financing laws made under the Proceeds of Crime Act 1997) and the codes of conduct for investment providers issued by the BMA.

142. A failure to conduct the business in a prudent manner may result in the restriction, suspension or revocation of the investment business licence, the imposition of a civil penalty, and some breaches of the IBA carry liability to a fine or a term of imprisonment[50]. It is important to state at the outset that this case does *not* concern whether Northstar committed a breach of the IBA or the regulations or codes of conduct made thereunder for the purposes of engaging the enforcement mechanisms under the IBA.

143. Under the IBA the BMA is required to issue a statement of principles[51] which it interprets the application of the minimum criteria and is empowered to issue codes of conduct or practice[52] for the purpose of providing guidance as to the duties, requirements, and standards to be complied with. The Minister of Finance is empowered by the IBA to issue regulations[53] with respect to money which investment providers hold in such circumstances as are specified in the regulations (referred to as "client money").

CMR 2004

144. The CMR applies to all investment providers (with the exception of licensed banks). The effect of these regulations needs to be fully understood and so the Court sets out the provisions that are relevant to the present application (so far as material). Again, in order to assist in identifying the most important provisions in the citation of the CMR, the most significant provisions for the present application are highlighted in bold.

145. A number of important definitions are set out in regulation 2:

> ***"client bank account" means an account at an approved bank which—(a) is a current or deposit account; (b) is in the name of an investment providers; and (c) includes the words 'client' or an appropriate description to distinguish the account is an account containing client money, from account containing money belonging to the investment provider;***
>
> *"client money" has the meaning given in regulation 5;*
>
> *"default" means the commencement of liquidation or any insolvency proceedings in any jurisdiction;*

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[49] Also see sections 38-39 IBA.
[50] Eg ss 31, 39, 49 IBA.
[51] Section 9 IBA.
[52] Section 10 IBA.
[53] Section 40 IBA.

"investment provider" has the meaning given in section 40 (4) of the Act;

"money" includes checks and other playable orders in any currency;

"pooling event" has the meaning given meaning given in regulation 13;

146. Regulation 5 defines "client money" (so far as relevant) as follows:

(1) "money in any currency which, in the course of carrying on investment business, ***an investment provider receives or holds (whether in Bermuda or elsewhere) in respect of an investment agreement entered into, or to be entered into with or for a client.***

(2) money is not client money if---
(a) it is immediately due and payable to the investment provider for its own account—
(i) in respect of fees and commissions in a manner which satisfies paragraph 3; or (ii) otherwise, though not, in such a case, if the obligation of the investment provider in respect of which the money is so payable to the investment provider has not yet been performed; and
(b) it is not held in (or it is properly withdrawn from) a client bank account.

(3) Money is not regarded for the purposes of paragraph (2) as due and payable in respect of fees and commissions claimed to be payable to the investment provider unless—

(a) the fees or commissions have been accurately calculated and are in accordance with a formula or basis agreed to in writing by the client;
(b) 14 days have elapsed since a statement showing the amount of those fees or commissions has been delivered to the client, and the client has not questioned the sum specified; or
(c) the amount of fees or commissions has been agreed in writing with the client or has been finally determined by a court or arbitration."

147. Regulation 7 requires investment providers to pay all client money into a client bank account and regulation 8 requires the investment provider to ensure that the money is held in a client bank account with an approved bank and that the title of the account distinguishes the account from any account containing money that belongs to the investment provider.

148. Regulation 9 requires investment providers to pay client money into a client bank account as soon as possible and not later than the next day) or to pay it out which secures that it is no longer client money in accordance with regulation 10, namely paid to the client or to a third party authorised by the client or to a bank account in the name of the client (that is not also in the name of the investment provider) or to pay the proper fees and commissions of the investment provider.

149. Regulations 11 to 15 provide as follows:

Part III
Default Obligations

Purpose of this Part

11. *(1) This Part applies to all client money held by an investment provider so as to create—*

(a) ***a fiduciary relationship between the investment provider and the client, under which the client monies in the legal ownership of the investment provider but in the beneficial ownership of the client****; and*

(b) ***a system of pooling of the beneficial interests of different clients once there has been a "pooling event"****.*

(2) Regulation 12 applies whether or not there has been a pooling event, and regulations 13 and 14 apply after the has been such a pooling event.

12. *(1) Whenever the circumstances are that* ***client money is held by an investment provider in the course of investment business carried on in Bermuda, the client money is held in accordance with these regulations by the investment provider on trust****—*

(a) upon the terms and for the purposes set out in these Regulations;

(b) subject to subparagraph (a), ***for the respective clients for whom that client money is held, according to the respective shares in it****; and*

(c) after all valid claims under subparagraph (b) have been met, for the investment provider itself.

(2) The duties of an investment provider holding client money under these regulations pursuant paragraph (1) ***shall take the place of the corresponding duties which would be owed by it as a trustee under the general law****.*

Pooling events

13. *(1)* ***The power of an investment provider****, in accordance with Part II, to pay money into and out of the accounts in which client monies held is interrupted by the occurrence of the pooling event specified in paragraph (2).*

(2) The pooling events are—

(a) ***the default of an investment provider****;*

(b) the default of an intermediary;

(c) the coming into force of a direction by the Authority in respect of all client money held by the investment provider; or

(d) the default of any approved bank with which any client money held by the investment provider is deposited, in which case regulation 15 applies.

(3) Notwithstanding paragraph (two), a pooling event will not occur, and regulation 15 will not apply, if, on the default of an approved bank or intermediary, the investment provider repays to its clients or plays into our client bank account an amount equal to the amount of client money held on their behalf with their bank or past to that intermediary.

(4) An investment provider shall inform the authority and all affected clients of any pooling event, as soon as practicable after its occurrence.

Pooling

14. *(1) Save as described in this Regulation,* ***where a pooling event occurs, money held in all the investment provider's client bank accounts is pooled, and must be made***

available to meet the claims of clients in respect of whom client money is or should be held in those accounts on a pari passu basis.

(2) Where, ***at the time when a pooling event occurs, client money from a client bank account is in the hands of an intermediary, it shall, on its return to the client bank account, be pooled in accordance with paragraph (1).***

(3) Where client money referred to in paragraph (2) cannot be returned within one month after the pooling event, the investment provider may make distributions from the account in advance of that date if he makes provision for the possibility of such money not being returned.

(4) If any surplus remains in the pool created by the operation of paragraph (1) after all valid claims of clients to money in their pool have been met, the surplus shall be distributed to the investment provider.

(5) Where an investment provider receives money from a client after a pooling event which, but for that event, would fall to be paid into a client bank account that money—

(a) shall be placed in a new client bank account duly opened after the pooling event; and

(b) shall not be pooled with the money held in the investment provider's client bank accounts at the time of the pooling event.

Pooling on default of approved bank or intermediary

15. (1) Where client money is held by an approved bank or an intermediary which defaults or which, following a pooling event by an investment provider, fails to recognize that the money is client money held in accordance with these Regulations—

(a) the money shall—

(i) be pooled separately;

(ii) be made available to satisfy the separate claims of the separate clients pari passu; and

(iii) after the claims described in subparagraph (a) (ii) have been satisfied, be paid into the pool created under Regulation 14 (1); and

(b) the pool created under that regulation shall be applied—

(i) to meet any claims of separate clients that are not separate claims and the claims of other clients (all ranking equally); and

(ii) after the claims described in subparagraph (b) (i) have been satisfied, to meet any unsatisfied separate claims of separate clients.

(2) In this Regulation—

"separate claim" means the claim of a separate client to the value of the money that was or should have been held with the approved bank or intermediary; and

"separate client" means a client whose money was, or should have been, held with the approved bank or intermediary.

The Court's summary of the relevant CMR provisions

150. From the points highlighted in bold above, the key points of importance (in the present context) are:

(i) An investment provider which receives or holds client money must immediately pay that client money into a client bank account, separate from any account in which it holds its own money; that client bank account must be identified as a client bank account, and steps must be taken to ensure that the bank is aware that the money in it represents client money so that any right of set off or combination in respect of the investment provider's own account does not apply to monies held in the client bank account[54].

(ii) Client money is any money received or held by the investment provider in respect to in respect of an investment agreement entered into, or to be entered into with or for a client[55].

(iii) Client money is held on trust for the client (or their respective shares in the client money) for the purposes of giving effect to the regulations and the ordinary duties of a trustee are displaced by the requirements of giving effect to the pooling of client monies if there is a pooling event[56].

(iv) A pooling event occurs when (for the purposes of these proceedings) the investment provider is the subject of a winding up proceeding[57].

(v) Upon the commencement of a winding up proceeding, all client monies held by the investment business provider in client bank accounts are pooled to meet the claims of all clients on a *pari passu* basis. If client money is in the hands of an intermediary at the time a pooling event occurs, it must also be pooled with the other client monies held by the investment business provider[58].

The JPLs' position in summary

151. The JPLs accept that in principle the CMR apply to NorthStar in respect of all of its investment policies issues both before and after the date of the issue of Northstar's investment business licence in 2018[59] and that the investment policies are investments[60].

152. The JPLs also accept and agree that on proper analysis, the investment policies (including the ELFI business) and all of Northstar's insurance business fall within the definition of investment business and are *prima facie* within the parameters of the CMR, with the possible exceptions of (a) any money credited to variable segregated accounts and (b) any money held subject to the MetLife trusts[61].

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[54] Regulations 2, 9 and 10 CMR.
[55] Regulation 5 (1) CMR.
[56] Regulations 11 and 12 CMR.
[57] Regulation 13 CMR.
[58] Regulation 14 CMR.
[59] JPLs submissions at paragraphs 314, 319.
[60] JPLs' submissions at paragraph 337.
[61] JPLs' submissions at paragraph 352

153. However, the JPLs have analysed these SACA and CMR provisions described above and have come to the conclusion that as a matter of law the assets held by Northstar in the assets in the variable investment segregated accounts do not fall to be treated as client monies for the purposes of the CMR for several reasons.

154. The first and most important of these is that the statutory firewall or ring fence that is imposed as soon as assets are linked to a segregated account (which may occur before the receipt of those funds) means that those assets cannot be applied for any other purpose but to discharge the liabilities that apply to that particular account.

155. However, on the basis of the facts that have been presented, and which were accepted by Hargun CJ in the Segregation Judgment, the JPLs' say that at no time did the monies that were transferred to Northstar for the purposes of funding the investment policies issued by Northstar in variable investments become "unlinked" from the relevant segregated account[62].

156. In addition, the JPLs say the CMR only apply to cash assets not the investments that were held by Northstar at the date of registration that were linked to the variable segregated accounts. Therefore, the JPLs conclude that the assets in the variable segregated accounts were not held by Northstar as client monies, were not within the definition of client monies held in a client bank account and consequently are not subject to any requirement to pool the assets for the benefit of all policyholders[63].

157. The JPLs also say that while monies received by Northstar after registration under the IBA could in theory have been subject to the CMR, the procedure followed by Northstar was such that even prior to the transfer of any monies to Northstar, the monies had been allocated to a segregated account (within the meaning of section 2 of SACA[64]) prior to those monies being transferred to Northstar, so that those funds were never in fact held by Northstar as client monies in the relevant meaning under the CMR, but were always subject to the statutory ring-fencing of SACA.

