In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION

COMPANIES (WINDING-UP)
2020: Nos. 304 & 305

IN THE MATTER OF NORTHSTAR FINANCIAL SERVICES (BERMUDA) LTD.

AND IN THE MATTER OF OMNIA LTD.

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 COMPANIES ACT 2000

AND IN THE MATTER OF THE PRIVATE ACTS LISTED AT APPENDIX 1

Before:	**The Hon. Chief Justice Hargun**
Appearances:	**Mr Michael Todd KC of Erskine Chambers and Ms Christina Herrero of Marshall Diel & Myers Limited for the Joint Provisional Liquidators**
	Mr Edward Davies KC of Erskine Chambers and Ms Jennifer A Haworth of MJM Limited for the Variable Representatives

Mr Christopher Tidmarsh KC of 5 Stone Buildings and Mr Nicholas Miles of Kennedys Chudleigh Limited for the Fixed Representative

Mr Matthew Collings KC of Maitland Chambers and Mr John Blackwood of Chancery Legal for the General Representative

Dates of Hearing: 24 - 28 April 2023
Date of Judgment: 28 July 2023

JUDGMENT

The requirements of the Segregated Accounts Companies Act 2000 for the establishment of a "segregated account"; whether a segregated account established by the mere keeping of records; what must those records say or identify in order to establish a segregated account; whether commingling of funds precludes the operation of segregation; the requirements for "linkage" for assets, rights, contributions, liabilities and obligations to an account; whether principles of tracing apply in determining whether an asset is linked to a segregated account; the proper approach to the construction of the SAC Act; determining the legislative intent underpinning the SAC Act; the extent that assets linked or allocated to a segregated account are to be held for the benefit of the relevant segregated account having regard to the requirements of the SAC Act; to what extent creditors in respect of any segregated accounts have claims against the general assets of the company under the SAC Act

HARGUN CJ

Introduction

1. Over a period of five days in April 2023 the Court heard an application on behalf of Rachelle Ann Frisby and John Johnston, the Joint Provisional Liquidators (**"JPLs"**) of

both Northstar Financial Services (Bermuda) Ltd. (in liquidation) (“**Northstar**”) and Omnia Ltd. (in liquidation) (“**Omnia**”), made by summons dated 1 June 2021, as amended on 26 July 2021, seeking determination of the following issues (“**the Segregation Issues**”), such determination being necessary for this Court to give directions to the JPLs:

(a) To what extent, if any, have Northstar and Omnia (“**the Company or Companies**”) established segregated or separate accounts in respect of investments made in it or policies[1] issued by it (“**the Segregated Accounts**")?

(b) To what extent, if any, are the assets of Northstar and Omnia to be held exclusively for the benefit of any such Segregated Accounts?

(c) To what extent, if any, do claimants in respect of any Segregated Accounts have claims against the general assets of Northstar and Omnia?

2. By Order dated 26 August 2021 the Court made the following representations order in relation to the hearing of the Segregation Issues:

(a) an investor or Policyholder[2] in one of the Companies holding only variable investments would represent the interests of investors or Policyholders holding variable investments (“**the Variable Class**”);

(b) an investor or Policyholder in one of the Companies holding only fixed investments would represent the interests of investors or Policyholders holding fixed and indexed investments (“**the Fixed Class**”); and

(c) a creditor of one of the Companies not holding any such investments or Policies would represent the interests of creditors not holding fixed, indexed or variable investments (“**the General Class**”).

[1] In this Judgment, “Policy” means an agreement to which the relevant Company was a party pursuant to which it provided a Product for the benefit of a Policyholder (and “Policies” should be construed accordingly).

[2] “Policyholder” means the person beneficially entitled to the benefit of such a Policy in accordance with the terms of the governing instrument(s) by which that Policy was issued.

3. No suitable representative for the General Class having been identified, on 13 December 2021, the Court granted an order appointing John Blackwood of Chancery Legal as legal representative of the General Class.

The Background

4. The background to these applications is uncontroversial and is helpfully set out in the written submissions filed on behalf of the JPLs (summarising the Northstar Report dated 1 June 2022 ("**the Northstar Report**") and the Omnia Report dated 6 September 2022 ("**the Omnia Report**") produced pursuant to paragraph 4 of the Orders dated 26 August 2021).

Northstar

5. Northstar was incorporated in Bermuda on 18 February 1998 under the name *"Nationwide Financial Services (Bermuda) Ltd"* and has since undergone several name changes and amalgamations with other corporate entities. The Company amalgamated with Metlife International Insurance Ltd ("**Metlife**") on 1 June 2007 and NFSB Investment Ltd on 14 November 2012. In August 2018, BMX Bermuda Holdings Ltd ("**BMX**") (an entity ultimately beneficially controlled by Mr Greg Lindberg ("Mr Lindberg")) acquired the entire issued share capital of the Company. Northstar was registered under its current name on 6 April 2006.

6. The Policies issued by Northstar (and those assumed by Northstar following the Metlife amalgamation) were variously subject to three different Private Acts: the Nationwide Financial Services (Bermuda) Ltd. Act 1998 ("**the Nationwide Act**"), the Citicorp International Insurance Company Ltd. Act 1999 ("**the Citicorp Act**"), and the Northstar Act[3]. On 4 April 2008, Northstar was registered as a segregated accounts company under the Segregated Accounts Companies Act 2000 ("**the SAC Act**").

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[3] The Northstar Financial Services (Bermuda) Ltd. Private Act 2008, subsequently amended by the Northstar Financial Services (Bermuda) Ltd. Amendment Act 2018 ("**the Northstar Act**").

7. Following the acquisition of Northstar by BMX in August 2018, a significant proportion of the liquid fixed income securities owned by Northstar were replaced with illiquid debt instruments and equity issued by entities affiliated with Mr Lindberg. That is a matter of ongoing investigation and the principal subject of the complaint issued by the JPLs on 4 January 2023 in the United States Bankruptcy Court for the Southern District of New York in respect of historical alleged wrongdoing in relation to the affairs of the Companies by Mr Lindberg, his associates and corporate entities affiliated with him (**"the US Complaint"**).

8. As a result of the amalgamations which occurred over time, Northstar traditionally viewed its business through three different *"blocks"*: the Nationwide Business, the Metlife Business, and the Northstar Business.

Omnia

9. Omnia was incorporated in Bermuda on 15 May 2000 under the name "*Sage Life (Bermuda) Ltd*" and has since undergone several changes of name. Between 2003 and 2016, Omnia formed part of the Old Mutual group of companies.

10. On 30 June 2017, Omnia was acquired by PBX. As in the case of Northstar, following this acquisition a significant proportion of the investment-grade assets held by Omnia were replaced with illiquid debt instruments and equity issued by entities affiliated with Mr Lindberg. Mr Lindberg and his affiliated entities' conduct in relation to Omnia is also a matter of ongoing investigation and is addressed in the US Complaint.

11. Between 2000 and 2009 Omnia sold various Policies under fixed and variable annuity contracts, primarily under Products[4] known as the Universal Investment Plan (**"UIP"**),

[4] "Product" means a given category of insurance or investment policy offered to Policyholders of one of the Companies under a given label or description, the Policies marketed and sold in relation to which bear similar (though not necessarily) identical terms to one another.

Guaranteed Rate Plan (“**GRP**”) and Guaranteed Index Plan (“**GIP**”). Omnia was never registered under the SAC Act. Instead, it purported to establish segregated accounts under two Private Acts. Policies were initially issued and administered under the Sage Life (Bermuda) Ltd. (Segregated Accounts) Act 1999 (“**the Sage Act**”), and latterly (from 4 April 2004) under the Omnia (Bermuda) Ltd. (Segregated Accounts) Consolidation and Amendment Act 2004 (“**the Omnia Act**”). Except for the SWAP Product held by Liffey, the JPLs do not currently have access to any Policy contract forms in respect of Policies issued under the Sage Act.

Northstar Business

12. Northstar’s business involved the sale and management of investment and annuity products under three broad categories of Business:
    (a) Investment business written under the Northstar Act (“**Northstar Business**”). The Northstar Business postdates Northstar’s registration under the SAC Act.
    (b) Long-term insurance business issued prior to Northstar’s registration under the SAC Act pursuant to the Nationwide Act (“**Nationwide Business**”).
    (c) Insurance business written by Metlife under the Citicorp Act (“**Metlife Business**”). The Metlife Business included segregated and non-segregated products and pre-dates Northstar’s registration under the SAC Act.

13. Northstar issued 104 different iterations of Products under 33 broad categories of Product. For example, a Product with the designation *“Global Advantage”* had different iterations (for example, *“Global Advantage I”* and *“Global Advantage II*”) with each iteration having variations in the form of underlying contract issued to Policyholders.

14. Northstar’s marketing literature divided the Products it sold into three categories: (i) fixed rate investment plans; (ii) variable investment plans; and (iii) indexed investment plans. Some of the Products sold by Northstar provided for participation in only one kind of investment (for example, only *“fixed”* investment) while others permitted investment of

funds in different kinds of investment (for example, allocating some funds to *"fixed"* investment and some to *"variable"* investment).

15. Variable investment plans enabled Policyholders to invest in a range of different mutual fund assets, with the return being *"variable"* in the sense that return would depend on the performance of the underlying mutual fund investment.

16. Fixed investment plans were those that 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 at a set interest rate over a defined period. In contrast to variable investment options, fixed investment options did not offer Policyholders a choice of underlying mutual funds in which to invest their funds.

17. The JPLs understand that, prior to the acquisition of Northstar by Mr Lindberg, Northstar's policy was to invest approximately 75% of the sums backing fixed investments into a portfolio of liquid income securities managed by Blackrock Asset Management (UK) Limited, with the remaining sums being invested in a portfolio of high-yield investments. Following Northstar's acquisition by Mr Lindberg, these investments were liquidated and replaced by investments in illiquid equity and debt instruments issued by entities affiliated with Mr Lindberg.

18. Indexed investment plans 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 (the S&P 500). The only Product offered by Northstar which the JPLs are aware offered indexed investments was the *"Global Index Protect"* product.

Omnia Business

19. Omnia sold four known categories of Product, with the investment options indicated in the table below:

Product Name	Private Act	Investment Options
GIP	Omnia Act	Indexed and fixed
GRP	Omnia Act	Fixed only
UIP	Omnia Act	Variable and fixed
SWAP Product	Sage Act	Sui generis

20. Contract forms are available on the IMS, Omnia's electronic Policy administration system, for most of the Policies historically issued by Omnia. In contrast to Northstar, Omnia does not appear to have issued an individualised Policy form to each Policyholder. Instead, it prepared only standard Policy forms, which, in the case of the GRP and GIP Products, were available to all Policyholders on the IMS.

21. There are 10 unique Policy iterations available to the JPLs: three available iterations of each of the GIP, GRP and UIP Policies, and one iteration only of the SWAP Product. The Products sold by Omnia offered Policyholders variable, fixed and indexed investment options. Variable investment options were available only to the purchasers of UIP Policies. As in the case of Northstar, they permitted Policyholders to select a choice of investment funds (mostly mutual funds) in which to invest, so that the performance of the Policyholders' investments would depend on that of the underlying fund.

22. Again, as in the case of Northstar, the holders of variable investment options would not be allocated with holdings in the underlying investment funds directly. Instead:

    (a) The Policyholder would select the funds in which they wished to invest. It was intended (and represented in Omnia's marketing materials) that Omnia would use the Policyholder's investment to acquire holdings in the selected funds in the proportions chosen by the Policyholder.

(b) The Policyholder would be allocated Units, which were a unit of measurement used on the IMS to calculate the value of the variable investment option. Each Unit corresponded in value to a unit of equivalent value purchased by Omnia on the Policyholder's behalf in the underlying investment fund. The "*unitisation*" structure is explained in detail at paragraph 294 of the Omnia Report. In summary:

(i) The number of Units allocated to a Policyholder when purchased would be calculated by dividing the amount invested in the relevant fund by the value of a single Unit.

