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The Regulation of Client Money under FSA Rules
The Consequences of the judgement of the Court of Appeal in *Re Lehman Brothers*
***(International) Europe (in administration)* [2010] EWCA Civ 917**

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Introduction

1. This presentation covers four key topics:-
 - 1.1. What did the Court of Appeal actually decide in its recent judgment on client money issues thrown up by the failure of Lehman Brothers International (Europe) (“LBIE”)?
 - 1.2. What issues are still unresolved / “up for grabs” before the Supreme Court or possibly the European Court of Justice?
 - 1.3. What does the judgment mean for firms that must operate the FSA’s client money regime on a day to day basis? What operational guidance can we draw from the judgment?
 - 1.4. Given the judgment of the Court of Appeal, what (if anything) can we say about the future content of the client money rules?

What did the Court of Appeal actually decide?

Role of Trust Law

2. Court of Appeal (Arden LJ at [65] to [74]):
 - 2.1. The rules of trust law provide the analytical framework and the principal diagnostic tool for resolving the problems which require to be resolved on this appeal.

- 2.2. There is no doubt that CASS7 imposes a trust. The provisions of that trust are, however, rudimentary. The trust is created with little elaboration and so the court is thrown back on general trust law.
- 2.3. Once a trust is declared and attaches to assets, there are a series of default rules and principles which apply irrespective of the intention of the parties setting up the trust or, indeed, the FSA. For instance, there is a fiduciary duty not to make a secret profit and a duty to account to the beneficiary in accordance with the terms of the trust. There are also rules applying in equity to the distribution of a common fund.
- 2.4. It follows that it is not appropriate, when applying CASS 7 to assume that if the rules are silent on a particular issue, nothing is to happen, or there is no default rule. One cannot assume, therefore that CASS is like a contract, so that
- “when the instrument does not expressly provide for what is to happen when some event occurs ... [the] most usual inference ... is that nothing is to happen. If the ... [FSA] had intended something to happen, the instrument would have said so....”
(Arden LJ at [66], quoting Lord Hoffmann in *AG for Belize v Belize Telecom* [2009] 1 WLR 1988 at [17].)
- 2.5. It follows that it is also not appropriate to interpret CASS in the same way as a “normal statute”. Not all the usual rules of statutory interpretation will apply:
- “It is not possible to accept without qualification the submission ... that the rules in CASS7 about pooling have to be construed in accordance with ... the rule that there is a presumption that Parliament did not intend to take away private property law rights and the presumption that where statute expressly permits one thing (the making of rules providing for the pooling of money in accounts), any further power of pooling is excluded. If the effect of the default rules of trust law is that private law property rights are clearly taken away, or that the pooling must necessarily extend to other property, those default rules displace the normal rules of statutory interpretation.” (Arden LJ, at [69]).
- 2.6. The default rules of trust law will apply unless they are displaced or varied by provisions to the contrary.

Does the statutory trust bite on receipt of money or on segregation of money for clients?

Key rules

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

Argument

3. **Trust on segregation:** “Holds” implies that the trust does not in fact bite until money is segregated for a client. The rules are silent as to how a firm is supposed to deal with money between receipt and segregation and silent as to what the rights of clients are in that period. The inference is that the firm is free to use the money to finance its business before segregation. MiFID requires only the maintenance of accounting records and segregation (organisational requirements). MiFID does not require a trust.
4. **Trust on receipt:** “Receives” means what it says – the trust bites as soon as money is received from or on behalf of a client. As a matter of English law, the clients rights in client money are not fully protected by either (a) the maintenance of an accounting record showing that the firm holds money for the client or (b) segregation of client money; unless or until a trust is also declared over that money in favour of the client. The protective object of MiFID therefore requires a trust from receipt.