158. In support of this analysis the JPLs referred to the sample transactions which show that even before the client's application was accepted, the documents show the identification of the account owner and the segregation of the investment for the account owner's exclusive benefit[65]. It will be recalled that the investment policies were sold through intermediaries, and the application forms require the prospective investor to set out details of the name of the account owner, the type of investment, the amount of money to be invested, and the identification of a segregated account with an individual account number. The JPLs say that this level of detail was found to be sufficient linkage in the Segregation Judgment. There is no evidential standard, but the JPLs have to be satisfied that there is a sufficient documentary or other reliable linkage in Northstar's records.

159. In relation to payments made by Northstar to policyholders upon redemptions or surrender or termination of policies in accordance with their terms, the allocation of the proceeds of the policy to the particular client and linkage of the asset and its proceeds to a particular

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[62] JPLs Submissions at paragraphs 323-5 and 405.
[63] JPLs submissions at paragraph 358.
[64] Linkage includes by "*an entry or other notation made in respect of a transaction in the records of a segregated accounts company; or an unwritten but conclusive indication.*"
[65] See for example Bundle 7/2 pages 1109-1117, 1387-1395

account and account owner is never lost, even when those funds pass through Northstar's bank account to satisfy the liability to the account owner[66].

160. As a result, the JPLs conclude that SACA requires the liquidator of Northstar to recognise the segregation of these assets and give effect to its terms pursuant to the direct statutory injunction contained in section 25 (1) and without regard to the requirements of the Companies Act 1981 to achieve a *pari passu* distribution of assets among the unsecured creditors on an insolvency as a result of section 25A (3) of SACA.

161. Alternatively, the JPLs take the view that even if the CMR were held to apply to the monies representing the proceeds of redemption (or any other assets or monies if the JPLs' principal submission is not accepted), SACA is directly inconsistent with the pooling obligation contained in the CMR, and as primary legislation, SACA must be given effect, and that the doctrine of implied repeal does not apply[67]. Therefore, any assets or monies linked to a segregated account are not subject to pooling under the CMR.

162. In relation to money held by Northstar that is not held in a segregated account, the JPLs agree that this is client money within the meaning of the CMR and needs to be pooled and distributed to the policyholders (and any other eligible creditors) on a *pari passu* basis. The JPLs say this money is likely to include (i) non-segregated account money (ii) reinsurance recoveries in respect of death benefits associated with policies (excluding MetLife policies) except to the extent that those monies accrue to a segregated account associated with that policy[68].

163. To the extent that there are such client monies (which will be the subject of a future analysis) it will be necessary for the JPLs to perform a tracing exercise to disentangle client money which has been mixed with non-client money, applying conventional tracing principles. Due to the complexity and volume of the records, the JPLs say this is likely to be a difficult, time-consuming and therefore expensive exercise. The JPLs do not consider that it will be fruitful and seek the Court's directions as to whether they should embark upon it. However, the JPLs agree that the result of such an exercise will result in a single unitary trust for the benefit of all the policyholders on a *pro rata* basis, rather than upon trust for any specific policyholders[69].

164. The JPLs do not consider that it is possible to create a new client money account into which to pay monies which were received after the winding up commenced (e.g. on-going premium payments for MetLife policies) which is not to be pooled pursuant to Regulation 14 (5). However, the JPLs say money that has not already been received but is received in the future should be paid into a new client account and applied for the benefit of the particular policy it relates to[70].

165. If these conclusions are endorsed as being correct in law by the Court, the JPLs seek a direction to enable them to proceed to distribute the assets in each of the variable segregated accounts to the variable investment policyholders in respect of Northstar

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[66] See for example the chain of documentary and accounting information relating a to sample surrender transaction in Bundle M7/2 pages 1739-42 and 1743-8 and corresponding banking records at M7/2 page 1753.
[67] JPLs' submissions at paragraphs 175-82.
[68] JPLS' submissions at paragraph 323.
[69] JPLs' submissions at paragraph 427.
[70] JPLs submissions at paragraph 526.

according to their respective individual entitlements to the assets which are held in those accounts without delaying further and without waiting until a meeting of creditors is convened. This is for purposes of efficiency and saving of costs and on the basis that the other policyholders have no entitlement to the assets.

166. The JPLs consider that it is appropriate to admit the claims of Northstar's fixed investment policyholders without the need for formal proof of debt (based on the records the JPLs' have access to) subject to an appeal or objection mechanism, based on a claim for breach of an implied term in the investment contracts to segregate the fixed investment assets properly and convene first meetings of creditors and contributories.

167. Because the CMR do not apply to Omnia's accounts, the directions sought in relation to Omnia do not require extensive analysis of these legal issues. The position is that the variable investment policyholders will be entitled to prove for their entitlements based on the assets linked to their respective segregated accounts. The same directions to those sought in relation to Northstar are also sought for the admission of Omnia's fixed investment policyholders' claims without the need for a formal proof of debt and for directions in relation tot he convening of the first meeting of creditors and contributories.

UNFCU's position in summary

168. UNFCU takes the position on its own behalf as a fixed investment policyholder in Northstar's products and as the non-JPL party (but not as a formal representative party for all fixed investment policyholders) that the CMR requires all assets across each of the constituency of Northstar's policyholders (whether fixed, variable or indexed) to be pooled for the benefit of **all** policyholders on a *pari passu* basis. Northstar's general unsecured creditors will need to be considered separately, because section 36A of the Insurance Act 1978 gives priority to insurance debts, and as there will be an insufficiency of assets to meet all the policyholders' claims, it is likely that the ordinary unsecured creditors of Northstar will not be able to recover from the assets available for distribution.

169. In other words, to continue the analogy the Court drew earlier, it is said that the CMR requires the JPLs to act as the 'beekeeper' of the Northstar 'hive' and drain all the 'honey' from every cell in the honeycomb into a single combined pot to share amongst all of Northstar's policyholders.

170. UNFCU submitted that the central policy objective of the CMR is that all investors should share equally in the common misfortune of the failure of the investment business[71]. That requires all client money to be pooled and (after deduction of proper administration and liquidation expenses) to be distributed rateably among the clients who are beneficially entitled to it[72].

171. UNFCU submitted that the requirements to keep client monies in client bank accounts and pooling of those accounts on a failure of the investment provider in the CMR are mandatory, cannot be contracted out of, and the management's failure to comply with the

[71] UNFCU Submissions at paragraphs 16 and 288.
[72] UNFCU submissions at paragraph 6.

requirements of the CMR cannot be relied upon to deny the rights of policyholders to the protections afforded thereby[73].

172. UNFCU also pointed out that the result that would be achieved by the application of segregation to the assets would be to deprive one group of creditors of almost any meaningful recovery while at the same time allowing another group of creditors to recover almost fully as a result of the "happenstance" of what type of investment product an investor had purchased[74]. It was submitted that this would an egregious breach of trust and an unjust and unprincipled result that the Court should not countenance[75].

173. UNFCU submits that the result of applying the CMR and pooling all the assets held by Northstar (including those held under the MetLife trust structures[76]) would achieve a pro rata distribution to all creditors and fulfil the policy objectives of the IBA which is the protection of investors.

174. UNFCU submitted that because the CMR was not raised by any of the parties before Hargun CJ, the conclusions in the Segregation Judgment are rendered unreliable, at least insofar as those findings do not consider the impact of the CMR on the failure to segregate the assets that relate to the fixed investments.

175. In their written submissions UNFCU contended that the decision of Hargun CJ was decided *per incuriam*[77] and therefore should not be followed by this Court. In oral argument UNFCU submitted that this Court does not need to go that far; it was submitted that this Court could hold that the statements of general principle as to the effect of linkage and segregation in the Segregation Judgment are correct so far as they go, but that this Court must apply the CMR to the facts before this Court on this application, and conclude that on the present facts the CMR override the provisions of SACA.

176. Alternatively, UNFCU submitted that even if the JPLs' submissions are correct in relation to the effect of SACA on the assets held by Northstar in the variable segregated accounts, once those assets are turned into money upon a surrender or a partial surrender, or a payment of a death benefit, those cash proceeds become "client money" when they are received by Northstar into Northstar's account and before they are transmitted onwards to the policyholder in satisfaction of the policyholder's rights. It was submitted that these funds need to be paid into a client bank account and must be pooled for the benefit of all policyholder claimants.

177. UNFCU pointed to the following factual points in support of this submission. The first point is that the policyholder must close the segregated account in order to make a surrender or to claim payment of any proceeds of a life policy upon maturity (or the happening of the "event" that triggers liability under the ELFI)[78]. Thus, UNFCU submitted

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[73] UNFCU submissions at paragraph 12.
[74] UNFCU submissions at paragraph 60.
[75] UNFCU submissions at paragraphs
[76] UNFCU submissions at paragraph 64.
[77] UNFCU submissions at paragraphs 5 and 40.
[78] See Bundle 5/2 page 802: *"The Segregated Account shall be closed by the Company when the contract terminates and as soon as practicable after the closure the Company shall distribute the property attributable to the Segregated Account in accordance with the terms of the Contract."*

that the protection afforded by segregation is broken, and the assets become (in effect) unlinked.

178. The second point is that once the surrender form is submitted closing the account, the intermediary authorises the trade to sell the appropriate number of units to raise the amount of money required to meet the cash surrender value or the liability under the contract. This means that the property in the segregated account is not specific property to which any proprietary interest attaches, and the cash representing the sale of the units is simply their equivalent cash value.

179. The third point is that the liability under the policy is a liability of Northstar, not the segregated account. Northstar uses the proceeds of sale of the units to satisfy its own liability to the policyholder.

180. It was submitted that the proceeds of the surrender of policies therefore meet the definition of client money in regulation 5 of the CMR as being money that "*an investment provider* ***receives or holds*** *(whether in Bermuda or elsewhere)* ***in respect of an investment agreement*** *entered into, or to be entered into with or for a client.*"

181. Accordingly, it was submitted that this money must be pooled and is available to meet all the claims of all policyholders of whatever type on a *pari passu* basis. It was submitted that all Northstar policy surrenders and distributions must follow the same pattern, and consequently all assets held by Northstar in all the variable investment segregated accounts will have to be converted into "client money" and thus will have to be pooled.

182. It is to be noted that the position of Omnia is unaffected by UNFCU's submissions as it was accepted by UNFCU that the CMR never applied to Omnia. The Court infers that, in this respect, no challenge is made to the JPLs' analysis of the application of the principles set out in the Segregation Judgment or the JPLs' conclusions on the legal effect of SACA on the distribution of assets to the variable investment policyholders.

The principles of statutory interpretation

183. The Court's primary task on this application is to determine whether the CMR overrides SACA. This engages the Court in applying the conventional principles of statutory interpretation to the provisions of (i) SACA (ii) the Northstar Amendment Act 2018 (iii) the IBA and (iv) the CMR.

184. This involves two exercises in this case: the first is to determine the legislative intention of Parliament in construing the provisions of SACA and the Northstar Amendment Act 2018 and the Minister of Finance's intention in promulgating the CMR by way of delegated authority under the IBA; and the second is (in the event of a conflict between the two) to consider to what extent the CMR has repealed the application of SACA in relation to SACs which conduct investment business (and are governed by the CMR).