(ii)The value of Units would directly mirror the "*net asset value*" of Omnia's underlying units in the relevant investment fund. Kane LPI Solutions Ltd, the administrator of Omnia Policies, would update the Unit value manually on the IMS based on Bloomberg feed valuation data for the underlying investment fund. Subject to delays in updating values, there was always a one-to-one correspondence between the value of a Unit on the IMS and the value of a corresponding asset held by the Company.

(iii)As the value of the underlying mutual fund holdings fluctuated, so too would that of the Units and (by extension) the Policyholder's variable investment.

(c) Upon a withdrawal of contract value, a surrender or the maturity of a Policy, a number of Units would be deducted from the Policyholder's allocation that corresponded to the value withdrawn.

23. As in the case of Northstar, fixed investment options (available under the GIP, GRP and UIP Products) sought to guarantee a particular defined rate of return to Policyholders over a set period. The amounts invested, the terms of the investments and the applicable interest rates were shown in confirmation statements and quarterly statements appearing on the IMS and visible to the Policyholder.

24. In fixed annuity products of this kind, the JPLs understand that the issuing company will normally collect in all the cash advanced for fixed investments into a cash pool and invest that cash pool on its own behalf, aiming to use the proceeds of that investment to generate a return that could be used to pay the interest due to Policyholders. The extent to which Omnia followed this standard market practice in respect of its fixed investment options is considered below.

25. The value of a fixed-only Policy at any given time (recorded as the "*Contract Value*" on the IMS) was the value of the initial investment plus the interest credited over time (which was calculated daily), subject to fact-specific charges, deductions and adjustments provided for by the terms of the relevant Policy.

26. Indexed investment options did not guarantee a particular rate of return. Instead, Policyholders would select an index whose movements would be used to determine the rate of return (and the amount due to the Policyholder). Positive changes in the index would be reflected, up to a maximum cap rate, in the crediting of interest. Negative changes would not have any consequences (there were no index "*debits*").

27. In contrast to the indexed investment options offered by Northstar, for Omnia the relevant indices appear only to have been used as a method of calculating the rate of return due to the Policyholder, and there is no suggestion that Omnia was required to or did make any corresponding investment in any underlying index funds. The value of an indexed investment option would be determined by aggregating the value of the initial investment with the total index interest credits applied to the Policy over time. Index credits were credited annually.

28. Most of the Policies issued by the Companies were held pursuant to a trust structure. The effect of the trust structures is that Policyholders did not contract with the Companies directly; instead, a trustee or sub-trustee would purchase a Policy on the Policyholder's behalf, so that the benefit of the Policy would be held on trust for the Policyholder.

Appointment of the JPLs

29. The circumstances in which the JPLs came to be appointed as officeholders of the Companies can be summarised as follows:

    (a) The Companies originally came to the attention of the Bermuda Monetary Authority ("**BMA**") due to non-compliance and liquidity issues caused by the investment management of certain assets provided by subsidiaries of the Global Bankers group. In July 2018, significant assets belonging to the Companies were replaced with illiquid equity and debt instruments, mainly in special purpose vehicle structures in the United States under the control of Mr Lindberg.

    (b) On or around 3 October 2018, the BMA was notified that the US Department of Justice had launched an investigation into Mr Lindberg.

    (c) On 15 April 2019, the BMA proposed (and the Companies agreed) that conditions would be placed on the insurance licences of the Companies to assist with the enhanced supervision of the BMA.

    (d) It became apparent that this arrangement was not sustainable and could not be continued. Moreover, the BMA had become concerned with the Companies' solvency and the pending actions against Mr Lindberg.

    (e) In May 2020, the BMA engaged Deloitte to conduct an independent review of files held by the BMA in relation to the Companies. The findings of Deloitte's investigation resulted in the presentation of winding-up petitions by the BMA on 18 September 2020 on the grounds that the Companies were unable to pay their debts and had failed to comply with statutory filing obligations.

30. The JPLs were appointed by Orders of the Court dated 25 September 2020. On 26 March 2021, the Companies entered liquidation, with the JPLs directed to continue in office as joint and several provisional liquidators of the Companies.

Segregated Accounts: The Legal Framework

31. To properly analyse the Segregation Issues, it is necessary to consider (i) the legal landscape relating to segregated companies and segregated accounts in Bermuda; and (ii) the wording of the Policies issued by Northstar and Omnia.

32. In *Ivanishvili v Credit Suisse Life (Bermuda) Ltd* [2022] SC Bda 56 Civ this Court (Hargun CJ) observed that the general concept and purpose of the SAC Act was:

> "*In general, 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 (and from the general assets and liabilities of the company). 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.*" **(emphasis added)**

33. The feature of *linking* an asset or liability to a segregated account is achieved and emphasised by a number of provisions appearing in section 2(1) of the SAC Act:

- "*'<u>segregated account</u>' means a separate and distinct account (comprising or including entries recording data, assets, rights, contributions, liabilities and obligations <u>linked</u> 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 assts and liabilities of the segregated accounts company for the purposes of this Act;*"

- *"'general account' means an account comprising all of the assets and liabilities of a segregated accounts comply which are not linked to a segregated account of that company;"*
- *"'creditor' means, in respect of any segregated account ... or the general account 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*".
- *"'account owner' in relation to a segregated account means any person who is— [...]*
  - *(a) 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*
  - *(b) expressly designated in the records of the segregated accounts company as being an account owner in respect of that segregated account;*
  - (c) *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'*".
- *"'linked' means referable by means of:*
  - *(a) an instrument in writing including a governing instrument or contract;*
  - *(b) an entry or other notation made in respect of a transaction in the records of a segregated accounts company; or*
  - (c) *an unwritten but conclusive indication which identifies an asset, right, contribution, liability or obligation as belonging or pertaining to a segregated account*" (emphasis added).

34. The Court accepts the agreed position between Counsel that the touchstone for linkage is the identification of an asset or liability with a given segregated account (by writing or conclusive indication) rather than on the segregation of funds (for example by the maintenance of separate bank or securities accounts).

35. Section 17 of the SAC Act sets out the consequences of linkage of assets and liabilities to segregated accounts recognised under the SAC Act. The relevant provisions of section 17 provide:

> ***"Nature of segregated accounts, application of assets and liabilities***
> *17 (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

(b) available only to meet liabilities to the account owners and creditors of that segregated account; and shall not be available or used to meet liabilities to, and

(b) 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.

(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;

(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.

36. Section 17 of the SAC Act was described in the Explanatory Memorandum accompanying the original Bill as "*the crux of the Bill [which] sets out the operative law that effects the separation of accounts. The assets of the segregated account are held exclusively for the benefit of the beneficial owner or counterparty and can only be applied to the liabilities of the account and a statutory 'firewall' insulates those assets from the claims of other creditors*".

37. Relevant principles for interpretation of Bermuda Public Acts are uncontroversial and were recently set out by this Court (Hargun CJ) in *Re Jardine Strategic Holdings Ltd* [2022] SC (Bda) 27 Com at [44] and those principles are as follows:

"*Counsel for both parties referred to principles of statutory interpretation which are potentially relevant to the interpretation of section 106 of the Act. The relevant "principles" are uncontroversial and are as follows:*

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

(2) 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 [2004] 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's 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."

(3) 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 edn) ("Bennion"), [21.1]). Accordingly, the court's task is to "identify the meaning borne by the words in question in the particular context." The court will "ascertain the intention of Parliament expressed in the language under consideration." This is an objective, rather than a subjective, exercise (R v Environment Secretary, Ex p Spath Home Ltd [2001] 2 AC 349, at 396 (Lord Nicholls)).

(4) 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)).

(5) The court will take into account the state of the previous law and its evolution (Bennion [24.5]).

(6) The court will seek to avoid a construction that produces unreasonable or absurd results, and "[t]he more unreasonable a result, the less likely it is that Parliament intended it" (Bennion [26.3]; Regina v Central Valuation Officer and Another [2003] UKHL 20, [117] (Lord Millett)).

(7) 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])."

38. In *Ivanishvili*, this Court held that "*Section 17(5) provides that once liability is affixed against a segregated account, that liability (i) can be enforced against the assets of that segregated account; (ii) cannot be enforced against the assets of other segregated accounts of the company; and (iii)* ***unless the parties otherwise agree in writing*** *cannot be enforced against the general account of the segregated accounts company*." **(emphasis added)**

39. In *Re CAI Master Allocation Fund Ltd* [2011] Bda LR 57 at [17]-[18] Kawaley J (as he then was) emphasised the extent of the separation between the assets and liabilities of a given separate account and those of a company's other accounts. Kawaley J observed that this separation is "*sacrosanct*" and a "*statutory Iron Curtain*", such as to preclude any piercing of the separate legal status of the segregated accounts on the basis that they had been used as a vehicle of fraud. Kawaley C held that "*[t]he scheme of the Act is inconsistent with departing from the segregated account scheme in the absence of investor agreement or compelling equitable grounds for so doing*" (at [19]).

40. In similar terms, Kawaley J (as he then was) observed in *BNY AIS Nominees & Gottex ABL (Cayman) Ltd v New Stream Capital Fund* [2010] Bda LR 34 at [93] and [130] that a segregated account is a "*company within a company*" whose assets are behind a "*firewall*". Kawaley J did, however, note the considerable scope for modification of the statutory regime by contract (at [147]):

> "*The statutory segregation requirements are not designed to place the management of a segregated account company in a straight-jacket and to deprive them of the ability to informally manage cash-flow within a corporate group in a flexible manner when no questions exist about the ability of account holders and creditors having their obligations met in full. ... If parties managing a segregated account company wish to modify the application of the Act in transactions its accounts enter into, this should (as the Act requires) be expressly reflected in the relevant transaction documents.*"

41. A number of Policies issued by Northstar and Omnia are likely to be governed by relevant Private Acts. In relation to Northstar, the position is as follows:

    (a) All the Policies issued under the Northstar Act post-dated Northstar's registration under the SAC Act, which provides by s. 3(2) that, from the date of registration, "*a segregated accounts company shall be bound by this Act and from such date it may establish one or more segregated accounts to which this Act shall apply*". As a result, the SAC Act applies to all Policies issued under the Northstar Act and governs all matters relating to segregated accounts. It does not displace the Northstar Act in relation to any of its provisions "*not pertaining to the operation of such accounts*" (s. 8(4) of the SAC Act).

    (b) The position in relation to the Nationwide Act and the Citicorp Act is governed by section 8(1) of the SAC Act which provides that:

    > "*Where a company has operated segregated accounts by virtue of authority conferred by a Private Act and the company has registered—*

(a) *the provisions of this Act shall apply to that company and, to the extent of any inconsistency between this Act and the provisions of that Private Act, the provisions of this Act shall prevail;*
(b) *subject to paragraph (c), any contracts to which the company was a party on the date of registration shall be construed in accordance with the Private Act but contracts renewed or entered into after the date of registration shall be construed in accordance with this Act; and*
(c) *subsections 17A(1) to (4) shall apply with retrospective effect to any transaction entered into by the company in respect of and between accounts to the same extent that those sections would have applied to that transaction if that company had been a segregated accounts company under this Act at the time of the transaction.*"

42. In relation to Omnia there can be no doubt that the Omnia Private Acts govern the segregated accounts created by Omnia. It was never registered under the SAC Act, and section 3(2) of the SAC Act provides that it applies only to a company registered under the SAC Act. The Omnia Act repeals the Sage Act for most purposes.