Court of Appeal

5. Agrees with Briggs J at first instance, in *Re Lehman Brothers (International) Europe (in administration)* [2009] EWHC 3228 (Ch):
 - 5.1. Accepts the analysis that if a firm pays client money into a house account (which it is permitted to do if it uses the “Alternative Approach” to the segregation of client money under CASS 7) then, unless there is a trust over that client money from the moment of its receipt, a client will have no protection in the event of the firm’s insolvency:

“Thus the United Kingdom had an obligation to require firms to take further effective measures. That measure is in my judgment to comply with CASS7, in particular CASS7.2.1R. Under this provision it must receive and hold client money as a trustee and this will enable the client to pursue a proprietary claim to his money and to prevent the firm from using the money, so long as it

is identifiable, to pay its own creditors in the event of an insolvency.” (Arden LJ at [88])

- 5.2. Accepts, therefore, that because, as a matter of English law, compliance with MiFID organisational requirements is not sufficient by itself, the requirement to hold client money on trust is not “gold plating” of the MiFID organisational requirements in relation to client money (Arden LJ at [89]).
- 5.3. This interpretation of MiFID (i.e. that it requires a trust of client money from receipt) is consistent with the Alternative Approach:

“it is clear that the main benefit of the alternative approach is the firm's ability to net out a client's positive and negative balances, where appropriate. There is no indication that the FSA contemplated that a firm would use the alternative approach to fund its MiFID or other business.” (Arden LJ at [90]).

6. Agrees with the conclusion reached by Briggs J on the interpretation of CASS 7.7.2R:

I have no doubt that CASS7.7.2R can and should be read as creating a trust on receipt and I reach that conclusion irrespective of the stronger interpretive obligations of the court with respect to conforming interpretation if the imposition of a trust from receipt is a requirement of European Union law.” (Arden LJ at [104])

When does money which the firm owes to a client become "client money"?

The issue

7. It is easy to see that the statutory trust applies when a firm receives money from a client or receives money from a third party on behalf of a client. But what about the situation in which a firm simply owes money to the client – for example because an OTC derivative transaction has settled at a profit to the client?

Key rules

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

Argument

8. **Argument that this debt is client money:** that in such a case the firm is “holding” money for the client in a general sense, because the client has the right to demand payment, but has decided not to do so, in favour of leaving money with the firm.
9. **Argument that the debt is not client money:** An English law trust (even a statutory trust) cannot be created without property to which it can attach. Where there is no property which is sufficiently identified to form the subject matter of a trust, no trust is created. A firm cannot hold on trust a debt or a claim against itself.

Court of Appeal

10. Agrees with Briggs J at first instance. When a firm owes money to a client, no client money is created unless and until the firm appropriates money from its own assets and sets it aside / earmarks it to meet the obligation to the client. At that point (and only at that point) there is “property” to which the statutory trust can attach.
11. Shows an important corollary of the proposition that trust law underpins CASS:

“trust law can in general be moulded by the terms of the trust, and of course it is open to Parliament to enact any provision that it thinks fit (though this proposition may have to be modified in relation to European Union law). However, because of the impact on unsecured creditors, the court has in my judgment to start from the position that a trust is not intended to be created by a statutory rule if the trust is not one which could be created under the general law.” (Arden LJ at [171]).

Are the client monies to be pooled at the PPE the monies in the segregated accounts or all the client monies?

Key rules

CASS 7.9.2G “The client money (MiFID business) distribution rules seek to facilitate the timely return of client money to a client in the event of the failure of a firm or third party at which the firm holds client money.”

CASS 7.9.6R: “If a primary pooling event occurs:

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

(2) the firm must distribute that client money ... so that each client receives a sum which is rateable to the client money entitlement ...”

Background

12. LBIE had over the period since the implementation of MiFID on 1 November 2007;
 - 12.1. Operated the Alternative Approach to the segregation of client money (CASS 7.4.14G) - so that it paid client money into its house accounts (creating a “mixed fund” of client money and house money), subject to a daily reconciliation and payment into or out of its segregated client accounts;
 - 12.2. Failed to recognise some of its counterparties as clients (e.g. affiliate firms in the wider Lehmans group) and so failed to segregate or treat as an asset held on trust the money received or held for them;
 - 12.3. Failed to operate its reconciliation and segregation procedures perfectly, not always through fault on its part;
 - 12.4. Operated a liquidity management process under which it swept surplus cash in its house accounts every night to its US parent company, with which it in effect had an overdraft facility to finance its business.
13. So, arguably:-
 - 13.1. LBIE had used vast amounts of trust money in its business. To the extent that it could not now account to its clients for that money, it was now in breach of trust; but
 - 13.2. At least some of that trust money might still be identified in LBIE’s house accounts.
14. But the firm is now insolvent.