General principles of statutory construction

185. The conventional approach to statutory interpretation has been considered in numerous cases and is conveniently encapsulated in a statement of the relevant principles in the

judgment of Hargun CJ in **Re Jardine Strategic Holdings Ltd**[79] (and applied in the Segregation Judgment). These principles are:

(i) The sole object of statutory interpretation is to arrive at the legislative intention… In construing that intention [the court] has regard to the language of the section, its statutory context, and broader policy considerations" Per Hellman J in **MFP—2000 LP Viking Capital Limited** [2014] Bda LR 6 at 32.

(ii) The primary indication of legislative intention is the legislative text, read in context and having regard to its purpose. The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose: **Barclays Mercantile Finance Ltd v Mawson** [2014] UKHL 51 at [28]. As Lord Bingham explained in R (Quintavalle) v Secretary of State for Health [2003] UKHL 13 at [8]:

> "*the basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty... Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.*"

(iii) A statute should be read as a whole, so that one of its provisions "*is not treated as standing alone but is interpreted in its context as part of the instrument*" (Bennion on Statutory Interpretation (8th edition) ("Bennion"), [21.1]. Accordingly, the court's task is to "*identify the meaning borne by the words in question in the particular context.*" This is an objective, rather than a subjective, exercise (**R v Environment Secretary, ex parte Spath Home Ltd** [2001] 2 AC 349, 396 (Lord Nicholls)).

(iv) When identifying the intention of Parliament, the court will assume Parliament "*to be a rational and informed body pursuing the identifiable purposes of the legislation it enacts in a coherent and principled manner*" (**R (N) v Walsall Metropolitan Borough Council** [2014] PTSR 1356 [65] (Leggatt J)).

(v) The court will take into account the state of the previous law and it evolution (Bennion [24.5])

> [*At its most basic level, the purpose of an act is normally to make changes to the law. In order to understand the meaning and effect provision it is essential to understand the state of the law at the time the act was passed. The court cannot soundly judge the mischief that the provisions intended to remedy unless it knows the previous state of the law, the defects found to exist in that law, and*

[79] [2022] SC (Bda) 27 Com at 37.

the facts that caused the legislature to pass the legislation. Moreover, an Act is drafted against the backdrop of general legal principles with a view to the Act taking its place in the wider scheme of statutory and common law rules. The courts will often look to the previous law to support a particular construction.[80]]

(vi) The court will seek to avoid a construction that produces unreasonable or absurd results, and *"the more unreasonable a result, the less likely it is that Parliament intended it*" (Bennion [26.3] (Lord Millett)).

(vii) Where a statute permits the expropriation of property, it should be construed strictly in favour of the party whose property is to be expropriated (Bennion [27.6]; **S Franses Ltd v Cavendish Hotel (London) Ltd** (2018) 3 WLR 1952 [16] (Lord Sumption) **Re Changyou.com Limited**, FSD 120 of 2020 (28 January 2021) (Smellie CJ, [52-54]).

186. To these principles, UNFCU added three additional points[81]:

(i) Effect must be given to the legislation as a whole (**R v J** [2004] UKHL 42 at [5]) "It is the duty of the court to give full and fair effect to the meaning of a statute...It must seek to give effect to all the provisions of a statute. It cannot pick and choose, giving effect to some and discounting others..."

(ii) That principle extends to the general legal rules and principles operating in the body of law, of which the new legislation becomes a part: **R v Sec of State for the Home Department, ex p Pierson** [1998] AC 539, 573 per Lord Browne Wilkinson. A statute will usually rely for its effectiveness on general legal rules and principles operating in the body of law of which becomes part: see also **Wisely v John Fulton (Plumbers) Ltd, Wady v Surrey County Council**: [2000]2 All ER 545, 548 (Lod Hope).

(iii) The existing law is sometimes used to supplement an act where it is silent on honest. This is so frustrating an issue or fails to address it adequately, but the courts will not allow it to be used in a way that cuts across legislative scheme. In **Shilo Spinners Ltd v Harding** [1973] AC 691 at 724-5 Lord Wilberforce said:

> *"In my opinion whether courts have established a general principle of law equity, and the legislature steps in with particular legislation in a particular area, it must, unless showing the contrary intention, be taken to have left cases outside that area where they were under the influence of the general law."*

[80] This passage was not quoted by Hargun CJ but was added by UNFCU as a relevant extract from the case cited by Hargun CJ.
[81] UNFCU's submissions at paragraph 67.

Presumptions

187. In construing a statute, the court will apply the ordinary and natural meaning to the words used, taking into account the context they are used against the background to the statute when read as a whole[82].

188. The court will strive to give those words effect but will apply a number of presumptions where there is an ambiguity or potential ambiguity in the meaning of the words to assist the court in reaching a conclusion that is consistent with those presumptions[83].

189. The relevant presumptions in the present context are (i) a presumption against unfairness, or against absurd or unreasonable or arbitrary results and (ii) a presumption against expropriation of property or property rights[84].

190. However, these presumptions will be displaced by clear language to the contrary[85].

Implied repeal

191. The general principle is that a later Act of the legislature is inconsistent with an earlier Act, the later Act by implication amends the earlier so far as is necessary to remove the inconsistency between them[86].

192. Where the provisions of an Act are inconsistent with the provisions of an earlier Act, the earlier provisions may impliedly be repealed by the later. There is a general presumption Against implied repeal, the strength of which varies according to the context. The presumption against implied repeal is particularly strong where general provision in an Act covers a situation for which specific provision is made in an earlier Act[87].

Application of the principles

193. The Court has therefore endeavoured to take these principles into account when tackling the problems presented by the submissions made by the JPLs and UNFCU. The Court will analyse the ordinary and natural meaning of the words used by the draftsperson in the respective provisions that are engaged, taking into account the purpose of the legislation and the context of the relevant provisions against the background of the whole legislation, and where it fits in the legislative firmament, and taking care to construe any ambiguities or uncertainties to avoid an irrational, absurd or nonsensical result.

194. The starting point is to determine the ordinary and natural meaning of the legislation that needs to be interpreted, before considering whether any of the judicial aids to interpretation need to be deployed to assist the Court in coming to a view as to the meaning of the particular provision that is to be applied.

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[82] This is traditionally referred to as the 'golden' rule of statutory interpretation: *Craies on Legislation* (13th Ed) (2016) at 17-002.
[83] *Craies on Legislation* at 19-004-6 and 19-017.
[84] *Craies on Legislation* at 19-012.
[85] *Craies on Legislation* at 19-004.
[86] *Bennion Bailey and Norbury on Statutory Interpretation* (7th ed) (2017) (referred to as "*Bennion*" hereafter) at principle 8.4
[87] *Bennion* principle 8.9.

The Court's Analysis

The ordinary and natural meaning of SACA

195. In the Court's view, SACA makes it clear that assets that have been linked to a segregated account may only be applied to discharge the liabilities associated with that account or by distribution to the account owner(s). The assets in a segregated account must not be used to discharge the liabilities attaching to another segregated account and may not be intermingled with or paid to the SAC itself, so that the assets never fall within the assets of the SAC that are available to satisfy the SAC's own liabilities. A liquidator must apply the same approach and is bound to give effect to the protection afforded by segregation, notwithstanding any provision of law to the contrary. The relevant provisions are set out above and will not be repeated.

Legislative purpose

196. The Bermuda court has explained the legislative purpose behind these provisions in several cases. For example, in **UBS Fund Services (Cayman) Limited and Tensor Endowment Fund v New Stream Capital Fund Ltd**[88], Kawaley J (as he then was) explained:

> *"The advantage the advantage of a segregated accounts company therefore is to allow the company to "ring fence" certain of its assets without incurring the expense and complications of incorporating, and in certain cases licensing, a separate company to hold the segregated assets, or having to resort trust or contractual structures. These types of companies are noticeably becoming more in demand in the insurance, funds and structured finance fields. Bermuda, BVI and the Cayman Islands have all recently introduced legislation to permit these types of companies.*
>
> *Bermuda was one of the first offshore jurisdictions to implement protected cell legislation in 1991. The legislation was initially drafted on a case-by-case basis through a private act regime to cater for the demands of Bermuda's insurance industry. Bermuda enacted public legislation, the segregated accounts companies act (the "SACA") in 2000. The Segregated Accounts Companies Amendment Act 2002 amended the SACA and the legislation now establishes a system of registration so that segregated accounts companies ("SACs") may be created speedily and with the flexibility necessary to respond to the needs of international business. Further tidying up amendments were made by the Segregated Accounts Companies Act 2004.*
>
> *The following description of the principal legal characteristics of segregated accounts in O'Neill & Woloniecki [On Reinsurance] is also instructive:*
>
> *"A core concept of the Bermuda public legislation is that the establishment of a segregated account does not create a separate legal person from the SAC. The SAC itself is of course a separate legal entity from its shareholders. Although the SAC Act makes it clear that a segregated account is not a separate legal entity, the legislation confers some of the attributes of a separate corporate personality on a segregated account which contributes the legislation provides shall be exercised by the SAC itself acting on behalf of the segregated account. So, the SAC act provides that the SAC may*

[88] [2009] Bda LR 74 at paragraphs with 21-2.

sue and be sued in respect of a particular segregated account and expressly permits the property of a segregated account to be subject to order of the court as if it were a separate legal person. In addition, the legislation expressly provides that transactions between the company itself in respect of one party and a third party shall have legal effect as if entered into between the SAC itself and the third party." "

197. In a second case involving the same SAC, **BNY AIS Nominees Ltd et al v New Stream Capital Fund Ltd**[89], Kawaley J also went on:

> *"The [SACA] Act provides a statutory framework for companies to which the Companies Act 1981 applies to be registered as and to operate as segregated account companies. The traditional corporate concepts are also both as regards the internal relations between the SAC car company and its shareholders ("account holders"), and as regards the external relations between the company and third parties with which the company deals on behalf of a segregated account ("counterparties"). Irrespective of what commercial context the drafters of similar legislation elsewhere had in mind, the Bermuda legislation certainly contemplates insurance and reinsurance companies and mutual funds registering under the Act...*
> *...Section 15 of the Act also makes specific provision for share redemptions in the case of mutual fund companies out of assets linked to the segregated account. The Act also requires the company to keep separate accounting records. For each segregated account and to maintain a separate fund for such accounts distinct from its general account. Where a SACA company enters into transactions with third parties on behalf of segregated accounts, the transactions must be linked to the relevant segregated account. The internal and external relations of a separate company in relation to a segregated account are primarily governed by the "governing instrument", which will be (depending on the relationship at issue) bye-laws and any prospectus or offering document or the contractor other document evidencing a transaction with third parties linked to a segregated account. However, it is not possible to contract out of the statutory requirements for the assets and liabilities of a segregated account to be segregated.*
>
> *The immunisation of segregated accounts from the risk of insolvency flowing from commercial risks the account is not assumed as one of most important commercial and legal objects of the framework created by SACA. Thus, a SACA company can only be wound up with its general account is insolvent and the assets and liabilities of the segregated account may not be taken into account in determining whether the company is in this sense insolvent. Moreover, if the company is placed into liquidation, the liquidator must ensure that assets of the segregated account are only applied to meet the liabilities of account, unless one segregated account as an actual liability to another account. The notion of the segregated account as a "company within a company" is reflected in the receivership regime which is created for winding up the business of the segregated account....*
>
> *In summary, the Act does contemplate segregated accounts entering into transactions under which their assets may be applied to meet the liabilities of other segregated accounts or third parties. But in an insolvency situation, the Act envisages that the assets of each segregated account will be applied in accordance with whatever contractual arrangements are linked to the relevant accounts....*

[89] [2010] Bda LR 34 at paragraphs 89-96.