43. In relation to Northstar, Counsel for the JPLs have helpfully summarised the relevant provisions of the Nationwide and Citicorp Acts, which make substantially similar provision for the creation and operation of segregated accounts, in the following table:

Provision (Nationwide Act)	**Provision (Citicorp Act)**	**Summary of effect**
s. 2(1)(m)	s. 2(1)(l)	A "Separate Account" is an account "*established or recorded in the records of the Company*"
s. 4(1)	s. 4(1)	The relevant company must establish and maintain a Separate Account for a Policy or group of Policies where required under the terms of the Policy.
s. 4(3)	s. 4(3)	The Company must record, allocate or credit to the Separate Account "*such portion of the receipts or premium from or attributable to the related Policy and any other property of the Company including but not limited to rights of the Company under any contract*

		derived from or purchased with such receipts or premiums as the Policy may stipulate"
s. 4(4)	s. 4(4)	Subject to the terms of a Policy to which a Segregated Account relates, the Company may invest and deal with the assets, investment income and other property recorded, allocated or credited to the Separate Account as it thinks fit. (In the Nationwide Act only) commingling of those assets with others not allocated to the Separate Account is permitted *"provided always proper records are maintained which would allow identification of the property or the interest in the mixed fund or combined or converted property which represents the property or its proceeds or property or allocations or credits or portions of property among the Separate Accounts*", and the Policyholder shall have "*the remedies of tracing in law and in equity*" in respect of those assets and their proceeds.
s. 4(5)	s. 4(5)	All income, interest or other gains earned from and any property acquired by the investing or dealing of the assets forming part of a Separate Account shall be credited to that Separate Account.
s. 4(7)	s. 4(8)	(Subject, in the Nationwide Act only, to the terms of the Policy to which a Separate Account relates) all expenses, fees or losses relating to that Separate Account or incurred from dealing or investing the assets forming part of the Segregated Account may be charged against the Segregated Account.
s. 4(8)	s. 4(7)	The assets standing to the credit of a Separate Account shall, after the deductions mentioned immediately above, be held by the Company subject to the provisions of the

		Act, for the sole purpose of paying any and all claims arising from or other amounts owing under the related Policy, and no other person shall have any right or interest in the asset.
s. 4(8)	s. 4(7)	The assets standing to the credit of a Separate Account shall, after the deductions mentioned immediately above, be held by the Company subject to the provisions of the Act, for the sole purpose of paying any and all claims arising from or other amounts owing under the related Policy, and no other person shall have any right or interest in the asset.
—	s. 4(9)	Any asset which is standing to the credit of a Separate Account of the Company shall not be available or used to meet liabilities to, and shall be absolutely for all purposes protected from, the creditors of the Company who are not creditors of that Separate Account and who accordingly shall not be entitled to have recourse to the assets in the Separate Account.
—	s. 4(10)	Where a liability of the Company to a person arises from a matter, or is otherwise imposed, in respect of a Policy the provisions of which require the establishment of a Separate Account, unless the parties shall provide otherwise, such liability shall not extend to, and that person shall not, in respect of that liability, be entitled to have recourse to, the general assets of the Company. For the purposes hereof, the general assts of the Company are those assets of the Company that have not been credited to any Separate Account or Accounts pursuant to the provisions hereof.
s. 8(a)	s. 10(1)	Notwithstanding any statutory provision or rule of law to the contract, on the commencement of proceedings to

		wind up (or, in the Nationwide Act, dissolve) the Company, the liquidator shall be bound to recognise the separate nature of each Separate Account pursuant to the provisions of the Act and shall not apply the property of any one Separate 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 any Policy or Policyholder other than that to which the Separate Account relates.
s. 8(e)	s. 10(4)	To the benefit of the relevant Policyholder the remedies of tracing in law and in equity shall apply to the property and the proceeds of the property of any Separate Account where such property or proceeds may have been commingled.

44. In relation to Omnia, Counsel for the JPLs have again helpfully summarised the relevant provisions of the Sage and Omnia Acts, which make substantially similar provision for the creation and operation of segregated accounts, in the following table:

Provision (Sage Act)	**Provision (Omnia Act)**	**Summary of effect**
—	s. 1(s)	"*Linked*" is defined in the same way as in s. 2(1) of the SAC Act.
s. 2(1)(p)	s. 2(1)(dd)	A "*Separate* [or Segregated] *Account*" is an account "*established or recorded in the records of the Company pursuant to [the relevant section of] this Act, which shall be evidenced in the records of the Company and may be composed of sub-accounts and, where there are*

		sub-accounts, the expression 'Separate Account' shall mean also each sub-account".
s. 5(1)	s. 7(1)	Where required under the terms of a Policy and in accordance with the terms thereof, the Company shall establish and maintain a Separate Account for such Policy or any particular class of Policies with a sub-account for each Policy forming a part of the said class. [*In the Sage Act only: each said sub-account shall be deemed to be a Separate Account for the Policy to which it relates*.]
s. 5(2)	s. 7(2)	Subject to this Act, rights and interests in the property subject to a Separate Account shall be determined by the terms of the relevant Policy and no other rights or interests which might exist in the said property shall be recognised notwithstanding any statutory provision or rule of last to the contrary. Each Policy shall be deemed to have a provision incorporated therein to the effect that no claim under the Policy may be paid from the Assets or funds of any Separate Account not relating to such Policy.
S. 5(3)	s. 7(3)	The Company shall allocate or credit to the relevant Separate Account such portion of the [assets specified below]* attributable to the Policy as the Policy may stipulate. *Sage Act: "*retrospective premium and the receipts from or attributable to the related Policy*"; Omnia Act: "*premium and other receipts and any Asset or other property of or under the control of the Company attributable to the [Policy]".*
s. 9(1)(b)	s. 13(1)(a)	Subject to the terms of the Policy to which a Separate Account relates, for each Separate Account, without prejudice to the protections afforded by this Act to property subject to Separate Accounts, the

		Company may invest and deal with the Assets, investment income and other property belonging to or concerning a Separate Account in such manner as the Company thinks fit including without limitation commingling the property thereof with property belonging to or in control of the Company or for which the Company is responsible (whether relating to other Separate Accounts or not) provided always that proper records are maintained which would allow the Approved Actuary to identify and allocate the property or the interest in the commingled fund or combined or converted property which represents the property or its proceeds or property or allocations of portions of property among the Separate Accounts.
s. 9(1)(c)	s. 13(1)(c)	The Company shall allocate to a Separate Account all expenses, income, interest, gains (or losses) incurred or earned from investing or dealing with the Assets, investment income and other property belonging to or concerning that Separate Account.
s. 10	—	The Company shall not issue any Policies under a Separate Account unless the Policy provides that: (1) the amount of all claims by all Policyholders under a Separate Account shall not exceed the aggregate of the Assets of the Separate Account; (2) in the event that a Separate Account has insufficient Assets (including reinsurance recoverables) to pay all such claims, the claims shall be reduced, as provided in the Policy, or, if no such provision is made for reduction in claim amounts, in the sole discretion of the board of directors of the Company; and (3) no claim shall be made under any Policy on the Assets of any Separate Account other than the one under which such Policy was issued.

		Any Policy issued by the Company without the aforementioned provisions shall hereby be deemed to have such provisions incorporated therein and the reduction in claim amounts referred to in subsection (2) hereof shall be determined by the board of directors of the Company in its sole discretion.
s. 13	—	No creditor of the Company, or of a purchaser of a Policy or of any Policyholder, may attach any rights or interests in the property subject to a Separate Account or the proceeds of a Policy of the Company that is subject to a Separate Account, unless [certain conditions are met].
s. 14(a)	s. 25(1)	Notwithstanding any statutory provision or rule of law to the contrary, the liquidator shall deal with the property of a Separate Account in accordance with the Act [*but in the case of the Omnia Act, where an Asset or Liability is Linked to more than one Segregated Account, the liquidator shall deal with it in accordance with the terms of the relevant Governing Instrument or contract*].
s. 14(e)	—	To the benefit of the relevant Policyholder the remedies of tracing in law and in equity shall apply to the property and the proceeds of the property of any Separate Account where such property or proceeds may have been commingled.

The wording of the Policies issued by Northstar and Omnia

45. The JPLs have, since their appointment, conducted investigations to assist with the determination of the Segregation Issues. These investigations have included a review of the language connoting segregation in the Policies issued by Northstar and Omnia. In the case of Northstar, the large volume of Policy forms meant that a targeted sampling exercise was required, the methodology of which is explained in Section 3.3 of the Northstar Report. The

population of available Omnia Policy forms is much smaller, so that the JPLs have been able to review all of them.

46. The review of the Policy documentation by the JPLs has resulted in the creation of certain schedules to the Northstar Report:

47. Schedule 1 contains the results of the JPLs' review of the pro-forma contracts available in respect of each Product, with that review being explained at Section 3.2 of the Northstar Report.

48. Schedule 2 contains a high-level analysis of the population of contracts which were sampled (i.e. it relates to the sample population as a whole, rather than to individual contracts sampled). This is explained at Section 3.4 of the Northstar Report.

49. Schedules 3 and 4 contain the results of the JPLs' analysis of the actual sample population. Schedule 3 contains certain identifying information in relation to each sample, while Schedule 4 primarily extracts the language from the sampled contract (if any) which purports to create *"segregated"* or *"separate"* accounts. This is explained at Section 3.5 of the Northstar Report.

50. Thus, by way of illustration, Schedule 4 of the Northstar Report summarises the relevant segregation provisions in relation to the Global Asset Portfolio (as part of the Metlife Business) as follows:

> *"Page 7 of the Circular notes: "The Separate Account" consists of 29 variable investment divisions, each of which invests exclusively in shares of a Mutual Fund as well as the Guaranteed Fixed Investment Option, a non-unitized division which invests in fixed income securities and other investments which support the guarantee periods. The Separate Account assets are kept separate from the general assets of the Company. Under Bermuda law, amounts invested in the separate account are not chargeable with liabilities arising out of any other business that the Company may conduct."*
>
> ...

See also the definition of "Separate Account" at page 6 of the Specimen Contract at Appendix A and the section "Separate Account" at page 8 of the Specimen Contract, which states:
"The Separate Account was established by the Company pursuant to this Contract and the Citicorp International Insurance Company Ltd. Act, 1999, an Act of the Legislature of Bermuda (the "Act"). Pursuant to this Act, the Company shall establish and maintain a Separate Account with respect to this Contract. The Separate Account shall not be chargeable with liabilities arising out of any other business that the Company may conduct. The Participants shall have no recourse to any rights or assets of the Company other than those credited or allocated to the Separate Account."

51. Schedule 4 of the Northstar Report summarises the relevant segregation provisions of the Global Variable Annuity (part of the Nationwide Business) as follows:

> "*Page 1 of the endorsement (page 23 of the Contract) states "1) On and after the Date of Issue, the Company shall establish and maintain a separate account for the Contract (the "Contract Separate Account") and for the purposes of section 4(1) of the Nationwide (Bermuda) Act, the Contract Separate Account shall be a Separate Account for the Contract. The rights and interests in the property of the Contract Separate Account shall be determined by the terms of the Contract as such terms shall stand from time to time." See also paragraphs 2 through 5 on this page.*
> *See also the definitions of "Multiple Maturity Account" on page 5 and "Variable Account" on page 6 and discussion of multiple maturity account and variable accounts on pages 13 - 15. See also the discussion of annuitization provisions and fixed and variable payment annuities on pages 19-20.*"

52. Schedule 4 summarises the relevant segregation provisions of the Global Advantage. Select (part of the Northstar Business) as follows:

> "*Page 5 of 14 per the Contract defines Segregated Account as: "A separate and distinct account pertaining to the assets and liabilities of this Contract which are segregated from the assets and liabilities of (i) any other segregated accounts, and (ii) the general account of the Company for the purposes of the SAC Act."*
> *The "Entire Contract" clause on page 7 states: "...This Contract will be linked to a Segregated Account."*
> *See the entire section on "Segregated Account" on pages 8-9. The first paragraph states:*
> *"The Company shall establish and maintain a Segregated Account in respect of this*

Contract only. The rights and interests in the property of the Segregated Account shall be determined by the terms of this Contract."
Further quoted from the Contract (same page): "Each Segregated Account is separate, distinct and identifiable from the other Segregated Accounts of the Company and the general account of the Company. The assets allocated to the Segregated Account are not chargeable with the liabilities arising out of the other business of the Company, including any other Segregated Account or general account of the Company. No claim shall be made under any contract on the assets of any Segregated Account other than the one linked to such contract."