The issues

15. The questions are:-

- 15.1. Should the Court interpret CASS to give the un-segregated clients a remedy – i.e. make the general estate (the unsecured creditors) pay for the firm’s failure to segregate client money in the past?
- 15.2. What happens to any client money outside the segregated accounts –does it get put into the client money pool (“the CMP”) for distribution? If yes, what is the process and test for finding it? Who gets to go looking for it? If no, what happens to any client money outside the CMP?

Briggs J at first instance

16. **On the first question** (do the un-segregated clients have a remedy):-

- 16.1. Rejected argument in favour of a simple top up by the general estate. Primarily on the basis that it would violate the principle that on an insolvency, the assets of a firm are to be distributed equally amongst all its unsecured creditors – including those who are creditors because they have claims in respect of breaches of trust.
- 16.2. Rejected arguments that un-segregated clients were entitled to a proprietary interest over the assets of the general estate (or a priority interest ahead of the general estate). Specifically (Briggs J at [43] to [45])
 - 16.2.1. Rejected the argument that each client whose money had not by then been segregated was entitled to participate in a “floating trust” over all monies of the firm;
 - 16.2.2. Rejected an the argument (based on dicta of Lord Templeman in *Space Investments v Canadian Imperial Bank of Commerce Trust Company (Bahamas) Ltd* [1986] 1 WLR 1072) that clients whose assets had not been segregated had a priority over unsecured creditors, arising out of LIBIE’s breach of trust.
- 16.3. Importantly, these arguments were not pursued before the Court of Appeal.

17. **On the second question**, accepted that un-segregated clients could have a proprietary claim to assets in the general estate, but only if those clients individually could establish on evidence what had happened to their property. That is, in legal jargon, if they could follow or trace their money by

“demonstrating what has happened to their property, identifying its proceeds and the persons who have handled or received it, and justifying their claim that the proceeds can properly be regarded as representing his property” (*Boscawen v Bajwa, Abbey National plc v Boscawen* [1995] 4 All ER 769 (CA) at 776 to 777, *per* Lord Millett).

18. The problem is that tracing:-

18.1. Is usually difficult, time consuming and expensive;

18.2. Has finite limits:

“Tracing is only possible so long as the fund can be followed in a true sense, that is, so long as, whether mixed or unmixed, it can be located and identified. It presupposes the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. If, on the facts of any individual case, such continued existence is not established, equity is ... helpless” (Halsbury, Vol. 6, paragraph 861);

18.3. Is subject to well established legal rules which provide that the tracing process must stop if, for example, money is paid into an overdrawn account, or is expended in such a way that it does not form part of a substitute asset (general expenses etc.). So, if this rule applies in LBIE’s case, the overnight sweep into an overdrawn account is potentially very problematic for any un-segregated client.

19. Briggs J concluded that:-

19.1. Given the likely difficulties of tracing and the purpose of the rules to ensure a prompt distribution it was entirely understandable that CASS7 should have limited the CMP to money held in segregated accounts.

19.2. It followed that (with minor exceptions) the client money distribution rules in CASS 7 only applied to client money that had in fact been segregated. Un-

segregated clients could individually pursue tracing remedies in respect of client money in LBIE's house accounts, but the Administrators did not have to do so.

The Court of Appeal

20. Notes that Briggs J himself recognised that his solution was unsatisfactory in one important respect:

“[a client money] trust [that applies] from the outset, coupled with pooling that benefits only segregated clients, leaves client money not in client accounts in a legal "black hole". (Arden LJ at [42], emphasis added)

21. Recognised this as a “difficult point” (at [139]), but ultimately fundamentally disagreed with Briggs J:

21.1. Disliked the idea of a “black hole”;

21.2. Concluded that the statutory trust under CASS 7 is intended to be a single trust which, so far as possible, treats all clients equally (Arden LJ at [125]). Not a series of separate trusts (i.e. (a) a statutory trust with CASS 7 distribution rules in respect of segregated client money; and (b) a series of separate statutory trusts with different rights and outcomes in each case if a client could trace client money into LBIE's house account). A single trust pointed to a single CMP in which all clients would share: “equality is equity”.

22. Concluded that the CMP should contain all “identifiable” client money:

Do clients participate in the pool if they have contractual claims to client money or only if they have contributed to the pool?

Key rules

CASS 7.9.6R: “If a primary pooling event occurs:

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

(2) the firm must distribute that client money ... so that each client receives a sum which is rateable to the client money entitlement calculated in accordance with CASS7.9.7 R.”