.....the Bye laws of the defendant (and perhaps the loan documentation as well) must seemingly be read as containing an implied term that the assets of the plaintiff's segregated accounts should not be available to meet the claims of other segregated accounts or other creditors as well..."

198. In **Ivanishvili and Others v Credit Suisse Life (Bermuda) Limited**[90], Hargun CJ (as he then was) adopted with approval the statements cited above and added:

"The concept of a segregated accounts company was introduced in Bermuda in 2000 by the SAC Act. The concept of a segregated accounts company is that the company, as a separate legal entity, may create segregated accounts such that the assets and liabilities of each segregated account are separate from the assets and liabilities of each other segregated account. A segregated accounts company comprises (i) a general account containing assets and liabilities which are separate from the assets and liabilities of other segregated accounts; and (ii) the segregated accounts. A fundamental feature of a segregated accounts company is that assets linked to the segregated account may only be used to discharge liabilities which are linked to that segregated account. This fundamental feature is reinforced by a number of provisions set out in the SAC Act.

The requirement of an asset or liability been linked to the segregated account is central to the concept and functioning of a segregated accounts company...."

199. From these statements, it is clear that the mechanisms of a segregated accounts company created by SACA require the segregation of assets and liabilities of each segregated account to be given effect and maintained both during a SAC's operational life and in its liquidation. There is, in the Court's judgment, no ambiguity or uncertainty in understanding or applying the terms of these provisions. The Court did not understand UNFCU to contend that there was any uncertainty, but rather only that the effect of SACA's provisions was overridden by the CMR. There is therefore neither need nor room to apply any interpretative aid to supply a gloss to the meaning of SACA's terms: they are clear.

200. The objective of SACA is to provide a flexible corporate structure to promote the development of the international financial business sector, which is central to the Islands' economy.

The legislative purpose of the IBA and the CMR

201. The CMR were introduced under the power conferred on the Minister of Finance in section 40 of the IBA that the Minister may make regulations with respect to money (referred to as client money) which investment providers hold.

202. It was submitted by Mr. Chivers KC on behalf of UNFCU that although expressed in slightly different terms, the CMR were the Bermuda version of the rules that apply under CASS 7 in the United Kingdom[91], and that cases decided on the meaning of CASS 7 are

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[90] [2022] SC (Bda) 56 at paragraphs 24-5.

[91] CASS 7 is short for Client Assets Sourcebook issued by the UK Financial Services Authority in implementation of the Markets Financial Instruments Directive 2004/39/EC. *"The central feature of the client money rules is the requirement imposed on regulated firms to segregate money that they receive or hold for or*

instructive, both as to interpretation and as to the policy and purpose that lies behind the CMR.

203. The policy and purpose of the pooling rules have been described by Lord Dyson in **Re Lehman Brothers International (Europe) (In Administration)**[92] in the following terms:

> *"The purpose of the scheme (as required by the Directives) is to provide a high level of protection to all clients and in respect of client money held in each money account of the firm. That purpose would be frustrated if the protection were restricted in this way. As Mr. Miles and Mr. Crow point out, bifurcated scheme would provide clients with different levels of protection based on the happenstance of whether the firm has segregated money on behalf of their client. That is an arbitrary basis for a scheme which is intended to provide protection to all clients who entrust their money to a firm. It is unlikely that the draughtsman of CASS 7 intended the scheme to have this effect. It is improbable that the draftsman contemplated that there would be two regimes substantially in operation for the distribution of client money (one under the CASS 7 rules set up for the purpose and one under equitable tracing principles outside CASS 7).*
>
> *There is the further point that, in view of the overriding purpose of the scheme, it is unlikely that client money which had yet to be segregated under the alternative approach was intended to be treated differently from client money the which have been segregated, whether under the normal approach for the alternative approach."*

204. In point of clarification, the references to segregation in the above passage do not refer to segregation under any equivalent provision to those set out in SACA. The reference to segregation relates to the obligation under the CASS 7 rules to establish separate client money accounts into which client money is to be paid, i.e. the equivalent of Regulations 7 and 8 of the CMR. In the **Lehman Bros** case, the competition was between the application of CASS 7 client account rules and application of the equitable rules of tracing to claims made against funds held in accounts which were not segregated from Lehman Brothers' own accounts.

205. In relation to the pooling obligations contained in CASS 7, it was submitted by Mr. Chivers KC that in relation to recovery from a failed investment provider, the CMR expressly requires distribution of all client monies to policyholders on a *pari passu* basis[93]. Reliance was placed on the *dictum* of Lord Briggs JSC in **Equity Trust (Jersey) Ltd v Halabi**[94] that the *pari passu* rule of distribution may not do perfect justice in every case, but

> *"there is an inherent justice and equal division, or people sharing a common misfortune, which is captured by the equitable maxim that equality is equity."*

206. The Court agrees that the provisions of the CMR are intended to provide clients of an investment provider protection in the event of the failure of the investment provider. The question of how far that protection extends depends upon the proper construction of the

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on behalf of their clients in the course of their business by placing it into an account so that it is kept apart from the firm's own money." See **Re Lehman Brothers International (Europe) (In Administration)** cited below per Lord Hope JSC at paragraph 1.)

[92] [2012] UKSC 6 at paragraph 166 (hereafter referred to as the **Lehman Bros** case).

[93] Regulation 14 (1) CMR.

[94] [2023] AC 877 at paragraph 277.

specific provisions of the CMR that are engaged by a "pooling event". These are addressed below.

Court's analysis of the CMR

Client money

207. There are several important points to consider before assessing the overall impact of the CMR on the assets which are held by Northstar in its segregated accounts. The first is the meaning of "*client money*" in CMR Regulation 5.

208. In the Court's judgment there is no doubt that this simply means money in the conventional sense of cash or a credit in a bank account or wire transfer of funds in a currency: this is clear from the definition of "*money in any currency which an investment provider receives and holds in respect of an investment agreement*" and the definition of what is not client money, namely monies due for the payment of proper fees and commissions to the investment provider.

209. This is relevant because the obligation to pay client money into a client bank account under CMR Regulations 7 and 8 can only apply to money in the conventional sense and does not apply to the assets which have been purchased or the units or shares of a mutual fund or other investment instrument into which client monies have already been invested. This is consistent with the discussion about "*client money*" in the **Lehman Bros** case[95].

210. This must in turn mean that upon the happening of a pooling event, there is no obligation on the part of an investment provider to cash in or realise the investments held by it on behalf of clients (leaving aside the particular structures used in Northstar's case) so that the cash value of those investments can be pooled and distributed to policyholders. The pooling obligation can only apply to client money held by Northstar in its own accounts which ought to have been held in client money accounts (remembering that on the facts of the case, Northstar did not in fact open any client bank accounts under Regulation 8 of the CMR).

The date of the pooling event

211. A second important point is what is the date of the pooling event. This point is important for two reasons. The first is that it determines what the relevant date is for the pooling obligation, and second it defines what client money is affected by the pooling obligation.

212. The date of default is defined as the commencement of the winding up of Northstar, which is the date of the presentation of the petition (i.e 20 September 2020). This is the effect of section 167 (2) of the Companies Act 1981[96]. However, the JPLs submit that the correct date for the pooling event is the date of the Winding Up Order (i.e. 26 March 2021) on the

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[95] At paragraphs 35-45 and the summary of the assumed facts at 51 per Lord Walker JSC: *"[LBIE] regularly and on a daily basis handled money in more that 50 currencies on behalf of more than 1500 clients in different time zones...Client money would be paid directly into and out of LBIE's own bank accounts...and LBIE would segregate money by making a single daily reconciling payment to bank accounts used exclusively by LBIE in order to segregate client money."* Although Lord Walker was in the dissenting minority there is no disagreement about these facts which were adopted by Lord Dyson and the majority.

[96] *"...the winding up of a company shall be deemed to commence at the time of the presentation of the petition for the winding up".*

basis that (i) the presentation of the petition may not result in a Winding Up Order being made and (ii) the date of the Winding Up Order is the conventional date for the valuation of claims in a liquidation[97].

213. The Court feels unable to accept the JPLs' submission on this point because (i) the clear definition of the event of default is the commencement of the winding up which is defined by reference to the Companies Act 1981 (ii) the effect of the pooling event is not intended to value the client's claims to recovery in the liquidation, but rather (for the reasons given below) to allow for the speedy return of uninvested cash held by the investment provider to the clients. This is on the basis that the beneficial interest in those monies is retained by the clients until they are invested, when the monies are no longer held in the client money account. In the Court's view, the potential for delay between the presentation of the petition and the Winding Up Order would lead to uncertainty, and undermine the immediate protection that the draftsman intended to achieve by providing a mechanism to return the uninvested cash held at the moment the winding up proceedings are initiated.

214. The significance of the date of the commencement of the winding up is that this is the date at which the obligation to pool client monies arises. Regulation 14 (1) states that where a pooling event occurs money held in all the investment provider's client bank accounts is pooled and this includes all client money which ought to be in the client bank account but was not held in a client bank account. Regulation 14 (2) adds to that an obligation to pay into a client bank account any money received from an intermediary after the pooling event that was due in relation to an investment contract as at the date of the pooling event: ie monies in the hands of intermediaries on 30 September 2020 which were due to be paid to Northstar.

215. It seems clear that there is no obligation to pool client monies received by an investment provider that fell due for payment *after* the date of the pooling event because Regulation 14 (5) states that

> *"where an investment provider receives money from a client* ***after*** *a pooling event which, but for that event, would fall to be paid into a client bank account, that money—shall be placed in* ***a new client bank account****...and (b)* ***shall not be pooled*** *with the money held in the investment provider's accounts* ***at the time of the pooling event.***"
>
> (Emphasis added)

216. In the Court's view, the inevitable conclusion that has to be drawn from this provision is that the pooling is only intended to relate to the position as it stood on the date of the presentation of the petition.

217. This conclusion also has implications for Mr. Chivers KC's more subtle argument that when the JPLs realise the assets which back the investments in order to meet the liability to pay out on a surrender or termination of a policy, the units or mutual fund holdings are sold and converted to cash, those monies have to be converted into cash and become "client monies" which are subject to the obligation of pooling.

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[97] **Re Lines Brothers** (supra).

218. The Court does not accept that submission because the clear meaning of the requirement to pool client monies held by Northstar is as at the date of the commencement of the winding up. It is not an ongoing duty to pool; on the contrary, Regulation 14 (5) (b) expressly provides that when monies have been received by an investment provider from a client *after* a pooling event, those monies shall *not* be pooled. This can only mean that the pooling obligation is only in respect of client monies held at the point in time when the liquidation is deemed to have commenced. Nothing in the Regulations suggests that a pooling obligation arises again at a later point in time, i.e. in the course of the distribution of assets in a liquidation.