53. The JPLs' review of a sampled selection of the contracts issued by Northstar has revealed certain differences between Products developed under the Metlife Business and those Products developed under the Nationwide and Northstar Businesses. These differences are set out at Section 3.8 of the Northstar Report. In summary:

(a) The *"Universal Life"* Product does not appear to make any provision for the creation of "*segregated*" or "*separate*" accounts.

(b) The *"Variable Universal Life"* Product contains wording that potentially suggests the creation of *"segregated"* or *"separate"* accounts in respect of variable investment but not in respect of fixed investment. The *"separate account"* created is said to *"hold assets funding the variable benefits for this Policy <u>and other similar contracts</u>*" (emphasis added).

(c) The *"Global Variable Deferred Annuity"* Product contains wording which suggests the creation of *"segregated"* or *"separate"* accounts in respect of variable investment but not in respect of fixed investment. The *"separate account"* created is said to apply in respect of *"this and <u>other contracts of the same type</u>"* (<u>emphasis added</u>).

(d) The *"Global Asset Portfolio"* Product appears to make provision for the creation of a single *"Separate Account"* with sub-divisions. This *"Separate Account"* purports to apply to both fixed and variable investment.

54. The JPLs' analysis of the available *pro-forma* contracts and the sampled selection of actual contracts indicates that, with only limited exception of the Universal Life Policy relating to the Metlife Business, each contract or Product contains language which the JPLs consider to be consistent with an intention to create *"segregated"* or *"separate"* accounts. The Court has reviewed Schedule 3 and Schedule 4 of the Northstar Report and agrees with the conclusion of the JPLs set out at paragraph 148 of the Northstar Report. The segregation issue in relation to the Metlife Business is further considered at paragraphs 120 to 124 below.

55. In relation to Omnia, Schedule 1 to the Omnia Report sets out the results of the JPLs' analysis of the Policy forms, identifying the Policy and the text of any language connoting segregation. By way of illustration, Schedule 1 summarises the segregation provisions relating to the Universal Investment Plan as follows:

> *"Page 4- definition of "General Account" as "An account comprising all of the assets and liabilities of the Company which are not Linked to a Segregated Account."*
> *Page 4 – definition of "Linked" as "Means any asset, right, contribution, liability or obligation belonging or pertaining to a Segregated Account."*
>
> *Page 4 – definition of "Private Act" as "A private act issued to the Company by the Bermuda Parliament, effective April 4, 2004. The Private Act enables the Company to, among other things, establish Segregated Accounts."*
>
> *Page 4 – definition of "Segregated Accounts" as "An account established or recorded pursuant to Section 7 of the Private Act, which shall be evidenced in the records of the Company and may be composed of sub-accounts and, where there are sub-accounts, the expression "Segregated Account" shall also mean each sub-account."*
>
> *Page 8 – Section VIII. "Segregated Account":*
>
> > *"The Plan will be Linked to a Segregated Account established by us when the Plan comes into force and which is separate, distinct and identifiable from the other Segregated Accounts and the General Account. No other Plans or contracts will be Linked to that Segregated Account. No claim shall be made under any Plan on the assets of any Segregated Account other than the one under which such Plan was issued. Each Segregated Account is an account containing assets and liabilities that are legally*

separated from the assets and liabilities of Our General Account and the other Segregated Accounts established pursuant to the Private Act.
No other rights or interests shall exist with regard to the assets or funds in the Segregated Account except as determined by the terms of the Plan. No claim under the Plan may be paid from assets or funds of any other Segregated Account not relating to or Linked to the Plan and vice versa.
All income from the Investments will accrue to the Segregated Account relating to the Plan.
Any moneys or proceeds receivable or received by us under any coverage against loss relating to the Plan shall form part of the property of and be payable directly into the Segregated Account and shall not be available to any other Segregated Account or General Account or claimant thereunder.
We may close the Segregated Account at the time the Plan is terminated and distribute the property attributable thereto.
The following deductions will be made from the Segregated Account...
The Company shall not be required to account to the Segregated Account for any payment or benefit (whether by way of profit, commission, remuneration or otherwise) which the Company has received from or by reason of offering the investments pursuant to the Plan or any connected transactions, and the Company's Fees and Charges shall not, unless otherwise provided, be thereby abated.
Notwithstanding any statutory provision or rule of law to the contrary, in the winding up of the Company the liquidator shall deal with the assets and liabilities which are Linked to the Segregated Account only in accordance with the Private Act and accordingly the liquidator shall ensure that the assets Linked to the Segregated Account are not applied to the satisfaction of liabilities Linked to any other Segregated Account or to the General Account."

56. In short, all the available Policy forms contain language that appears to denote the creation of segregated accounts. The Court has reviewed the Omnia Report and agrees with this conclusion expressed by the JPLs.

57. With this background the Court proposes to deal with the detailed List of Issues prepared by the JPLs in relation to the relief sought in the Summonses dated 1 June 2022.

<u>ISSUE 1: To what extent, if any, has each Company established segregated or separate accounts in respect of investments made in it or Policies issued by it (the "Segregated Accounts")?</u>

Legal Requirements under the SAC Act

1. What are the requirements of the SAC Act for the establishment of a "segregated account" (as that term is defined in section 2(1) of that Act)? In particular:

(a) Is a segregated account established by the mere keeping of records, or is something else required?

(b) In order to establish a segregated account, what level of record-keeping is required and what must those records say or identify?

(c) Does a commingling of funds preclude the operation of segregation?

58. Essentially for the reasons set out in the Northstar Joint Opinion of Mr Todd KC and Mr Andrew Blake ("Mr Blake") dated 19 April 2021 ("**Northstar Opinion**") and as submitted by Mr Davies KC, a segregated account can and should be treated as having been established in respect of a particular Policy (or Policies) where, (a) the relevant contractual materials for the Product in question evince an intention that there should be a segregated account and, (b) particular assets (being assets of a kind that the relevant Policy provides may be segregated) are connected in the company's records to the particular Policy (or Policies). Commingling of funds does not preclude the operation of segregation.

59. First, whilst the SAC Act defines "*segregated account*" as meaning "*a separate and distinct account*" that separate and distinct account is evidenced by "*entries recording data, assets, rights, contributions, liabilities and obligations linked to such account*." The definition of "*segregated account*" makes clear that what is required are accounting entries which record matters pertaining to an account. The requirement for such record-keeping is that it should establish the necessary "*linkage*" between the item and the account. The Court accepts that the focus is on the maintenance of records, not on segregation of funds.

60. Second, the Court accepts that whereas segregation of funds in trusts law is often critical (it is likely to be a breach of trust to commingle trust funds), the SAC Act for the most part imposes a statutory regime which excludes principles of trusts law.

61. Third, under section 12(1) of the SAC Act, a segregated accounts company may apportion an asset or liability among two or more segregated accounts and the general account. This would appear to be incompatible with the notion that the maintenance of distinct funds is required for effective segregation. Section 12(2), however, reinforces the requirement for clear record-keeping: "*Where a segregated accounts company has apportioned an asset or liability pursuant to subsection (1), the extent to which the asset or liability is linked to each segregated account shall be clearly indicated in the contract or governing instrument effecting the apportionment.*" As noted in the Northstar Opinion apportionment of that kind had seemingly taken place in *UBS Fund Services (Cayman) Ltd v New Stream Capital Fund Ltd* [2009] Bda LR 74. Kawaley J held segregation notwithstanding that some of the accounts' assets *"formed part of [a] pool of assets in which other segregated accounts were also interested'.*

62. Finally, the Court accepts the submission that one of the main objects of the SAC Act is to allow a company to ring-fence assets without the expense or complications of a trust structure (see: *Bickley, Bermuda, British Virgin Islands and Cayman Islands Company law* (2nd ed) at 15-001 to 15-002). That object is likely to be defeated by strict adherence to trusts law principles.

63. The Court confirms that the touchstone for linkage under the SAC Act is the ability to identify an asset to a segregated account, by writing or conclusive indication, and that it is not necessary for the assets to be placed and maintained in a separate bank or securities account. The relevant provisions of the SAC Act do not impose any more demanding requirements for effective segregation than that particular assets that are capable of being segregated for the benefit of a particular Policy are connected to that Policy in the records maintained by the company.

1(d). What is required for assets, rights, contributions, liabilities and obligations to be "linked" to an account? In particular, for any given asset, right, contribution, liability or obligation:

> ***(a) In what circumstances is it sufficiently identified as "referable … as belonging or pertaining to a segregated account" so as to be "linked" to a segregated account for the purposes of s.2(1) of the SAC Act? Must it be identified specifically in the relevant written instrument, entry, notation or unwritten but***

conclusive indication, or may it be sufficiently identified by class or description?

(b) ***To what extent (if any) do the principles of tracing apply in determining whether it is linked to a segregated account for the purposes of s.2(1) of the SAC Act?***

64. As noted above, the term '*linked*' is defined in broad terms; it is satisfied by a written instrument or an entry or notation in the company's records, or even an unwritten conclusive indication. Whether a particular asset which is capable of being segregated for the benefit of a particular Policy is connected to that Policy in the records maintained by the Company would be a matter for the judgment of the JPLs. As noted above, the SAC Act does not prescribe any test or standard of proof. It is merely necessary that as a commercial matter the JPLs are satisfied that sufficient record-keeping exists which establishes the necessary "*linkage*" between the item and the account.

65. The Court confirms that it is not necessary that the assets in question can be demonstrably derived (through some process of tracing or following) from the original investment; in principle, segregation simply requires that the segregated assets can be identified.

1(e). What is the effect of section 27A of the SAC Act? In particular, does (1) the establishment and (2) the continuing existence of a segregated account require that the relevant segregated accounts company comply with the provisions of the SAC Act?

66. Section 27A of the SAC Act provides that "*... no transaction or interest in a segregated account shall be void or voidable by reason only that at the relevant time the segregated accounts company fails to comply with, or is in breach of, any provisions of this Act.*" It is to be observed, as Mr Davies KC rightly contends, that section 27A proceeds on the footing that there is a segregated account in existence. Therefore, in the Court's view this provision could not operate to overcome failures that went to the validity of the establishment of the segregated account itself. Instead, the focus of the provision is on the failure *by the company* to comply with "*any provisions of this Act*". Thus, by way of an example, section 16(1)(a) requires that a segregated account company maintain records in accordance with generally accepted accounting principles used in the preparation of financial statements of the company. Mere failure by the

company to comply with the requirements of section 16 (1)(a) will not by itself render a transaction or interest in a segregated account void or voidable if there is nevertheless sufficient evidence of segregation. However, if there is no record maintained by the company from which the JPLs can conclude that an asset is linked to a particular segregated account, the absence of such evidence is unlikely to be cured by section 27A of the SAC Act.

1(f). Are the requirements of the SAC Act for the formation of a segregated account mandatory, or may they be varied by the terms of a contract entered by a segregated accounts company?

67. Under section 11(1) of the SAC Act 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 the counterparties shall be evidenced in the form of contracts.

68. As correctly noted by Mr. Todd KC in his written submissions it is open to the parties under section 18 of the SAC Act to significantly modify the default operation of the SAC Act. In particular, the governing instrument may:
    (a) empower the account owner to give directions to the segregated accounts company in the management of the segregated account (s. 18(3));
    (b) regulate the extent to which the account owner may have an "*undivided beneficial interest in the assets linked to a segregated account*" (s. 18(10): by default, they do have such an interest) or a "*specific interest in specific segregated account property*" (s. 18(12): by default, they have no such interest); and
    (c) modify or remove the default rule (i) that the account owner's interest in a segregated account is "*freely transferable*" (s. 18(13)) and (ii) that the account owner becomes a creditor once they become entitled to receive a payment under the governing instrument (s. 18(14)).