Argument

23. **The “claims basis” for sharing in the CMP:** clients share in the CMP if they have a net contractual entitlement to client money, whether or not the firm has actually segregated client money for them. This is the outcome that MiFID requires. CASS7.9.7R requires the set off of individual client balances and client equity balances. These terms are described in Annex 1 to CASS7. This sets out a standard method of reconciliation which a firm can use to carry out the requisite internal and external reconciliations of its accounts and records. This shows that it is the client’s net contractual entitlement that determines his client money entitlement.
24. **The “contributions basis” for sharing in the CMP:** clients only share in the CMP if they have contributed to the CMP (i.e. if money has been segregated for them). CASS 7, Ann. 1 is only guidance. It is not a complete code for determining a client’s entitlement. It is simply a “reducing mechanism” that will affect some clients for whom money has been segregated. No client for whom money has not been segregated can show any proprietary claim to any segregated money. Their proprietary claim, if any, is to other money outside the segregated accounts. Segregated clients have an unqualified right to the credit on their segregated accounts. The Court should not interfere with property rights and should not read FSA rules as requiring such interference.

Briggs J at first instance

25. The basis for sharing in the CMP was the amount which the firm had actually segregated for each client as revealed by the last internal reconciliation carried out by the firm before the PPE (i.e. the contributions basis).
26. The contributions basis was to be preferred because it facilitated distribution to those who had contributed to the pool. That symmetry would justify the difference in the effect of the statutory trust as between the clients whose money was segregated at the PPE, and those whose money was not then segregated
27. The contributions basis would facilitate a speedier distribution of the segregated fund.

Court of Appeal

28. Disagrees with Briggs J.

28.1. Accepts that the term “client money entitlement” as used in CASS 7.9.6R(2), is intended to refer to a contractual entitlement. That term should have a consistent meaning throughout CASS 7 (Arden LJ at [155]).

28.2. Notes that the claims basis necessarily requires a calculation of each individual client’s contractual entitlement to client money at the time of the primary pooling event (“the PPE”). Therefore, it automatically allows for any adjustments necessary to take account of events between the last actual segregation of client money and primary pooling event. There are no rules in CASS 7 to indicate how contributions should be adjusted to take account of such events. This is a fundamental pointer to the claims basis, not just a “glitch” in the application of the contributions basis (as it had been described by Briggs J). (Arden LJ at [157]).

28.3. Decides that Briggs J overstated the simplicity of distribution only to segregated clients and (given his conclusion that tracing was unlikely to be productive for non-segregated clients) put too much weight on the ability of non-segregated clients to pursue tracing remedies as an alternative to a distribution from the segregated fund (Arden LJ at [157] and [158]).

29. Concludes (Arden LJ at [154]) that:-

29.1. The underlying concept of "client money entitlement" in CASS7.9.6R(2), is that of contractual entitlement to have client money segregated;

29.2. The effect of this interpretation is that some clients will benefit from a distribution even if they have no proprietary claim to client money; but

29.3. It was open to the FSA to determine that the failure of the firm should be treated as a common misfortune in which those who had claims to the recovery of client money should share without distinction.

Unresolved issues

Breach of Trust

30. Briggs J made clear at first instance (and the FSA accepted) that if a firm adopted the Alternative Approach, but failed to take appropriate steps to prevent dissipation or misuse of trust money (i.e. client money) while it was in the firm's house account, the firm would be in breach of trust. The Court of Appeal was less definitive:-

“In connection with the role of general law, it is important to make it clear that this court has been asked not to deal with any individual tracing claim. Accordingly there has been no real argument on the rights of a client who pays money to a firm adopting the alternative approach under the general law.

When the alternative approach is adopted, CASS7 contemplates that client money should be paid into a running account of the firm. So it is implicit in the structure of CASS7 that the firm will be able to use client monies which it receives, but the implication may go no further than this so that the authority to do this would only be on the basis that the firm's account contained equivalent substitute assets, and so that the beneficiary obtained a beneficial interest in substitute assets.

On this basis, it would be a breach of trust if the house account into which client monies were paid was overdrawn or if it would not have enough monies in it at any time relevant for the client to have a proprietary interest to the full extent of his monies. (Any breach of trust claim would, however, be only an unsecured claim against LBIE conferring no priority over other unsecured creditors such as trade creditors ...).