219. Regulation 14 (3) permits the investment provider to make a distribution of pooled client monies which are in the hands of an intermediary to clients and which have not yet been returned to the investment provider within one month of the date of the pooling event, provided the investment provider makes provision for the possibility of such money not being returned to the investment provider.

220. The Court considers that this provision is intended to ensure that the investment provider takes into account that client monies which it is entitled to recover from an intermediary may not in fact be returned when it makes a return of an investor's monies, so that any *pari passu* distribution of the pooled monies does not overestimate the ultimate recovery.

221. There was discussion about whether the intention behind allowing the investment provider to return the pooled monies within a month is an indication that this is intended to be a speedy process of return of their monies at the beginning of the liquidation. On the other hand it was suggested that the provision is aimed at determining who is entitled to have a claim on the pool.

222. The precise meaning of this aspect of the Regulation is a little obscure. There is no evidence that there were any such monies that were in the hands of Northstar on the date of the commencement of the winding up which needed to be pooled, so the meaning may not have a significant impact in this case.

223. However, on the conventional application of the rules in a liquidation, a liquidator cannot make a distribution until (i) proofs of debt have been admitted and (ii) there is a distribution by way of dividend (subject to any other directions which may be made by the Court within the Winding Up Rules 1982 or the court's general powers). No reference is made in the CMR to the interrelation between the CMR and the Winding Up Rules 1982 or the general rules for liquidation, even though the whole structure of the CMR is designed to address pooling of client monies on the winding up of the investment provider.

224. It seems to the Court that the only viable interpretation of Regulation 14 is that it is intended to override the general rule in an insolvency that no payments can be made by the liquidator until a distribution is made in the liquidation. Instead, the Regulation directs the liquidator to make an immediate return of any client monies held in a client bank account (or monies which should have been put into a client bank account) on a *pari passu* basis as at the date of the commencement of the liquidation and before the conventional realisation of assets and payment of liabilities to creditors in general.

225. This seems to be intended to ensure that any monies received by an investment provider on the date the liquidation commenced which have not been invested can be returned to

the investor without being caught up in the full liquidation process, resulting in share in a dividend with all the other creditors of the estate in (usually) many years' time, after deduction of the costs and expenses of the liquidation, before getting any of his or her money back. The policy reason behind seems to have been that if monies have been received by investors which are in liquid form and have not been invested on the date of the commencement of the liquidation, then there is a good chance that clients will be able get all or most of their uninvested money back in short order.

226. This seems to be the only workable interpretation of the provision because the pooling event is expressly triggered by the commencement of the liquidation of the investment provider, and because the draftsman must be taken to have appreciated that a return of client monies at this stage would be a departure from the normal course in a liquidation of the investment provider.

227. This interpretation is consistent with the description given of the purpose of CASS 7 given in the **Lehman Bros**[98] case, reflecting the purpose described in CASS 7.9.2 G that the client money distribution rules *"...seek to facilitate the timely return of client money to a client in the event of the failure of a firm [investment provider]..."*

> *"These elementary principles were adopted by section 139 of the Financial Services and Markets Act 2000...when the rule making powers conferred on the FSA relating to the handling of client money were being formulated. CASS 7 provides for the segregation of client money, and it creates a statutory trust over client money to support and reinforce the purposes of segregation. This ensures that money is kept separate and not used for the firm's own purposes. It protects the segregated funds from the claims of the firm's creditors in the event that protection is most needed, which is the firm's insolvency.* ***It also enables client money to be returned to the clients without delay, as it is beyond the reach of the firm's creditors.*** *If the system works in the same way as it does under the accounts rules that regulate the activities of solicitors, the client whose money has been segregated will be assured that their client money entitlement* ***is not depleted by having to share the money in the client's account with others who may have claims against the firm****, such as those whose client money has not been segregated, and those for whom the firm does not hold any client money at all."*

(Emphasis added)

Trust money

228. Mr. Chivers KC emphasized the importance of Regulation 12 which provides that when client money is held by an investment provider it is held upon a purpose trust and the duties of the investment provider as a trustee under the general law are replaced by the duties under Regulation 12.

229. In the Court's judgment this provision is clearly limited to client money held at the time of the commencement of the winding up and does not extend to other assets which are held by the investment provider, namely in this case the assets held in the segregated accounts that back the investment policies. The assets held in the segregated accounts (i.e. the units

[98] At paragraph 3 per Lord Hope. Although Lord Hope was in the dissenting minority, there was no disagreement about his statement of the general purpose of CASS 7.

and shares in mutual funds) are plainly not client monies within the definition in Regulation 5.

230. The 'purpose' of the trust is defined in Regulation 12 as (a) upon the terms and for the purposes set out in the CMR (b) subject to (a), for the respective clients for whom that client money is held and (c) after all valid claims under (b) for the investment provider.

231. The only *purpose* that is set out in the regulations is in Regulation 14 to pool the client monies and return the monies held in the client bank accounts to the clients in their respective shares and proportions on the date of the commencement of the winding up. The purpose trust does not, in the Court's judgment, have any wider impact and does not apply to the assets held by the investment provider generally, and therefore does not impact the assets held in (or linked to) each of the variable segregated accounts.

The failure to create client bank accounts

232. It was suggested by Mr. Chivers KC that the JPLs could not rely upon Northstar's breaches of duty under the CMR to pay client monies into a client bank account to avoid complying with the CMR[99]. However, although no client bank accounts were established, the Regulations provide that any client monies that are held by the investment provider on the commencement of the liquidation (i.e. on the presentation of the petition on 20 September 2020) that ought to have been held in a client bank account must be pooled. The Regulation provides its own remedy for a breach namely, to treat monies held by Northstar which were in reality client monies as being subject to the requirement of pooling.

233. Had Northstar not been a SAC, the JPLs would have had an obligation to establish whether any client monies were held by Northstar *on that date* which ought to have been held in a client bank account. But because Northstar is a SAC, the question is whether those client monies were already linked to a segregated account at the time that they were received in Northstar's account.

Inter-relationship of the CMR with SACA

234. Mr. Chivers KC argued that the CMR had the effect of repealing or at least overriding SACA insofar as investment providers are concerned. The Court does not accept this submission.

235. The CMR were introduced in 2004 and have been amended from time to time since then, including amendments which were made as recently as 2022[100]. SACA has been in force since 2000, and the wide use of SACs in insurance and collective investment schemes and mutual fund investment vehicles is well understood by the BMA and the Ministry of Finance. If it had been the intention of the Minister of Finance that the CMR should have the effect of repealing or disapplying SACA, it is remarkable that there is no reference to any intention to override or repeal any aspect of any other law, except insofar as the duties of an investment provider as a trustee under the general law are varied with respect to the performance of the purpose trust objectives in Regulation 12.

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[99] UNFCU submissions at paragraph 12.
[100] E.g. Regulations 6 and 9 CMR.

236. Furthermore, the requirements of segregation are expressly set out in SACA and are said to apply notwithstanding any other provision of law to the contrary[101]. This indicates a clear legislative intention to have primacy over any other legislation. The CMR has no such indication.

237. The segregation of assets and liabilities linked to a segregated account are central to the viability of a SAC as a vehicle through which to conduct insurance and reinsurance business, as well as mutual fund investment business. The inviolability of the principle of segregation underpins the public purpose and policy of the legislature in creating these flexible structures for use in the offshore financial sector in Bermuda, which is a main pillar of the island's economy. The Court would therefore expect that any departure from the clear objective of SACA to grant absolute protection to assets held in segregated accounts would be explicitly set out in any subsequent legislation or delegated legislation made under another regulatory Act such as the IBA, especially one that is also concerned with the regulation of international financial services. There is no such indication.

238. It is notable that the draftsman of the Northstar 2018 Amendment Act recorded in the preamble that the purpose of the amendment Act was to replace an outdated provision of the Northstar 2008 Act, and ensure compliance with the IBA, the draftsman also included in section 4 (3) an express provision that:

> *"...Any issue of a Financial Instrument from the commencement of this Act shall be governed by the Investment Business Act 2003* ***and the Segregated Accounts Companies Act 2000.***"
>
> (Emphasis added)

239. This suggests that the provisions of SACA were not to be overridden by the CMR but read alongside the CMR, and that the two regimes were not considered to be mutually inconsistent.

240. In any event, for the reasons already explained, in the Court's judgment, the CMR only applies to client monies held by Northstar in its own accounts (but which ought to have been in a client bank account) as at the commencement of the liquidation, and not to other assets. Therefore, there is no direct clash of incompatible legislative provisions. The CMR does not affect and does not purport to affect the segregation of assets under SACA.

241. Even if there were an inconsistency, the Court is of the view that the provisions of SACA override and take priority over the CMR by virtue of the express provisions that say so. The Court therefore rejects the submission that the CMR has directly or indirectly repealed or overridden the provisions of SACA. In the Court's judgment, the CMR only applies to the limited class of client monies which represents uninvested cash which is held by an investment provider on the date of the commencement of the winding up, in order to achieve a speedy return of client monies to clients without having to make a claim in the liquidation. This is because the beneficial interest in those uninvested funds is treated as being still vested in the clients.

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[101] Sections 17 (2), 18 (1), 24 (1) and 25 (1) of SACA.

242. The CMR do not apply to the assets held in Northstar's segregated accounts. The CMR is not a comprehensive code which applies to the winding up of investment providers and does not purport to displace the ordinary rules which apply to the distribution of an investment provider's assets upon a winding up. In the case of investment providers which are incorporated, the Companies Act 1981 and the Winding Up Rules 1982 apply to the distribution of the assets on a liquidation, which (after payment of liquidation expenses and preferred claims) results in a *pari passu* distribution of assets to ordinary unsecured creditors in the conventional way.

243. In the case of a SAC, the ordinary rules of distribution under the Companies Act and Rules are displaced by the provisions of SACA to give effect to the SACA scheme of exclusive distribution of assets in a segregated account to the account owner(s), after payment or discharge of any liabilities which attach to the account or the assets held in it. This is the basis of the explanation given by Kawaley J in the **New Stream Capital** case cited above that a segregated account is a 'company within a company'.

244. Mr. Chivers KC relied upon a passage in the speech of Lord Dyson in **Lehman Bros**[102] that explained that as a matter of statutory interpretation it was unlikely that the draftsman of CASS 7 (for our purposes the equivalent of the CMR) would have intended that there would be two regimes substantially in operation for the distribution of client money (one under CASS 7 rules set up for the purpose and one under equitable tracing rules and outside CASS).

245. This is, however, in the Court's judgment, not an appropriate comparison. In **Lehman Bros** the issue was whether the investors could get their money back if it had not been segregated into a client bank account, or whether investors could also recover against the money held in Lehman Bros accounts which had not been segregated into a client bank account (the claims versus contributions theory). By a majority the English Supreme Court held that CASS 7 should be construed to enable investors to recover client monies whether or not they had in fact been held in a client bank account. (The term 'segregated' was used in that case to describe the existence of a client bank account and was not used in the same sense as it is used under SACA.) The passage relied on referred to 'two systems' of recovery because it was argued that CASS only applied to monies actually held in a client bank account, and that clients who wished to recover monies which were held in Lehman Bros' own account (but which ought to have been held in client bank accounts) had to rely upon tracing principles.