69. The need for any derogation from the default statutory regime to be both permitted under the relevant statute and also expressly provided for under the governing instrument was highlighted in *BNY AIS Nominees & Gottex ABL (Cayman) Ltd v New Stream Capital Fund [2010] Bda LR 34*, where it was held that, "*If parties managing a segregated account*

company wish to modify the application of the Act in transactions its accounts enter into, this should (as the Act requires) be expressly reflected in the relevant transaction documents".

70. However, as a matter of principle, if the parties deliberately contracted on terms that did not meet the minimum requirements for the application of the SAC Act, it would follow that their arrangement would not be covered by the SAC Act. Whilst the parties are given considerable freedom in relation to the contractual terms to be agreed upon, the parties must comply with the minimum requirements of the SAC Act in order to obtain the benefits including the ability to ring fence assets to support liabilities of a particular segregated account.

1(g). Having regard in particular to section 18(16) of the SAC Act, are principles of trust law and/or the law of property excluded by the SAC Act for the purposes of determining whether a segregated account has been established? If those principles (or some of them) are not excluded, to what extent are they relevant?

71. As noted earlier, section 11(1) of the SAC Act provides that 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 the counterparties shall be evidenced in the form of contracts.

72. Section 18(16) of the SAC Act further provides that:

> "*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.*"

73. Having regard to the statutory provisions contained in sections 11 and 18(16) of the SAC Act, questions as to the existence and consequences of segregation under the SAC Act are matters

of statutory construction, contractual interpretation and analysis of the company's record keeping. These provisions make it clear that such questions do not depend upon the application of principles of trusts law. Section 18(16) expressly permits two exceptions to this general prohibition: (a) the remedy of tracing where such assets have been commingled with the assets of any other segregated account or the general account; and (b) remedies available under the doctrine of constructive trusts.

1(h). Do the requirements for the creation of a single segregated account in respect of multiple Policies differ from those applicable to the creation of separate segregated accounts in respect of individual Policies?

74. The requirements for establishing a single segregated account in respect of multiple Policies apply in the same way as the requirements for establishing a segregated account in respect of an individual Policy.

75. Thus, by way of an example, in the Metlife Business the Global Asset Portfolio defines "*Separate Account*" as follows:

> "*Separate Account": The Separate Account established by the Company pursuant to this Contract and Citicorp International Insurance Co Ltd Act 1999, an Act of the Legislature of Bermuda. It consists of divisions which either invests [sic] in shares of the Mutual Funds that comprise the Variable Investment Option or invests [sic] in fixed income securities and other investments that support the Guaranteed Fixed Investment Option. The Separate Account assets are kept separate from the general assets of the Company.*"
>
> "*Variable Investment Option": This Option consists of one or more investments in 29 divisions of a Separate Account, each of which holds shares of one of the Mutual Funds available under this Contract.*"

76. The Court accepts that the above terms plainly connote an intention to establish a "*Separate Account*" and equally plainly indicate that the underlying investments in mutual funds were to be held as part of the Separate Account, albeit organised in divisions.

77. Whilst it appears that the funds attributable to a variable investment made by a Policyholder

would have been commingled with funds in respect of both variable and fixed investments of other Policyholders, such commingling would not preclude the effective segregation of the Variable Assets acquired by the Company in respect of the Policyholders' investment.

78. The Court accepts Mr. Davies KC's submission that against that backdrop, the essential question becomes whether the record-keeping was sufficient to enable effective segregation of the Variable Assets to take place.

Northstar Private Acts

2. To what extent, if any, do any requirements of the Northstar Private Acts for the establishment of segregated accounts remain relevant and operative following the registration of Northstar under the SAC Act?

79. The legal framework governing segregated accounts companies in Bermuda is laid down under the SAC Act. Prior to the enactment of the SAC Act, the establishment of segregated accounts companies was dealt with on a case-by-case basis through Private Acts of the Bermuda Legislature.

80. Where a company has operated segregated accounts under the authority of a Private Act, and the company has then registered under the SAC Act (which Northstar did on 4 April 2008), then the interaction between the old and new regimes is governed by section 8 of the SAC Act. The key provision is section 8(1), which provides as follows:

> "*(1) Where a company has operated segregated accounts by virtue of authority conferred by a Private Act and the company has registered—*
>
> (d) *the provisions of this Act shall apply to that company and, to the extent of any inconsistency between this Act and the provisions of that Private Act, the provisions of this Act shall prevail;*
>
> (e) *subject to paragraph (c), any contracts to which the company was a party on the date of registration shall be construed in accordance with the Private Act but contracts renewed or entered into after the date of registration shall be construed*

in accordance with this Act;"

81. Further, for the purposes of the provisions of section 8 of the SAC Act concerning the operation of segregated accounts under a Private Act, section 8(5) provides that the meaning of "*segregated account*" "*shall not be strictly applied and, for the avoidance of doubt, the meaning of the term "segregated account" shall include "separate accounts", "segregated reserves", "suites" or any cognate expressions thereof importing similar meaning... which may be used in a Private Act.*"

82. It appears to be common ground that the Northstar block of Northstar's business entirely post-dates the Company's registration under the SAC Act on 4 April 2008. Consequently, the Court agrees that the SAC Act is the applicable legislation for the purposes of the determination of the Segregation Issues in relation to Policies issued as part of the Northstar Business.

83. Prior to Northstar's registration under the SAC Act, (i) Northstar carried on long-term insurance business consisting of fixed and variable annuities under the Nationwide Act; and (ii) prior to Metlife's amalgamation with Northstar on 1 June 2007, Metlife carried out an insurance business under the Citicorp Act. The JPLs state that no new contracts were written under the Metlife business after the amalgamation.

84. Accordingly, pursuant to the terms of section 8(1)(b) of the SAC Act, the position is that Policies under the Nationwide Business and the Metlife Business that were issued before 4 April 2008 (and have not been renewed since) are to be construed in accordance with the applicable Private Act.

85. Mr Tidmarsh KC noted that section 3(2) of the SAC Act provides that "*From the date of registration under this Act, a segregated accounts company shall be bound by this Act and from such date it may establish one or more segregated accounts to which this Act shall apply.*"

86. Thus, Mr Tidmarsh KC argues that the SAC Act applies only after the date of registration and applies only to segregated accounts which are created *after* registration. Mr Tidmarsh KC contends that section 8(1)(a) does not therefore have the effect that it applies in relation to

separate accounts established before registration. He says section 8(1)(b) confirms that contracts existing at the date of registration are to be construed in accordance with the relevant Private Act and contacts made after registration are to be construed in accordance with the SAC Act. Section 8(4) is to be construed consistently with section 3(2) and means that segregated accounts established after registration are to be operated in accordance with SAC Act but that provisions of Private Acts not pertaining to the operation of segregated (or separate) accounts are not affected by SAC Act.

87. Mr Tidmarsh KC also argues that this is consistent with the presumption against legislation applying retrospectively, i.e. that is it should be presumed to change the law only from the time of its commencement and with the general principle that legislation should be just and fair (***Halsbury's Laws of England, vol 96*** (2018), para 751, 760).

88. The Court agrees that in consideration of the issue whether there has been effective establishment of a segregation account in relation to a Policy issued under a Private Act the Court must look at the provisions of the Policy alongside the provisions of the Private Act in existence when the segregated account was sought to be created. In a sense that can be considered as an exercise of construction of the Policy in accordance with the Private Act. However, the effect of section 8(1)(a)[5] and section 8(4)[6] is that following registration under the SAC Act the *operation* of all segregated accounts, including those initially established under the Private Acts, is governed by the SAC Act alone.

89. It may well be that in the context of the present case this may well be an academic debate as the JPLs consider that there is no material inconsistency for present purposes regarding the operation of the segregation regimes between the Private Acts and the SAC Act. The Variable

[5] Section 8(1)(a) provides that: "*Where a company has operated segregated accounts by virtue of authority conferred by a Private Act and the company has registered (a) the provisions of this Act shall apply to that company and, to the extent of any inconsistency between this Act and the provisions of that Private Act, the provisions of this Act shall prevail.*"

[6] Section 8(4) provides that: "*For the avoidance of doubt it is declared that, where a Private Act confers authority on a company to operate segregated accounts but also contains other provisions not pertaining to the operation of such accounts, those other provisions shall not be affected by the registration of the company under section 6.*"

Representatives support that view.

3. ***To the extent that any requirements of a Northstar Private Act remain relevant and operative for this purpose:***
   (f) ***To what extent (if any) do they differ from those identified by the Court in relation to the SAC Act?***
   (g) ***How is any such difference to be resolved in determining these questions?***

90. The Court agrees with the position taken by Mr Todd KC, on behalf of the JPLs, Mr Davies KC, on behalf of the Variable Representatives and Mr Collings KC, on behalf of the General Representative that there is no material inconsistency for present purposes regarding the operation of the segregation regimes between the Private Acts and the SAC Act.

91. As noted in the Northstar Opinion, the Nationwide Act is a Private Act of the Bermuda Parliament, presented, amongst other reasons, to allow the Company (then known as Nationwide Financial Services (Bermuda) Ltd) to establish and maintain segregated accounts, property and reserves. Its provisions contain less detail than the SAC Act. Nevertheless, the Nationwide Act lays down a similar segregation regime to the SAC Act.

92. Section 4(1) provides that, where required under the terms of a Policy, Northstar will *"establish and maintain a Separate Account for such Policy"* or, where the terms permit, more than one Policy. The term *"Separate Account"* is defined in section 2(1) as: " ... *each account established or recorded in the records of* the Company *as a Separate Account and maintained pursuant to section 4 hereof."*

93. Sections 4(7) and 4(8) provide that, subject to the terms of the Policy to which the separate account relates, all fees, expenses and losses relating to that separate account may be charged against the Separate Account. After such deductions, the property standing to the credit of a Separate Account is to be held, in the first instance for the sole purpose of paying all and any claims arising from or amounts owing under the related Policy. The Court agrees that these provisions broadly equivalent to segregation under the SAC Act.

94. The Citicorp Act is also a Private Act of the Bermuda Parliament. It was presented, amongst other reasons, to allow Metlife (then known as Citicorp International Insurance Company Ltd) to make provision for the establishment of segregated reserves.

95. Section 4(1) of the Citicorp Act is expressed in almost identical terms to section 4(1) of the Nationwide Act. The term *"Separate Account"* is defined in section 2(1) as: *"... an account established or recorded pursuant to section 4 of this Act, which shall be evidenced in the records of the Company".*

96. Sections 4(6) and 4(7) of the Citicorp Act are expressed in very similar terms to sections 4(7) and 4(8) of the Nationwide Act and are of similar effect. The Court agrees that the Citicorp Act lays down a regime broadly similar to segregation under the SAC Act.

Omnia Private Acts

4. What are the requirements of the Omnia Act for the establishment of a "Segregated Account" (as that term is defined in section 2(1)(dd) of the Omnia Act)? Amongst other things, to what extent (if any) do the requirements of the Omnia Act differ from those identified by the Court in relation to the SAC Act?

97. The Omnia Act is a private act of the Bermuda Parliament, presented by the Company in order to consolidate and amend the Sage Act. It came into force on the date that it received the Governor's assent, namely 4 April 2004.