Those issues are left open by this appeal. It should also be borne in mind that a client need not, under CASS7, know that his money is being paid into a house account. He may reasonably be under the impression that prior to segregation it is being paid into a general client account” (Arden LJ at [70], paragraph breaks and emphasis added).

Practicalities of Following and Tracing

31. As above, the Court of Appeal concluded that the CMP should contain all “identifiable” client money:
32. But the Court provided only limited guidance as to what “identifiable“ means:-
 - 32.1. The character of client money that is “identifiable” in this way is that a client can show a proprietary interest in it, so that there is no unfair competition between the interests of the general creditors and clients (Arden LJ at [132]); and
 - 32.2. “CASS7.9.6R ...cannot mean or include client money which has ceased to be identifiable, for example because it has been spent or lost” (Arden LJ at [133]).
33. These are of course similar to the principles underlying tracing and following at common law. So is there any difference between “identifying” client money outside the segregated accounts and tracing or following it?
34. The Court of Appeal also said at (Arden LJ at [72] to [73]):-
 - 34.1. We have not been asked to consider whether, if any client has a tracing claim in respect of client money paid into a firm's account, it is an individual claim or one belonging to clients in the same position collectively.
 - 34.2. If the right of clients to trace monies into the firm account were a collective right, then it may be that the right to follow the monies misapplied belongs not to any individual client but to the clients entitled to share in the house account collectively.
 - 34.3. If, however, the claim is an individual claim, there are ... a number of default rules of trust law, such as hotchpot and the rule in *Cherry v Boulton*, which are potentially applicable. We have not heard argument on these rules but the principle of hotchpot may offer the means of solving the problem ... of a client seeking to benefit from a share in the pool and not bringing into account the benefit of other claims which he has. On that basis, the client who happens to have an individual claim to follow trust property, because his monies were

misapplied, would have to bring that claim into account if he wishes to share in the house account pool.

- 34.4. The requirement to bring claims to other property into account may extend to assets purchased with client money (even though the FSA has no statutory power to compel the pooling of assets that are not “money”)

“such as a yacht, purchased with client monies misappropriated from a client or house account. Such property may have to be brought into account under the default rules of trust law applying to individual claims or they may in any event belong to clients collectively. This is, as the FSA point out in their written submissions, the sensible solution since no single client could ever easily identify that it was his particular monies that were spent on the yacht.” Arden LJ at [73]

- 34.5. The FSA made the important point that is likely to be more efficient if the insolvency officeholder decides whether to pursue other identifiable client money since he will have access to all the accounting records and other information.

- 34.6. LBIE’s Administrators objected, but the Court agreed with the FSA:

“[The Administrators] ... submit that, unless they have been put on enquiry that a particular receipt of client money has not been segregated, they will be dependent on claims made by clients being backed by sufficient evidence to justify further enquiry. ... I consider that ... [the FSA] is right on this point. The task for the Administrators may be difficult but not as difficult as that facing clients with individual tracing claims as a whole” (Arden LJ at [122])

35. Overall, the identification exercise contemplated by the Court of Appeal seems to have its origins in the process of tracing and following but in practice to be very far from a classic, individualistic tracing exercise. Its scale and scope is presently unknown. It may be that the better analysis is that when the Court of Appeal refers to “identification” it has in mind is not a common law tracing exercise, but the working out of the practical consequences of the statutory client money trust in CASS 7. So there may well be room for argument that the limits that apply to this process are not the same as the limits that would apply to a tracing exercise.

Final reconciliation

36. Consistent with the Court of Appeal's finding that the basis for sharing in the CMP is contractual entitlement (i.e. the claims basis) a final reconciliation will be required, as at the time of the PPE to determine the entitlement of each client:

“In the light of the conclusions that I have reached on pooling I consider that Mr Miles' submission as to the need for a final reconciliation is correct. CASS7.9.6R does not limit pooling to client money accounts at any particular point in time prior to the PPE...” (Arden LJ at [142])

37. But it is not clear what the basis for that reconciliation should be – the better view is probably that it should be a “true” reconciliation” bringing into account all identifiable client money and all CMEs of segregated and unsegregated clients. In LBIE's case that is likely to disclose a very substantial shortfall, given the failure to segregate client money received from or held for Affiliates.