246. CASS 7 is not an alternative to the winding up regime, nor does CASS 7 displace the rules of distribution on a winding up save to the extent that it enables clients to get cash back that is held or ought to have been held in a client bank account. This is because the client retains the beneficial interest in those (uninvested) monies. Such monies are treated as standing outside the liquidation process. The UK regulators implemented an EU Directive requiring the UK to adopt a system that allowed clients to get 'client money' back on an expedited basis. CASS 7 (and the equivalent rules under the CMR) do not apply to assets which are held by the investment provider which back the investment provider's liability to meet policy claims (or other contractual liabilities). Those types of claims are dealt with by the ordinary liquidation process.

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[102] At paragraph 165.

247. It is also obvious but necessary to state for clarity that segregated accounts companies do not exist under English law, and so there is no equivalent comparison to be drawn to the statements of principle about recovery under CASS 7 (i.e. the CMR) and the rights of recovery under SACA.

248. Mr. Chivers KC submitted that the CMR is a comprehensive system for the protection of investors against the risk of insolvency, and that it does not matter what form of corporate structure the investment provider adopts, because this would lead to arbitrary and unfair results simply based on 'happenstance'. In the Court's view, that submission goes too far. In the first place, the protection afforded by the CMR is limited to the return of uninvested cash (for the reasons explained above). In the second place, the CMR do not displace the ordinary rules for winding up (also for the reasons explained above) or the special rules that apply to the winding up of a SAC. In the Court's judgment, the SACA and the CMR are not two systems governing the same process.

249. To the extent that it is necessary for the Court to do so, the Court expressly affirms that the policy objectives behind SACA that provide for ring-fencing of assets and liabilities in SACs, and the exclusive distribution of assets to segregated account owners during its operation and on liquidation does not lead to absurd, irrational or nonsensical results.

Conclusion on the threshold issue

250. For the reasons explained above, the Court has concluded:

(i) The CMR and SACA are not separate regimes dealing with the same process. They are capable of being read side by side but where there is any inconsistency between them, SACA takes priority and the CMR must give way.

(ii) The CMR is concerned only with client monies held in a client bank account (or which ought to have been held in a client bank account) on the commencement of the winding up of Northstar, i.e. the date of the presentation of the petition on 20 September 2020.

(iii) The definition of "client monies" in regulation 5 of the CMR does not include or cover the assets purchased or investments held by Northstar to back the obligations under the policies it issued (i.e. the units in mutual fund investments or other rights representing the financial instruments or rights into which the funds invested).

(iv) In the Segregation Judgment Hargun CJ held that, as a matter of fact, Northstar validly created segregated accounts for each of its policyholders, and while Northstar linked assets to the variable segregated accounts it did not do so in respect of any fixed or indexed investment segregated accounts.

(v) Hargun CJ held on the facts that the monies transferred to Northstar to make the investments in the variable investment policies were already linked to the relevant segregated account before they were received by Northstar, there in the Court's Judgment, there was no obligation to create separate client bank account under CMR.

(vi) Once monies or assets have been linked to an account (even before they are received by Northstar when an account is established on the application to make an investment) they are subject to segregation under SACA. They are thus protected from the claims that any other account holder may have against any other segregated account and/or against the general account of Northstar.

(vii) It follows that the monies held by Northstar in its accounts on 20 September 2020 which had been received from investors were already linked to their respective segregated accounts and were subject to the statutory ring-fence created under SACA and were not liable to be pooled under the CMR.

(viii) Ongoing payments of premium that are linked to a segregated account do not need to be pooled because (a) the obligation to pool only applies to monies held on the commencement of the winding up and (b) the monies are already linked to an account and are therefore subject to SACA segregation which overrides CMR.

(ix) Realisations and payments made to account owners on the surrender or partial surrenders of policies are also protected by SACA segregation and they do not become "client monies" upon receipt of the cash value of the investments by Northstar. First, those realisations are still 'linked' to the relevant segregated account, and it does not matter that the policyholder has given instructions to "close" the segregated account. The requirement of SACA is for Northstar (and its liquidators) to distribute the assets linked to each account only to the account owner(s) after discharging any liabilities which attach to that account. Second, under the CMR, the pooling obligation arises only in respect of cash held by Northstar on the commencement of the liquidation. It does not apply to these realisations or payments to account holders.

Equality is Equity

251. It was submitted by Mr. Chivers KC on behalf of UNFCU, and by Ms. Dwayadar and Mr. Silva not only on their own behalves but also speaking more generally for those other fixed investment policyholders, that the Court should strive to achieve a result that does justice and operates fairly as between the different classes of investor. The Court expresses its sincere regret that some policyholders have seen the (almost total) destruction of the value of their investments made from their hard-earned money, due to the circumstances which have occurred in this case. It is understandable that those policyholders may well feel aggrieved and consider the outcome to be unfair and unjust.

252. The result is however one which is dictated by the provisions of SACA, from which the Court (and the JPLs) cannot depart. With due respect to and admiration for the submissions were urged upon the Court by Mr. Chivers KC, the CMR is not a regime which is designed to provide the type of creditor protection for which he advocated. It is simply not a general regime which overrides either the general law of insolvency to provide preferred treatment for investor creditors, nor does it override the express terms of SACA. The present case is not an insolvency of an ordinary company whose assets will be divided (after payment of liquidation expenses and preferred claims) *pari passu* between all unsecured creditors whose claims have been admitted. This is the liquidation of a SAC (in each case).

253. The effect of the segregation of the assets and liabilities under SACA was expressly and clearly set out in the investment documents and the present result was one against which all prospective policyholders were warned, or at least well informed[103]. The Court is not here engaged in the application of principles of equity: it is engaged in applying the provisions of a system enacted by Parliament, which has clear and unambiguous effects, all of which the policyholders must be taken to have understood and expressly agreed to. It is unfortunate and regrettable that in the particular circumstances of the case one category of investors was badly affected by the actions taken by management. But that is not a misfortune that the Court has any power to remedy by interpretative ingenuity or the application of subjective notions of fairness.

Omnia

254. It is not necessary to engage in an analysis of the position with respect to Omnia's policyholders because Omnia was not registered under the IBA and the CMR did not apply to its business. It is obvious that the principles that have been explained with respect to Northstar under SACA will apply equally to Omnia's policyholders.

Variable Segregated Account Directions

255. The Court now turns to the directions sought by the JPLs in the light of the findings and conclusions the Court has reached above. These directions are not opposed by UNFCU, save to the extent that UNFCU's (and BISI's and Ms Dwyadar's) position was that the CMR prevent the Court from acceding to them if UNFCU's submissions were accepted by the Court and/or that the theoretical availability of tracing claims may prevent the Court form giving those directions.

256. The directions and authorizations sought by the JPLs are (in summary):

(i) To permit (but not require) the JPLs to admit the variable investment policyholders' claims to be admitted without further proof under the Court's power under Rule 64 (1) of the Winding Up Rules 1982. This is because the JPLs already have all the information to identify the policyholder creditors, the accounts to which their respective claims relate and the assets available to meet those claims, and no useful purpose would be served by requiring formal proofs of debt to be produced. It would also be unduly burdensome and expensive for the JPLs to require policyholders to do so, which would be a duplicative and time-consuming exercise[104].

(ii) To approve the valuation methodology proposed by the JPLs to admit those claims at their realised value at the date of realisation rather than at the date of the Winding Up Order (which would be the conventional date for the valuation of these claims) because there will be fluctuations in value that will have occurred (both positive and negative) between the date of the Winding Up Order and the date of realisation.

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[103] See e.g. *Global Advantage Select* terms (as an example of a fixed investment policy) at pages M7/1 page 125 and M7/2 pages 953 and 956.

[104] For the reasons given in Edward Willmott's second affidavit in each of Northstar and Omnia's liquidation proceedings: paragraphs 57-65 (Northstar) and 47-55 (Omnia).

(iii) To approve a mechanism by which the variable policyholder creditors can object to the valuation made by the JPLs, failing which the JPLs' valuation will be treated as the valuation for the purposes of the liquidation.

(iv) To approve and authorise the JPLs to proceed to realise the assets and distribute them to the respective policyholders whose policies are linked to the relevant segregated accounts.

Admission of variable policyholder claims without the need for further proof

257. The Court considers that there is clear jurisdiction to give the JPLs the direction sought in relation to the admission of the variable policyholders' claims without the need for further proof, and there are sound practical, cost-saving and administrative reasons to do so.

258. The Court considers that although in the normal course of a liquidation provisional liquidators only admit proofs of debt or claims for the purposes of voting at the first meeting of creditors, in the case of the variable policyholders' claims against the variable segregated accounts, it is appropriate for the JPLs to be empowered to admit those claims for the purposes of making distributions (in due course). The basic reason for this is that the claims of the variable policyholders relate to the segregated accounts to which their respective entitlements to recover are known, quantified (or quantifiable), and restricted to the assets in the variable segregated accounts.

259. In the Court's view, there is no good reason to require the JPLs to wait until permanent liquidators have been appointed, and it would be impracticable to convene separate meetings of creditors for each group of creditors, and no purpose would be served thereby. It is appropriate for the JPLs to be authorized to proceed to admit those claims (subject to the right of policyholders to object or appeal against partial rejection). The Court takes comfort from the approach that was taken in **Herald Fund SPC (in official liquidation)**[105] in which Kawaley J (as a judge of the Grand Court of the Cayman Islands) held that *"yet another way [to prove a debt] is where it is clear on the face of the company's own records..."*

260. Therefore, the Court grants the direction sought and orders accordingly that the JPLs shall be entitled to but not required to admit the claims of the variable policyholders to rank for dividend without the need for further proof.

Approval of method for valuation of claims

261. The approach proposed by the JPLs is of course driven by practicality and obvious common sense. However, the valuation issue gives rise to some potential difficulty. This is because the general rule is that the date for the valuation of claims in a liquidation is the date of the Winding Up Order. This is a venerable rule that has been followed and applied since the earliest days of bankruptcy, whose rules have been incorporated and adopted in the liquidation of companies[106].

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[105] [2018] 2 CILR 162 at paragraph 84.

[106] The history of which is considered by the English Court of Appeal in **Re Lines Brothers Ltd** [1982] EWCA civ J0211-2

262. Although the Court had some reservations about the Court's power to approve a departure from this rule, the Court is satisfied that the JPLs have the power and the duty under section 234 of the Companies Act and Winding Up Rules to make a just estimate of contingent claims for the purposes of admission. To the extent that the actual value of the assets that are represented by a particular policy are, their value is uncertain and contingent. It is possible to analyse this as using hindsight (which is usually impermissible) in reality this is simply recognising the true value of the particular claim against the relevant account, which cannot be known until the surrender of the policy is effective and the assets are realised.

263. This is not a situation where the value of the claim as at the date of the Winding Up Order was fixed. The departure from the Winding Up Order rule in circumstances where values fluctuate has been recognised in other cases, such as **Wight v Eckhart Marine Gmbh**[107] and **Bwlfa and Merthy Dane Steam Collieries v Pontypridd Waterworks Co**[108].

264. In addition, or in the alternative, admitting the policyholders' claims at the surrender value on the surrender date is the only sensible or practicable way to achieve the objectives of SACA. To the extent that a departure from the conventional approach under the Companies Act 1981, such a departure is, in the Court's judgment, authorised by section 24 (1) and 25 A (3) of SACA which says that the Companies Act 1981 applies save to the extent that it is inconsistent with SACA. It would be inconsistent with SACA to value the claims of policyholders at more or less than the value of the surrender value of the policy.