98. Section 7(1) of the Omnia Act provides:

> *"Where required under the terms of a Policy or Financial Instrument and in accordance with the terms thereof, the Company shall establish and maintain a Segregated Account for such Policy, Financial Instrument or any particular class of Policy or Financial Instrument (the Company determining the nature of the class and which Policy or Financial Instrument shall form a part of that class) with a sub-account for each Policy or Financial Instrument forming a part of the said class."*

99. In analysing whether any or all segregated accounts were effectively established, it is necessary to have regard to the definition of *"Segregated Account"* in the Omnia Act. Section 2(1) defines a *"Segregated Account'* as:

> *" ... each account established or recorded pursuant to Section 7 of this Act, which shall be evidenced in the records of the Company and may be composed of sub-accounts and, where there are subaccounts, the expression "Segregated Account" shall mean also each sub-account ... "*

100. The effect of segregation is summarised in section 7(2). Rights and interests in the property subject to the Segregated Account are determined by the relevant Policy or financial instrument. No other rights or interests in that property may be recognised and each Policy or instrument shall be deemed to include a provision to the effect that no claim under the Policy or financial instrument may be paid from the assets or funds of any Segregated Account *not* relating to such Policy or financial instrument.

101. This is supplemented by the terms of the Policies. For example, the 2008 GIP Plan provided that *"[no] claim under the Plan may be paid from assets or funds of any other Segregated Account of the Company not relating to or forming part of the Plan and vice versa"* and that *"[a]ll claims under the Plan shall be paid from the assets or funds Linked to the Plan Segregated Account".*

102. Section 25(1) of the Omnia Act further states that:

> *" ... in the winding up of the Company the liquidator shall deal with the Assets and Liability 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 satisfaction of liabilities Linked to any other Segregated Account or 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."*

103. The Court agrees that the central feature of the Omnia Act is, like that of the SAC Act, segregation between various segregated accounts, and between the assets and liabilities of a segregated account and those of the Company's general account. The Court accepts Mr

Davies KC's submission that as with the SAC Act, under the Omnia Act a segregated account can and should be treated as having been established in respect of a particular Policy (or Policies) where, (a) the relevant contractual materials for the Product in question evince an intention that there should be a segregated account and, (b) particular assets (being assets of a kind that the relevant Policy provides may be segregated) are connected in the company's records to the particular Policy (or Policies).

5. In respect of Omnia Policies issued under the Sage Act, to what extent (if any) do the requirements of the Sage Act remain relevant and operative following the enactment of the Omnia Act (including, without prejudice to the generality of this issue, with regard to sections 5 and 27 of the Omnia Act and section 16 of the Interpretation Act 1951)?

104. As noted in Mr Todd KC and Mr Blake in their Opinion relating to Omnia dated 10 May 2021 ("**Omnia Opinion**") Section 27(1) of the Omnia Act expressly repealed the Sage Act. However, that repeal did not have effect so as to:

(a) affect the previous operation of the Sage Act (section 27(2)(a));

(b) affect any thing done by virtue of or in pursuance of the Sage Act, which shall, if in force immediately before the coming into effect of the Omnia Act, continue in force (section 27(2)(a));

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under or by virtue of the Sage Act (section 27(2)(b)) or any remedy in respect of any such rights (etc) (Interpretation Act 1951, section 16(l)(e));

(d) revive anything not in force or existing at the time at which the repeal takes effect (Interpretation Act 1951, section 16(l)(a)); and

(e) affect anything done or suffered under or by virtue of or in pursuance of the Sage Act (Interpretation Act 1951, section 16(l)(b)).

105. The Omnia Opinion notes that section 5(1) of the Omnia Act provides: *"For the avoidance of doubt, this Act applies to all Policies and Financial Instruments including, without limitation, Policies and Financial Instruments issued prior to the commencement of this Act."* The Court agrees that section 5(1) does not affect the operation of section 27 and accepts that although the Omnia Act is stated to *"apply"* to Policies issued prior to its commencement, that provision does not have the effect of overriding the application of the Sage Act to the establishment of segregated accounts during the time that that earlier Private Act was in force.

6. To the extent that the requirements of the Sage Act remain relevant for this purpose (a) To what extent (if any) do they differ from those of the Omnia Act? (b) How is any such difference to be resolved in determining these questions?

106. Mr Todd KC advised the Court that the JPLs no longer seek assistance of the Court in relation to this issue since the JPLs are satisfied that the Court's determination on the Omnia Act would provide them with sufficient guidance by analogy.

Approach to construction and application of the SAC Act and Private Acts

7. In determining whether any segregated account has been established by a Company, what is the proper approach to resolving any ambiguity (1) as to the construction of the relevant Act(s) or (2) as to the content or effect of any other applicable legal principles? In particular (and to the extent relevant):

- ***a. How, if at all, does legislative intent affect the construction and application of the SAC Act and/or each of the Private Acts?***
- ***b. What is the legislative intent underpinning the SAC Act and/or each of the Private Acts?***

107. As noted earlier, in *Re Jardine Strategic Holdings Ltd* [2022] SC (Bda) 27 Com at [44] the Court referred to the general principles in relation to the interpretation of Public Acts which included the passage that:

> *"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 [2004] UKHL 51, at [28]. As Lord Bingham explained in R (Quintavalle) v Secretary of State for Health*

[2003] UKHL 13, at [8]:"...The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's 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."

108. The SAC Act is a modern corporate legislative innovation which permits a segregated accounts company, as a separate legal entity, to 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 and from the general assets and liabilities of the company. The advantage of segregated accounts company is to allow a 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 to the trust or contractual structures (See: *Bickley: Bermuda, British Virgin Islands and Cayman Island Company Law*, 2nd edition, at 15-001).

109. As correctly noted in the Northstar Opinion the central feature of the SAC Act is the segregation between the various segregated accounts, and between the assets and liabilities of a segregated account and those of the general account of the company. This has been described in previous cases as *"sacrosanct"* and an *"Iron Curtain": Re CAI Master Allocation Fund Ltd* [2011] Bda L.R. 57 at [17]-[18]. It has also been said that a segregated account is essentially a *"company within a company"* and that its assets are to be behind a *"firewall": BNY AIS Nominees & Gottex ABL (Cayman) Ltd v New Stream Capital Fund* [2010] Bda L.R. 34 at [93] and [130].

110. The central importance of preserving segregation in the context of insolvency is emphasised by section 25(1) of the SAC Act which requires that the liquidator shall deal with the assets and liabilities which are linked to each segregated account only in accordance with the provisions of the SAC Act.

111. In the circumstances the Court is satisfied that, providing the minimum requirements of the SAC Act in relation to segregation are met, the appropriate approach for the Court to take is, where possible, to strive to uphold segregation, not just because it represents the

apparent will of the contracting parties but also because it is the central feature of the SAC Act and the Private Acts, under which the Company has carried on business.

Application to the Facts

8. To what extent has each Company purported to establish segregated accounts in respect of (1) variable and (2) fixed and indexed investments, either by the terms of its Policies or otherwise?

112. The Court agrees that Northstar has purported to establish segregated accounts by (i) the terms of all Northstar Act Policies; (ii) the terms of all Nationwide Act Policies; and (iii) certain Citicorp Act Policies.

113. The Northstar contracts state:

> *"The Company shall establish and maintain a Segregated Account in respect of this Contract only. The rights and interests in the property of the Segregated Account shall be determined by the terms of this Contract."*

114. The term *"Segregated Account"* is defined as follows:

> *"A separate and distinct account pertaining to the assets and liabilities of this Contract which are segregated form the assets and liabilities of (i) any other segregated accounts, and (ii) the general account of the Company for the purposes of the SAC Act."*

115. Having regard to these provisions of the Northstar contracts it seems clear that the Northstar contracts seek to establish a segregated account in respect of each individual contract.

116. In relation to the Nationwide contracts, it is provided by way of an endorsement that:

> *"On and after the Date of Issue the Company shall establish and maintain a separate account for the Contract (the "Contract Separate Accounts") and for the purposes of section 4(1) of the [Nationwide Act]. the Contract Separate Account*

shall be a Separate Account for the Contract. The rights and interests in the property of the Contract Separate Account shall be determined by the terms of the Contract as such terms shall stand from time to time."

117. In relation to the above endorsement Mr Tidmarsh KC refers to subparagraph (4) which provides that: "*The Company* ***shall or may*** *allocate to the Contract Separate Account* ***all expenses, income, interest, gains (or losses) incurred or earned*** *from investing or dealing with assets, <u>investment</u> income and other property belonging to or concerning the Contract Separate Account.*" Mr Tidmarsh KC argues that given the words "*shall or may*" appear to give the Company the discretion whether or not to so allocate "*all expenses, income, interest, gains*" indicates that the underlying investments are not assets of the separate account.

118. The Court is unable to agree with this submission made by Mr Tidmarsh KC. It appears to the Court that the clause does not merely deal with gains or income arising from the underlying segregated assets. It is also dealing with expenses or losses. In that context, the broad drafting of "*shall*" or "*may*" is a perfectly understandable drafting technique. It is seeking to capture both the credits ("*shall*") and the debits ("*may*") to the account. Even if there was any ambiguity in the expression used, the Court would resolve the ambiguity in favour of the commercial purpose of these documents which, the Court accepts, is plainly to result in the segregation of the shares in the mutual funds.

119. Accordingly, the Court agrees with the view expressed in the Northstar Opinion that like the Northstar contracts, the Nationwide contracts also sought to establish a separate account for each individual contract.

120. In relation to the Metlife segregated business the Court was referred to the Group Variable Deferred Annuity (GVDA), Global Asset Portfolio (GAP) and the Variable Universal Life insurance (VUL) Policies. The Court was advised at the outset of the hearing that all parties agreed that approximately US $52 million of claims relating to the GVDA and VUL fixed investments were not segregated and therefore should be considered as claims against the

general account. Nevertheless, Mr Davies KC indicated that the Court still needed to consider whether there was effective segregation in relation to the Variable Policies.

121. In the Northstar Opinion the view is expressed that Metlife contracts do not seek to establish a separate account for each individual Policy. Instead, they each establish or make reference to a (singular) *"Separate Account",* which is to be distinguished from the general account of the Company. The GAP contract expressly provides that the Separate Account is established pursuant to the Citicorp Act. The GVDA and VUL contracts do not expressly so provide, though the use of the words *"Separate Account",* the Court agrees, makes the position sufficiently clear.

122. The Northstar Opinion refers to the fact that in each case, the Separate Account is said to be divided into a number of subdivisions, each of which purchases shares of a single portfolio or fund. The Court agrees that the various *"sub-accounts"* or *"divisions"* do not themselves constitute separate accounts. The Citicorp Act does not provide that sub-accounts have the same effect as separate accounts. The Court accepts the view that Metlife contracts each refer to a single "Separate Account" and do not suggest, expressly or by implication, that the sub-accounts or divisions are themselves separate accounts within the meaning of the Citicorp Act.

123. The Court agrees with the view expressed that neither the Citicorp Act nor the contracts referred to above require the maintenance of separate and distinct "funds" in respect of each account. The Citicorp Act provides that a Separate Account is *"an account established or recorded pursuant to section 4 of this Act, which shall be evidenced in the records of the Company".* Section 4 makes clear that, where required under the terms of a Policy, the Company shall establish and maintain a Separate Account and that *"if the said terms* [of the Policy] *permit, a Separate Account may relate to more than one Policy."*

124. Finally, in relation to the Metlife Business, Mr Davies KC referred to the terms of the Group Variable Deferred Annuity Contract and in particular to the sentence that "*The assets of the Separate Account are subject to the claims of creditors*." Mr Davies KC

submitted that there was a plain error in the wording in that it was intended to be "*are **not** subject to the claims of creditors*." He also pointed out that it was noticeable that the equivalent words in the Variable Universal Life Contract say that the assets to the separate account are "*not*" subject to the claims of creditors. The Court agrees that the omission of the word "not" is obviously an error and as a matter of construction of the relevant paragraph the Court will construe the sentence as meaning "*The assets of the Separate Account are not subject to the claims of creditors*."

125. The Court also agrees that Omnia has purported to establish segregated accounts by the terms of all its Policies.

126. In summary the Court agrees with the submission of Mr Davies KC that in almost all cases the contracts for the products with active Policies include language purporting to create a segregated (or "separate"), account, in respect of both variable and fixed investments, although different language is used in certain of the Metlife contracts. The exceptions are where the Policies did not provide for segregated accounts are the Universal Life Product and also in respect of fixed investments under the GVDA and Variable Universal Life Products.