Operational guidance

Treatment of Affiliate Firms

38. In both the High Court and the Court of Appeal it was simply accepted that the correct interpretation CASS, following the implementation of MiFID is that the general rule is affiliate companies are to be treated as clients. (Briggs J at [48] Arden LJ at [10]).

Prudential buffers and cash / liquidity management

At first instance

39. Briggs J set out a general principle:-

“It is not for the court to specify the precise method whereby a firm using the alternative approach should make adequate arrangements to safeguard the clients' rights in relation to client money mixed in house accounts. It is sufficient for the court to conclude, as I do, that the obligation exists, leaving firms, their auditors and the FSA to decide on a case by case basis the adequacy of such arrangements as are proposed or implemented.” (Briggs J at [156])

40. But, Briggs J also identified several possible protective strategies

- 40.1. (a) the maintenance of a minimum balance in mixed accounts; and (b) the avoidance of charges, security or group liquidity management strategies:

"It seems to me that there are at least two methods whereby a firm can protect client money mixed in its house accounts between successive points of segregation under the alternative approach. The first takes advantage of the general rule that where a trustee holds trust money and money of his own in a mixed account, any payment out of that account otherwise than for a purpose authorised by the trust is deemed to be a payment of his own money rather than of the trust money. It follows that by maintaining a minimum balance on house accounts used for the receipt of trust money under the alternative approach sufficient to ensure that there is never less in a particular house account than the amount of the client money contribution to it, between any two points of segregation, a firm will substantially protect the client money, and the clients' rights in relation to it, from misuse. It would also be necessary for the firm to avoid subjecting those house accounts used for the receipt of client money to any form of charge or other security, or to any group liquidity management arrangements of the type used by the Lehman Brothers group." (Briggs J at [155])

- 40.2. Maintaining a client money buffer in a separate account:

"An alternative form of protection, (using the same historical calculation to provide a prudent quantification of the amount required) could be used to establish a prudent buffer in a segregated client account, pursuant to CASS7.4.21R, thereby leaving the firm completely free to use its house accounts for its own purposes, secure in the knowledge that there was also an additional amount in the segregated client accounts, in excess of the amount of client money mixed in house accounts between successive points of segregation." (Briggs J at [155])

41. The size of the minimum balance could be based on historical records, as is the size of the buffer for unapplied credits under CASS 7.

"Since a firm's obligation to maintain records distinguishing between client and house monies must be sufficient for it to know, retrospectively, the amounts of client money in house accounts over time, I can see no reason why historical statistical information could not be used by a firm for the purpose of quantifying the amount of a prudential buffer of that type." (Briggs J at [154])

The Court of Appeal

42. As set out above, the Court of Appeal:-

- 42.1. Accepts that CASS 7 creates a trust of client money on receipt and that on this basis the Alternative Approach (i.e. the mixing of client money with house money) is consistent with MiFID.
- 42.2. Leaves open the possibility that use of money in the mixed house account, without a buffer may be a breach of general trust law, which forms as background to the implementation of CASS.
43. Accordingly the Court of Appeal says that “there was no need for the judge to suggest prudential buffers. They are implicit in the MiFID Directives themselves” (Arden LJ at [91]).
44. In my view it would be an unwise firm that would assume that the judgement of the Court of Appeal gave it any more leeway to make use of a house account consisting of a mixture of client money and house money than the judgement of Mr Justice Briggs at first instance.

Auditing requirements and private rights of action

45. LBIE’s auditors were required to certify not only the existence of appropriate systems and controls to enable compliance with FSA client money rules, but also the fact of compliance (and indeed did so in LBIE’s case): see SUP 3.10.4R and 3.10.5R:

“The client asset report must state whether in the auditors opinion the firm was in compliance with ... the client money rules ... at the date as at which the report has been made”

46. There is no sign yet of claims against auditors although there are reports that professional bodies are investigating / preparing disciplinary proceedings.
47. Private rights of action mentioned by the Court of Appeal, but possibly unlikely in this case, given the client base.

Outlook for FSA rules

48. Substantial re-drafting is likely to be required. Both the High Court and the Court of Appeal were critical of aspects of the drafting. Though the High Court more so and the Court of Appeal more willing to “work around” problems.

49. The fundamental question will be to decide (a) what are the consequences of and limitations on the operation of a mixed fund under the general law of trusts – under the Alternative Approach; and (b) which if any of those consequences does the FSA (or its successor) wish to preserve?