Cut-off date

265. The JPLs are concerned to ensure that all claims can be managed and determined within a time frame that is practical and enables the JPLs to progress the liquidation and distribute the variable policy assets to the variable policyholder creditors.

266. This approach is analogous to imposing a bar date for the submission of claims under section 191 of the Companies Act 1981 and is also supported by the practical approach taken in an earlier Bermuda insolvency case in **Re Cambridge Re Ltd (In Liquidation)**[109] and a Caymanian insolvency case in **Re Premier Assurance Group SPC Ltd (in Official Liquidation)**[110].

267. In principle, the Court therefore considers that it is appropriate to authorise and direct the JPLs to set a cut off date for the purposes of having finality in the admission and valuation process. However, the Court recognises that this process may require the giving of additional or more specific directions to implement the cut off valuation process and accordingly gives the JPLs liberty to apply in that regard if need be.

268. If there is any concern about this process being at odds with the ordinary statutory mechanisms under the Companies Act 1981, the Court is prepared to make the alternative

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[107] [2003] UKPC 37 at paragraphs 27-33.
[108] [1903] AC 426 at page 431.
[109] Unreported but summarized by Roger Kaye QC (sitting as a deputy judge of the Chancery Division) in **Re a Company No 0013734** [1993] BCLC 59 at 63h to 64a.
[110] FSD No 264 of 2020.

holding that to the extent there is such a departure, it is one necessitated by the nature of the SACA regime, and is justified by section 24 (1) and 25A (3) of SACA.

Policyholder Objections

269. The JPLs propose to give all policyholders a period of time in which to decide if they accept or reject the valuations of their claims, and to allow the policyholders to advance an alternative basis for valuation before accepting or rejecting the JPLs' valuation[111]. This does not require authorisation or direction from the Court. However, in the event of a dispute, the ordinary rules that apply to the appeal against a rejection of a proof of debt under the Winding Up Rules will apply, subject to any further directions the JPLs may seek.

Authorization to make distributions to the variable investment policyholders

270. Provisional liquidators do not usually make distributions to creditors as part of the provisional liquidation process. However, the powers conferred upon the JPLs by their appointment Order include all the powers that a permanent liquidator enjoys under section 175 of the Companies Act 1981. These powers include the power to pay any classes of creditor in full (s. 175 (1) (d))[112] provided that the liquidator has the sanction of the court or a committee of inspection.

271. It follows from the Segregation Judgment and the analysis that this Court has applied in this Ruling that the policyholders of variable investments in both Northstar and Omnia represent a separate class of creditors in each of the respective liquidation proceedings. In fact, on proper analysis, each individual segregated account represents a separate 'class' of creditor, rather than all of the segregated policyholders representing a class of creditors as a whole, even though their rights may be the same in relation each of the segregated accounts. It is also clear that each segregated account must be wound up on an individual basis[113].

272. Therefore, it must follow that, applying the SACA regime, the liquidation of each segregated account has no bearing or impact upon the liquidation of any other segregated account or Northstar or Omnia. There is consequently no reason to defer or delay the liquidation of the variable segregated accounts to abide the outcome of any other aspect of the liquidations and, given the passage of time since the commencement of the liquidations, it is appropriate not to delay the distribution of the assets of the variable segregated accounts any longer than absolutely necessary.

273. The Court will normally grant the sanction to exercise a power under section 175 (1) of the Companies Act 1981 if the Court is satisfied that (i) the liquidators genuinely take the view that it is in the best interests of the creditors as a whole (ii) the liquidators have acted in good faith in arriving at that view (and have reasonable grounds for arriving at that view) (iii) the liquidators have not acted or are not acting in a way that is partisan (iv) there

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[111] JPLs submissions at paragraph 715.

[112] The other power relied upon is under section 175 (1) (h) i.e. *'to do any other things as may be necessary for the winding up of the company'* is a restricted power and is for "*mopping up*". It is not a substantive general power, so the Court places no reliance upon that provision for the purposes of this application: see **Re Phoenix Oil and Transport Ltd (in liquidation) (No 2)** [1958] Ch 565 at 571 per Winn-Parry J.

[113] **CAI Master Allocation Fund Ltd** [2011] SC (Bda) 45 Com at paragraph 13 per Kawaley J.

are no substantial reasons disclosed by the evidence why the court should not grant the sanction and (v) the liquidator's reasons must not be based upon flawed reasoning or a flawed understanding of the facts[114].

274. In this case, the Court is satisfied that the JPLs have come to the genuine view that it is appropriate and in the best interests of the liquidation as a whole to proceed to admit the variable policyholders' claims and to proceed to distribute the assets (after payment of liabilities and expenses that relate thereto) to the account owners. In view of the Court's conclusions, it is not open to the other policyholders to say that it is not in their interests to make the distributions to the variable investment policyholders, because the fixed and index linked policyholders have no interest in the assets that will be distributed to the variable investment policyholders.

275. The Court is also satisfied that the JPLs have arrived at that view properly and in good faith and have proper grounds for coming to the view that they have, and that their view is not based on a misunderstanding of the law or the facts. The Court is also satisfied that the JPLs have not acted in a manner which is partisan, and the Court cannot see any other reason why the Court should not grant the sanction to the JPLs to proceed to make the distributions, once they have admitted the claims and are satisfied that there is no other reason (e.g. an appeal) which would require the JPLs to postpone doing so.

276. The objection that has been raised by UNFCU in relation to the requirement that the JPLs must conduct a full tracing exercise to identify the sources of all payments received by Northstar before proceeding to make distributions is one that proceeds on the footing that all monies received by Northstar are client monies.

277. For the reasons already given, the Court has come to the conclusion that the payments made by investors in respect of the establishment of policies of all types were linked to their respective segregated accounts even before they were received by Northstar, based on the facts found by Hargun CJ in the Segregation Judgment. It must follow from that finding that it is unnecessary to conduct a tracing exercise, because the origin of the funds and their allocation to a segregated account in effect takes the funds out of the CMR regime. The monies received were not uninvested cash held by Northstar in which the investors retained a beneficial interest, they were monies received that were linked to the segregated account that related to the respective policy that was purchased and could only be applied for that purpose under SACA. Once the funds were paid out of Northstar's account they were invested for the benefit of the policyholder and were replaced by the relevant investment that was held in the segregated account.

278. Further, the JPLs say that their extensive analysis has shown that Northstar's records are complex and voluminous and that it would take a disproportionate amount of time and money to conduct such an exercise, and that there are significant gaps which might make the completion of such a task impossible.

279. For these reasons the Court has concluded that a tracing exercise is unnecessary because there is no ultimate benefit that would be achieved: it is accepted that the variable investments were linked to the variable assets, and that the fixed and indexed investment

[114] **Re Greenhaven Motors Limited (in Liquidation)** [1999] BCLC 635 at 643 a-c per Chadwick LJ approving Lightman J in **Re Edennote Ltd (No 2)** [1997] 2 BCLC 89 at 92h.

were not so linked. In light of the conclusions the Court has reached, a tracing exercise would not, in the Court's view, make any difference to this result. The costs and delay that would result from undertaking such an exercise would almost certainly outweigh any possible benefit that might accrue.

280. Therefore, the Court does not view this as an obstacle to the Court granting the sanction to the JPLs to proceed to make distributions when they have arrived at the point where they are able to do so.

General Directions

281. The JPLs have sought a number of general directions for the conduct of the liquidations in relation to the fixed and indexed investment policyholders and the general creditors that flow from the conclusions that the Court has reached in this Ruling, and the conclusions that Hargun CJ reached in the Segregation Judgment.

282. The general directions sought are:

(i) To admit the claims of the fixed and indexed investment policyholders against the general accounts of Northstar and Omnia respectively without further proof based upon an implied term in the policies issued by each of Northstar and Omnia that each policyholder would have been entitled to assert a claim against the general account for the value of their contract for so long as their segregated account has been denuded of its assets by the respective company[115].

(ii) To value these claims (i) at their actual contractual value if the contract had come to an end prior to the Winding Up Order (ii) at an estimated value as (a) a prospective or (b) a contingent debt if the policy is still active applying the rules as to the admission of prospective or contingent debts respectively and (iii) to impose a cut off date for the purposes of establishing a final valuation for all claims.

(iii) To admit policyholders' claims in a manner that permits policyholders to vote at the first meetings of creditors if they are held through a trust structure; and

(iv) To conduct the first meetings of creditors and contributories and determine which creditors may vote and in what amounts.

The implied term

283. The result of the Segregation Judgment and the Court's rejection of the arguments as to the application of the CMR leave the fixed and indexed investment policyholders with a prospect of making minimal recovery from the liquidations.

284. The whole purpose of having segregation of the assets linked to the fixed and indexed policies was to avoid the result which has in fact happened. The only reason the assets did not remain linked to the respective segregated accounts was that under the terms of the fixed investment contracts the companies were entitled to have access to the assets in order

[115] JPLs' submissions at paragraphs 900-904.

to earn more for their general accounts than was required to meet their obligations under the policies. The model was supposed to ensure that the companies would be able to meet the guaranteed fixed rate of return so that the policyholders would be protected from the risks of fluctuations in market values, which risks were in effect assumed by the companies.

285. The effect of the replacement of the investment grade assets with illiquid and poor-quality investments in Mr. Lindberg's companies has been to deprive the fixed investment policyholders of the assets that should have been available to meet their claims.

286. For the reasons explained earlier in the Ruling, the fixed and indexed policyholders have no claim against the general account. Northstar would have received US$244 million in premium from fixed and indexed policyholders and Omnia has received US$42 million in premium from fixed and indexed policyholders, but neither company has given anything of equivalent contractual value in return. It would clearly be unjust for the estates of the two companies to be enriched as a result of the conduct of the management in stripping out the assets of value and replacing those assets with worthless assets, with the likely prospect that a surplus would revert to the shareholders.

287. The JPLs have formulated two distinct and alternative grounds for the implication of a term into the policies issued by Northstar and Omnia[116]. The first (and the JPLs' preferred formulation) is:

> *"For as long as the Company takes the money or other property of the Segregated Account into its General Account, the Contract Owner shall be entitled to assert such right(s) to repayment against the General Account as that Contract Owner would have been entitled to assert against the Segregated Account pursuant to the terms of this Contract if that money or other property had remained in the Segregated Account."*

288. The basis of the implied term would be that in exchange for the ability to use the assets ion the segregated account, the company would be liable for the value of the contract because no claim could be made against the segregated account whose assets had been removed.

289. An alternative formulation of an implied term could be:

> *"For so long as the Company takes money or other property of the Segregated Account into its general account, the Company shall confer upon, and allocate and link to, the Segregated Account a right to claim against the General Account for the value of the claims which the Contract Owner would have had against their Segregated Account pursuant to the terms of this Contract had the money or other property remained in the Segregated Account."*

290. The basis of the implied term on this formulation would be that the policyholder would have a chose in action that was linked to the segregated account which would be directly enforceable by the policyholder.

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[116] JPLs' submissions at paragraphs 839-44.