9. To what extent (if any) do the terms of the Policies issued by each Company impose more exacting requirements for the creation of segregated accounts than the requirements of the applicable legislation?

127. As noted in the Northstar Opinion there are several contractual terms which may support the view that the parties intended that the accounts would be maintained as separate funds. For example:

(a) The contracts refer in several instances to the *"property of the Segregated Account"*. In particular, where the contracts talk of comingling they refer to the need for identification *"of the property"* or *"interest in the mixed fund"*. The concept of property is more obviously associated with a fund than with an accounting exercise.

(b) The contracts state that monies received under any coverage against loss will be *"paid into"* and form a part of the property of the segregated account. They also talk of the separate account being *"closed"* by the company and its property distributed when the contract terminates. Both concepts arguably make more sense in the context of maintenance of a separate fund.

(c) Third, the definition of *"Segregated Account",* namely a *"separate and distinct account"* pertaining to assets and liabilities of the contract *"which are segregated from the assets and liabilities of (i) any other segregated accounts, and (ii) the general account of the Company for the purposes of [SACA]"* might itself be thought to support the idea of segregation of funds, at least insofar as it does not refer to recordkeeping.

128. However, having regard to the other provisions of the Northstar contracts and for the following reasons set out in the Northstar Opinion, the Court concludes that the Northstar contracts did not put in place a more restrictive regime than that which is permitted by the SAC Act so as to require the maintenance of a separate "fund":

(a) Like the SAC Act, the contracts do not use the language of segregated "funds". If the intention was to put in place a more restrictive regime, that would be expected to be made clear on the face of the contracts, and for there to be an express obligation to establish a bank account for the exclusive use of the particular account.

(b) Consistently with a record-keeping approach to segregation, the contracts state that payments, investment income etc *"shall be allocated and linked to the Segregated Account"* and that the Company *"may allocate"* certain expenses and other matters to the Segregated Account.

(c) The contracts further state that the Company may invest and deal with assets, income and other property *"recorded, allocated or credited to the Segregated Account".*

(d) The contracts expressly permit co-mingling.

(e) As in the SAC Act, the references to a *"separate and distinct account"*, segregated from other assets and liabilities are likely to refer to the legal consequences, rather than how segregation is to be carried out. The references to *"property"* and *"payment"* can be read as shorthand for *"assets linked to an account":* under the SAC Act, account owners and counterparties generally have an undivided beneficial interest in the assets linked to an account. The *"closing"* of the account (paragraph 148(b) above) may simply refer to the collapsing of the legal structure, rather than the closing of a bank account.

129. Similarly in relation to Omnia, as noted in the Omnia Opinion, there are several contractual terms which, on one reading, may indicate that the separate accounts *would* be maintained as separate funds. For example, the Policies stipulate that:

(a) the segregated account will be *"separate, distinct and identifiable"* from other segregated accounts;

(b) certain monies shall form part of the *"property"* of and be *"payable directly into"* the segregated account; and

(c) the Company may *"close"* the segregated account.

130. The Court agrees that this terminology is similar to that used in the Omnia Act. The Court does not consider that the Omnia Act requires the maintenance of separate funds, and it is unlikely that the Policies intended to put in place a more restrictive regime than that which was permitted by this Omnia Act.

131. Moreover, as noted in the Omnia Opinion, there are certain provisions of the Policies which are more consistent with a record-keeping approach to segregation. For example, the 2008 Guaranteed Index Plan and the 2008 Guaranteed Rate Plan refer to the *"assets or funds Linked to the Plan Segregated Account"*. The definition of segregated account in each of the Policies stipulates that the segregated account *"shall be evidenced in the records of the*

Company". Both of those formulations would be unlikely if the intention was to require the maintenance of separate funds.

10. To what extent (if any) has each Company in fact established segregated accounts in respect of (1) variable and (2) fixed and indexed investments,

- ***a. by the terms of the Policies;***
- ***b. the records maintained by each Company or on its behalf;***
- ***c. the maintenance (if any) of separate funds, and/or otherwise?***

132. The Court agrees with the views expressed in the Northstar and Omnia Opinions that with the exception of the Universal Life Product and in respect of fixed investments under the GVDA and Variable Universal Life Products relating to the Metlife Business, all Policies provide for the creation of the segregated accounts. The maintenance of separate funds is not required for the establishment of a separate account by their terms or by the applicable legislation. As a result, whether a segregated account has been established depends on whether the records maintained by the Companies satisfy the relevant legislative requirements.

133. In relation to the Northstar Business, Section 2(1) of the SAC Act, as noted earlier, defines a *"segregated account"* as:

> *" ... 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".*

134. In relation to the requirement of *"a separate and distinct account (comprising or including entries recording data, assets, rights, contributions, liabilities and obligations linked to such account)"* the relevant issue is whether the accounts purportedly established by each of the Northstar contracts comprised or included entries recording, for example, data, assets and liabilities.

135. The Court holds that this requirement is satisfied given that in relation to variable investments, the Portal shows each of the funds which the investor has selected, the accumulation units held in each fund, the *"unit value"* of each fund and *"Current value"* (being the product of unit and unit value) of the account in respect of each fund. In relation to fixed investments, the portal shows the *"Current Value"* of the investment when it expires.

136. Similar details are identified in the confirmation statements and quarterly Statements. In the circumstances the Court is satisfied that entries exist which record assets and liabilities linked to a segregated account, and that is sufficient for compliance with the statutory requirements.

137. In relation to the statutory requirement of *"pertaining to an identified or identifiable pool of assets and liabilities of such segregated accounts company"* the Court is satisfied that despite the absence of separate "funds", the assets and liabilities of the various accounts can properly be described as *"identified or identifiable"*.

138. In this regard, as noted in the Northstar Opinion, various assets and liabilities are largely *identifiable* from the Northstar contracts themselves, which provide, for example that:

(a) purchase payments, deposits, contributions, investment income and other funds received and/or attributable to the funding of each contract shall be allocated and linked to each account;

(b) expenses, income, interest, gains (or losses) incurred or earned from investing or dealing with assets, investment income, and other property belonging to or concerning the account may be allocated to the account; and

(c) any withdrawals for the purposes of making a payment under a contract ceases to form part of the property of the account.

139. The Court confirms the Northstar Opinion that given that Northstar's record-keeping was very similar in relation to Nationwide Act and Citicorp Act Policies (and the statutory requirements are materially similar) the same conclusion applies to those Policies.

140. In relation to Omnia the definitions of *"Segregated Account"* and *"Separate Account"* under the Omnia Act and the Sage Act refer to an *"account established or recorded pursuant to ... this Act, which shall be evidenced in the records of the Company and may be composed of sub-accounts ... "*.

141. The Court agrees with the view expressed in the Omnia Opinion that there is no need to maintain separate funds. Rather, the question is whether the accounts purportedly established by the Policies were evidenced in the records of the Company. The Court agrees that they were so evidenced in the records of the Company. In that regard the Court notes that the following information was made available on the Database:

(a) In relation to variable investments, the Database shows each of the Funds which the Policyholder has selected, the units held in each fund, the *"Unit value"* of each fund and its *"Total Market Value"* (being the product of unit and unit value) of the account in respect of each fund.

(b) In relation to fixed investments, the Database shows the *"Total Market Value"* of the relevant fixed product, together with the interest rate which is applied to the investment. Similar details are provided on reports generated for Policyholders.

142. In the circumstances the Court is satisfied that sufficient evidence of entries exists recording assets and liabilities linked to the segregated account which is sufficient for statutory purposes.

11. To the extent that each Company has established segregated accounts that are expressed by the terms of the relevant Policies to include "divisions" or "sub-accounts", are those "divisions" or "sub-accounts" separate segregated accounts?

143. The JPLs note that the status of "*divisions*" or "*sub-accounts*" is primarily relevant to Northstar: Sage and Omnia Act make references to sub-accounts (each of which is said to be a segregated account of its own), but these do not appear to have been used in practice. As to Northstar, "*sub-accounts*" or "*divisions*" are a feature of Metlife Policies only (with the exception of the Universal Life Product, which makes no provision for segregation).

144. The Court agrees with the view expressed in the Northstar Opinion that these Metlife "*sub-accounts*" or "*divisions*" are not distinct segregated accounts because (i) the Citicorp Act makes no reference to sub-accounts and (for that reason) does not provide that they have the same effect as separate accounts; and (ii) Metlife Policies do not suggest that sub-accounts or divisions are themselves separate accounts within the meaning of the Citicorp Act. Although fixed investors in the Global Asset Portfolio Product are entitled by its terms to have recourse only to one division of the Separate Account, this appears to be operative only as a matter of contract between Northstar and its investors. It does not have the effect of establishing a further separate account within the meaning of the Citicorp Act.

12. In the case of Northstar only, to the extent that Northstar has established segregated accounts in respect of Policies written under (1) the Northstar Act and (2) the Nationwide Act, are the following "accounts" referred to in the terms of those Policies segregated accounts distinct from any other segregated accounts created by Northstar:

a. The "Variable Account"?

b. The "Multiple Maturity Account"?

145. The Variable Account is defined in the Nationwide Policies as: "*A segregated investment account of the Company into which Variable Account Purchase Payments are allocated. The Variable Account is divided into Sub-Accounts, each of which invests in the shares of a separate underlying Mutual Fund. The Variable Account is sometimes referred to herein as the Separate Account.*"

146. The Multiple Maturity Account is defined in the Nationwide Policies as: "*A segregated account of the Company established for the purpose of facilitating accounting and investment processes associated with the offering of GTOs under the Contracts.*"

147. The Court agrees with the view expressed in the Northstar Opinion that these definitions do not indicate that they were intended to be segregated accounts. The Nationwide Act Policies further provides that the assets allocated to the Variable Account "*may not be charged with the liabilities from any other business in which the Company may take part*". The Court confirms that these accounts are not distinct segregated accounts applying to all variable or GTO investments (as applicable), granting the relevant Policyholders recourse to the underlying variable or Non-Variable Assets[7] credited to the relevant account. As set out in the Northstar Opinion that this conclusion is supported by the reasons that:

(a) The Nationwide Act makes no reference to the Variable Account or the Multiple Maturity Account, which are said in the Nationwide Act Policies to be "segregated", a word not used in the Nationwide Act. The Court agrees that it is more likely that these terms are simply used as a way of describing the investment options available.

(b) No records of Northstar positively support the notion that separate accounts were established on two levels, with one for each account owner and another for all variable or fixed investors together.

(c) Even if additional segregated accounts were to exist, they would not enable fixed investors to benefit from the assets acquired with the proceeds of fixed investments unless they were recorded, allocated or credited to the Multiple Maturity Account, which does not appear to have been done.

Issue 2: To what extent, if any, are the assets of each company to be held exclusively for the benefit of any such Segregated Accounts?

13. To the extent that segregated accounts are established in relation to Policies, to what extent (if any) are the following assets linked or allocated to the relevant segregated accounts for the purposes of the applicable Act(s):

[7] Non-Variable Assets are defined in the Northstar Report as assets acquired and liquidated by the Company over time which are not variable investments and which are instead likely to represent the proceeds of fixed investments

(a) Assets acquired by the Company to support the value of variable investment options?

(b) Any right to receive a payment from the relevant Company equivalent to the value of any accumulation units allocated to Policies in respect of variable investment options?

(c) In the case of Omnia only) assets invested as "premium-in-kind" in respect of any Managed Product Policy?

(d) Assets acquired to support the value of fixed investment options, including, for the avoidance of doubt:

i. (in the case of Northstar only) the "Principal Protected Amount" as defined in the "Global Index Protect" contracts)?

ii. (in the case of Omnia only) any indexed investment options available to Policyholders of GIP Policies?

(e) Any contractual right to receive a payment from the relevant Company representing re payment of a principal amount together with interest at a contractually agreed rate?