291. The benefit of the first formulation over the second (which in effect achieve the same result) would be that the first formulation creates a direct right of action, whereas the second would give rise to a secondary obligation to link the chose in action to the account. It is clearly simpler and more efficient to imply a direct right of action, and the Court would endorse the JPLs' formulation of the first version of the implied term, which would reflect what the parties would naturally expect: a direct right of recovery of the value of the assets that ought to have been in the segregated account, as opposed to an indirect claim that would have to be enforced by a claim to specific performance and/or damages.

292. The JPLs have analysed the potential objections to the admission of the claims of the fixed and indexed investment policyholders' claims on this basis. The first potential objection is that the assertion of the claim might be defeated by limitation of action arguments. The Court agrees and accepts that the right to assert a claim to the repayment of the value of the assets removed from the segregated account is an ongoing obligation[117], and the claims existed at least up to the date of the winding up Order. Therefore, such claims would not be time barred.

293. The second potential objection is that provisions of SACA which protect each segregated account also provide a barrier to claims by segregated accounts' owners against the general account[118]. However, Hargun CJ held that the policyholders could make a claim in respect of a breach of an implied term to ensure linkage was respected[119], and it was submitted that by implication, the embargo contained in SACA that insulates claims being made against the general account only applies where the SAC has complied with its own duties under SACA. The Court accepts that analysis and agrees that it would be incongruous for the JPLs (on behalf of the respective companies) to rely upon section 17 (5) (e) of SACA as a defence to a claim which arose from the breach of the companies' own obligations to maintain segregation.

294. The Court will not generally imply a term into a contract unless (i) it is necessary to give business efficacy to the contract and (ii) the term is so obvious that 'it goes without saying' in the light of the express terms, commercial common sense and the facts known to the parties at the time the contract was made.[120]

295. The JPLs say that the basis for the implied term is that it is an obvious and commercially essential term that goes without saying that the company (in each case) would be liable to make good the losses incurred by the policyholder as a result of the removal of assets from the segregated account, which had been established precisely and expressly to protect the policyholder from the risk of claims by third parties or losses incurred by the company.

296. The Court agrees. The test is one of necessity, and it is not relevant that the implication is into the terms of the governing instrument. It is therefore appropriate to direct and authorise the JPLs to admit the claims of the fixed and indexed investment policyholders

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[117] **Equitas Ltd v Walsham Bros & Co Ltd** [2013] EWHC 3264 *"...such a broker would rightly conclude that even now he was still under a duty to remit those funds and perhaps it would be reprehensible and dishonest not to do so..."* per Males J at paragraph 70.

[118] Section 17 (5) (e): *"...[that liability] shall not extend to, and that person shall not, in respect of that liability, be entitled to have recourse to the general account."*

[119] See paragraph 224 of the Segregation Judgment.

[120] **Marks & Spencer Plc v Bank Paribas Securities Services Trust Company (Jersey) Ltd** [2016] AC 742 and approved and applied in **Re X Trusts** [2023] CA (Bda) 4 Civ at 73-4 per Gloster JA.

as claims against the general accounts of Northstar and Omnia respectively, and the Court accedes to the JPLs' application for directions to do so.

Admission of fixed policyholders' claims without proof

297. The Court has already examined and approved the general principles for the admission of the variable investment policyholders' claims and has endorsed them. The same rationale applies to the admission of the fixed and indexed investment policyholders' claims against the general accounts of Northstar and Omnia respectively. The fixed and indexed investment policyholders' claims are so numerous and the policyholders are spread across the world so that the process would involve considerable time effort and expense, as well as unnecessary delay. By contrast, the details of the relevant policyholders' entitlements are disclosed in the records of each of Northstar's and Omnia's respective records and no benefit would be achieved by requiring a full proof of debt process to be followed.

298. The Court directs that the JPLs are permitted but not required to admit the claims of the fixed and indexed policyholders' claims on the basis of the values attributed to their respective policies as reflected in Northstar's and Omnia's records for the purposes of the first meetings of creditors in each liquidation. The JPLs can retain the flexibility to require a different approach to admission where the circumstances require[121].

Valuation of the fixed and investment policyholders' claims

299. The JPLs have formulated a valuation methodology for the fixed and indexed policyholders. In respect of policies which have come to an end, the value of the policy is known, and can be admitted at its face value as an admitted debt. In relation to active policies, the JPLs propose to admit them either as prospective liabilities whose value is known but which have not yet fallen due, or as contingent debts whose value is not known, but is estimated[122]. The JPLs' also propose to set a cut-off date for the valuation of claims to avoid the need to continuously re-value the claims based on changing circumstances.

300. The Court has considered the practicalities facing the JPLs at this stage and, applying the same rationale that was adopted in relation to setting a cut-off date for the variable investment claims above, the Court is satisfied that this is the appropriate approach for the JPLs to take for the purposes of convening and holding the first meetings of creditors.

301. It may be that after the first meetings have been held, the precise basis for valuations of the policyholders' implied term claims need to be re-assessed. But for the purpose of being able to attribute a value to each of the policyholders' claims for voting at the first meetings in the liquidations of Northstar and Omnia, the Court approves the valuation approach proposed by the JPLs.

Voting of trusts

302. One specific issue arises as to how to treat the votes of policyholders whose policies are in fact held under a trust structure. The JPLs propose to allow the ultimate economic interest holder of the policy held by a trust to vote at the first meetings of creditors provided

[121] For example, in respect of lapsed policies or where enhanced death benefits are involved and which may require a different assessment for admission and valuation: see paragraphs 906-908 of the JPLs' submissions.
[122] JPLs' submissions at paragraphs 900-904.

that (i) the trustee consents to a person who holds the ultimate economic interest in a policy exercising a proxy on its behalf for the value of that economic interest in the policy and (ii) the trustee delivers to the JPLs a proxy duly executed by the trustee in favour of the economic interest holder to cast a vote on the trustee's behalf.

303. It appears to the Court that this approach is consistent with the rules regarding the granting of proxies in Rule 104 of the Winding Up Rules 1982. The Court therefore approves the proposed mechanism for enabling the ultimate economic interest holder to cast a vote if he or she wishes to do so. Otherwise, the trustee may cast votes to the aggregate value of the policies it holds either in favour or against the particular resolution as directed by the ultimate economic interest holders of the policies.

Other directions for convening and conducting the first meetings.

304. The JPLs have proposed various directions for the convening of the first meetings of creditors and contributories of each of Northstar and Omnia. The Court has the power to give general directions for the conduct of the first meetings[123], and in view of the particular circumstances of the these companies, with such a widely held policyholder base, it is appropriate to make use of technology to assist in convening and conducting the meetings and disseminating the information necessary to enable creditors entitled to vote at the meeting to attend by video link.

305. The Court is satisfied that the scope of Rule 96 of the Winding Up Rules 1982 is not intended to exclude a contingent creditor from voting at the first meeting of creditors provided that the value of the contingent claim has been ascertained and has been admitted for voting purposes.

306. However, fixed investment and indexed investment policyholders whose claims are admitted on the basis of the implied term cannot also claim and vote in respect of claims against the fixed and/or indexed segregated account to which their respective claims relate.

Other matters

New monies received after the pooling event which are not linked to a segregated account

307. The Court has determined that monies which were received and held by Northstar at the date of the commencement of the winding up (i.e. the date of the petition) that were linked to a segregated account do not fall to be treated as client monies for the purposes of the CMR. It follows that any monies that are received by Northstar after the commencement of the winding up that are linked to a segregated account are also outside the CMR.

308. However, monies that have been or are now received by Northstar which are *not* linked to a segregated account[124] must be treated as "client monies". These monies must be held in a separate client bank account. Such monies would be held upon a unitary trust for the benefit of all policyholders[125]. The Court will not give any specific directions in relation

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[123] See Rules 85-88 of the Winding Up Rules 1982.
[124] The JPLs have identified some types of potential receipts which could fall into this category: see JPLs submissions at paragraphs 326-9, 341, 359-61: but only those receipts that are not linked to a segregated account.
[125] JPLs' submissions at paragraphs 474 and 481.

to this issue, because claims to these monies will depend on whether any sums in fact fall into this category and if so on whether the policyholders who may be entitled to participate in this unitary trust have also made a claim against the general account (which is considered below). This may be the subject of further directions at a later stage of each of the liquidations.

309. The JPLs point out that since no client accounts were established at the relevant time, and no monies were in fact held in a client bank account, it would be impossible to recreate the position as it stood at the commencement of the winding up. The Court agrees that it would be a waste of resources for the JPLs to attempt to do so, and it would be unlikely to improve the position of policyholders if they decide to make a claim based on the implied term.

Insurance Act priority

310. Section 36A of the Insurance Act 1978 provides that priority must be given to the payment of insurance debts (as defined). It is common ground that the liabilities to policyholders are insurance debts. In the Court's judgment, it also follows that claims based upon the implied term in the policies must also be treated as insurance debts as they arise from the policy.

311. However, the JPLs accept that policyholder claims against the unitary trust over any monies which are held in the client bank account (once established) as a result of receipts of monies which are not linked to any segregated account will not attract such priority[126].

312. It also follows that in the event of an insufficiency of assets to meet the policyholders' implied term claims, the general unsecured claims will not make a recovery against the general account in either liquidation.

Appeals

313. In the event that the JPLs reject or reduce the amounts claimed by policyholders, the ordinary rules as to appeal against a rejection of a proof of debt will apply to such rejection or reduction a apply under the Winding Up Rules 1982, unless further or other directions are given.

Orders

314. The JPLs submitted Orders in draft form setting out the directions sought. The Court hereby approves the forms of Order submitted for the variable investment segregated accounts in respect of Northstar and Omnia. The Court also approves the form of the proposed general directions for the conduct of the first meetings of creditors and contributories of Northstar's and Omnia's creditors and the methodology for admitting and valuing fixed and indexed policyholders' implied term claims set out in Schedules 1 and 2 to the draft Orders respectively.

315. There are a number of matters that need to be finalised in the draft Order. The Court authorises the JPLs to determine the appropriate date for the "cut off" in each case and to set the dates for the meetings of creditors and contributories and make arrangements to notify the creditors and fixed and indexed investment policyholders and the shareholders

[126] JPLs' submissions at paragraph 543.

of the dates for the convening of the first meetings of creditors and contributories. The JPLs are given liberty to apply in respect of any further matters which require additional direction.

316. The Court has decided that the admission of the fixed and indexed investment policyholders' claims based on the implied term are to be admitted on the basis of the valuation methodology proposed for voting purposes only at the first meeting of creditors in each liquidation. This is because (in the Court's view) it will properly be a matter for the permanent liquidators to determine whether that is the appropriate approach to valuation for the purposes of ranking for dividend.

317. It may very well be that the permanent liquidators will adopt the same valuations, and can if necessary apply to the Court for further directions in this regard at the appropriate time. To this extent the draft Order will need to be amended to reflect that admission of proofs of debt in relation to policyholder claims based on the implied term will be for voting purposes.

Costs

318. The Court orders that the costs of the applications for directions and the costs of UNFCU and BISI in relation to the directions hearing shall be borne as expenses of Northstar's liquidation and paid on the usual indemnity basis.

25 September 2025

THE SEAL OF THE SUPREME COURT OF BERMUDA

Martin J