(f) (In the case of Northstar only) call warrants acquired to support any "Index Return Amount" as defined in the "Global Index Protect" contracts?

(g) Any other assets acquired by the relevant Company as part of, or pursuant to, its Business of selling Policies to Policyholders?

148. As an introductory matter the Court accepts Mr Davies KC submission that in analysing whether there has been effective segregation of assets under any Product that ostensibly provided for segregation, there are two key matters to consider. First, it is necessary to consider the terms of the Policies in the context of the applicable segregation statute in order to assess whether the assets in question fall within the scope of the segregation provisions; i.e. to check that the assets are of the kind which were intended to be capable of being segregated for the benefit of the Policyholder. Secondly, it is necessary for there to have been adequate arrangements in respect of record-keeping so that it is possible to link or connect the relevant assets to the relevant account. Thus, even if the Policy evinced an intention to establish a segregated account, there could be no effective segregation of assets unless it were actually possible to connect particular assets to particular accounts. In simple terms, the availability of a record connecting the assets to the account is a practical necessity for effective segregation.

149. At this stage, having determined that segregated accounts were established in respect of

each of the contracts of Northstar Business, the Court is concerned with determining the assets which form part of each segregated account. In this connection it is convenient to consider separately the (i) Northstar Business; (ii) Nationwide Business; (iii) Metlife Business; and (iv) Omnia Business. It is also convenient to consider separately the Variable and Fixed investments in each of these Businesses.

Northstar Business

150. In considering this issue it is relevant to keep in mind section 17(2) of the SAC Act which provides that:

> *"17(2) Notwithstanding any enactment or rule of law to the contrary, but subject to this Act,* ***any liability <u>linked</u> 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—***
>   i. ***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.****"*

151. As is evident from the terms of section 17(2) of the SAC Act it is critical to determine whether a particular asset or liability is *linked* to a particular account and in this regard section 2(1) provides that:

> *""linked" means referable by means of—*
> a. *an instrument in writing including a governing instrument or contract;*

b. *an entry or other notation made in respect of a transaction in the records of a segregated accounts company; or*
c. *an unwritten but conclusive indication, which identifies an asset, right, contribution, liability or obligation as belonging or pertaining to a segregated account."*

152. In the context of linkage, the Northstar contracts provide that "*Purchase Payments, deposits, contributions, investment income and other funds received and or attributable to the funding of this Contract, including all monies, shall be allocated and* ***linked*** *to the Segregated Account."*

Northstar Variable Investments

153. The Northstar Report records in relation to the Variable investments how funds would flow following the commencement of the Policies and the subsequent transfers that would occur for the purposes of giving effect to the investment allocation selected by the Policyholders, and how funds would move upon and withdrawal and/or surrender by the Policyholder.

154. The Company's marketing material reveals that Policyholders under the Northstar and Nationwide Business blocks would first transfer their investments in the Company to the Master Trust Account. The prospective Policyholder would initially complete the relevant application forms and remit funds into the Master Trust Account, which the JPLs understand, from the Company's Operations and Finance Teams, acted as a receipt and clearing account. From their review, the JPLs understand that the funds would generally be transferred either by the individual prospective Policyholder or by their financial adviser (rather than by the Trustee of the relevant trust).

155. Upon money entering the Master Trust Account, a member of the Operations team would note the funds had been received, review any supporting documentation, and then manually create an entry onto the "New Premium File" which reflected the allocation of the Policyholder's investment as set out in the supporting documents provided with the Policyholder's application. The New Premium File therefore recorded the allocation of a

Policyholder's money between the fixed and variable portfolios. The Finance Team would subsequently review the information input into the New Premium File by the Operations Team.

156. The way in which funds received into the Master Trust Account were subsequently treated depended on how the funds had been allocated on the New Premium File (which, in turn, reflected the designations made by the Policyholder with their application).

157. The funds allocated to the Variable portfolio would be transferred by the Finance Team (in line with the information in the New Premium File) from the Master Trust Account to the Trade Account. The Trade Account holds funds that were intended to be used for subscriptions, fund transfer, and redemptions of investments in fund houses. Once funds had been transferred to the Trade Account, the Operations Team would consider the trade instructions from the Policyholders, and the Finance Team would procure the transfer of funds to the relevant fund houses in line with those instructions. The documents and identifying information generated as a result of that process would include trade instructions, Excel files setting out the subscriptions that the Policyholder wished to make, a Company internal record of the holdings to be acquired in each fund, and (in some, but not all, cases) confirmation of purchase provided by the fund houses to the Company.

158. Upon the Policyholder electing to withdraw or surrender their investment, the relevant investments would be redeemed from the fund houses, and funds would be remitted from the fund houses back to the Trade Account. Those funds would then be transferred to the Operations Account, which would be used to disburse all funds back to Policyholder.

159. In relation to the Variable investments, as noted in the Northstar Opinion, a Policyholder is not credited with the number of shares of a specified mutual fund but instead is allocated a number of "*Units*" in respect of that fund. The JPLs have described unitisation as follows:

> "*Unitization is the way the Company values allocations in a Variable Investment Option as offered within a Policyholder's Contract. The Policyholder can*

allocate their initial purchase payment to one or more offered Variable Investment Options. The amount of the purchase payment allocated to a Variable Investment Option purchases Accumulation Units of that Variable Investment Option (calculated as amount allocated divided by Accumulation Unit Value). Subsequently, the Policyholder may add or redeem value from any Variable Investment Option resulting in an associated increase or decrease in Accumulation Units."

160. As noted in the Northstar Opinion, the Northstar Contracts specifically provide for the allocation of units as opposed to shares in a particular mutual fund. Thus:

(a) An initial investment is allocated to a *"Variable Investment Option"* within a *"Variable Account"*. As part of this process the investment is *"applied to purchase* ***Accumulation Units of the Relevant Variable Investment Option****"*.

(b) An Accumulation Unit is described simply as a *"unit of measure used to calculate the value of a Variable Investment Option"*. The company invests amounts allocated to *"Variable Investment Options"* within the Variable Account in Funds. The Variable Account is defined as an *"account of the Company established for the purpose of offering Variable Investment Options within this Contract"*.

(c)The change in the Accumulation Unit value of a Variable Investment Option is dependent on the performance of the underlying Fund.

(d)Withdrawals and transfers taken from the Variable Accounts are *"applied to redeem Accumulation Units from the Variable Investment Option"*.

161. The Northstar Opinion accepts that the above arrangement is susceptible to two possible interpretations. First, that the only relevant linked asset of the segregated accounts is a contractual right to receive payment from the Company equivalent to the value of the so-called "accumulation units" held by the account, while the **Variable Assets** form part of

the general account. Second, that the Variable Assets themselves are linked to segregated accounts.

162. Mr Tidmarsh KC, for the Fixed Representatives, argued strenuously (by reference to Nationwide Policy at 28.14, page 4702) that it is the Accumulation Units that are comprised in the Separate Account (if there is one) and the assets do not include the shares of mutual funds in which premiums are ultimately invested. He argues that under the terms of the Policy a Policyholder elects to have the applicable part of a premium allocated to a Sub-Account. On being allocated to a Sub-Account, the premium ceases to be part of the separate account. It is "*allocated among one or more of the Sub-Accounts as designated by [the Policyholder]*" and "*is invested in the Accumulation Units*". That indicates, he argues, that the Accumulation Units are more than just an accounting unit (they are "*invested*" by the Sub-Account in that the units are accredited or allocated to a Policyholder).

163. In support of his argument Mr Tidmarsh KC further contends that the sum of the values of the Sub-Accounts differs from the value of the shares of the underlying Fund. Although that value is the starting point of a calculation the amount is subject to the deduction of Mortality and Expense Risk Charge and Daily Administration Charge set out in the Fees and Charges Section. The amount of those fees and charges are not fixed. Only the maximum charge (calculated by reference to the market price for one share of a Fund) is fixed. It follows, he argues, that the "*assets*" held in the Separate Account (if there is one) can only be the Sub-Accounts (which comprise the Units) which are the product of that calculation.

164. Mr Tidmarsh KC contends that the above conclusion is supported by the way in which a Sub-Account is valued. The initial unit value for each division is set at $10 and is subsequently determined for a Valuation Period by multiplying the value for the preceding Valuation Period by the Net Investment Factor. The Net Investment Factor in essence is the change in value of the relevant shares plus dividends received plus or minus a credit or debit for taxes less the Variable Account Charge. Accordingly, the value of the

Accumulation Units (and hence the value of the separate fund) will always be less than the value of the investments in the relevant Mutual Fund. The assets of a separate fund cannot be more than its value and so shares in the Mutual Fund are not assets of the separate fund.

165. Mr Tidmarsh KC submits that it follows that if there is a Separate Account relating to the Variable Account it comprises the right to receive a payment from the Company equivalent to the value of any accumulation units allocated to Policies in respect of Variable Investment Options. The Accumulation Units of course meet the liability under the Policy. They are in effect simply an accounting mechanism rather than actual assets. In essence Mr Tidmarsh KC contends that in order for there to be effective *linkage* between the segregated account and the shares of mutual fund there must exist account entries recording the number of shares allocated to the segregated account and identifying those shares by, for example, the numbers appearing in the share certificates. He says the mere fact that it is readily possible to calculate the number of shares owned by the segregated account is not sufficient for the purposes of satisfying the requirement of *linkage* under the SAC Act.

166. The Court is unable to accept Mr Tidmarsh KC's submissions in this regard. First, Mr Tidmarsh KC's submission is at variance with the actual wording and the provisions of the Northstar contracts. As pointed out in the Northstar Opinion, the Northstar Contracts make clear that the Company *"invests amounts allocated to Variable Investment Options within the Variable Account in the referenced Mutual Funds."* The contracts speak of *"the associated purchase or redemption of shares in the referenced Mutual Fund"* and the *"referenced Mutual Fund underlying each relevant Variable Investment Option"*. In other words, there is, according to the Northstar contracts, a direct correlation between the decision by an investor to buy or sell a particular Fund, and the action taken by the Company accordingly. It is evident from the contracts that the Variable Assets pertain to the account which selected the particular investment.

167. Second, it is the JPLs' understanding that the number of Accumulation Units in respect of each underlying Fund corresponded directly with the number of units held by the Company in the Fund. The numbers may not be identical, but one can always be derived from the other. As such, even if, strictly, each individual account only referred to the Accumulation Units rather than the Variable Assets, it would be a straightforward exercise from the Company's records to identify which units in the funds correspond to which accounts. Accordingly, record entries evidence that the Variable Assets pertain to a particular account.

168. Third, when the contracts refer to investments being *"applied to purchase Accumulation Units of the Relevant Variable Investment Option"*, the Accumulation Units represent, or are a measure of, the investor's share of, or interest in, a *"Relevant Variable Investment Option."*

169. Fourth, Mr Tidmarsh KC sought to support his argument with the theory that the segregated assets could not be greater in value than the value of the account as expressed in Accumulation Units. He pointed out that in some cases the underlying shares would be worth more than the Accumulation Unit aggregates total because of the deduction of expenses and argued that necessarily meant, as a matter of analysis, that the underlying assets could not be the segregated assets. However, it seems to the Court that there is no reason in principle why the Policy could not provide for the interest in the underlying assets to be subject to the deduction of expenses. Accordingly, the mere fact that the Accumulation Units express the Policyholder's interest after deduction of expenses provides no conceptual reason why the Policyholder could not have a direct interest in the underlying shares.

170. Fifthly, it seems to the Court that Mr Tidmarsh KC's submissions take an unduly technical approach to this issue and wholly ignore the overall factual matrix as to what would have been reasonably apparent to a reasonable person at the time of subscribing to these Policies. The Court accepts Mr Davies KC's submission that a reasonable person should be taken to have known that the Companies were authorised to provide the protection of segregated

accounts. They would have been aware of this through various different means including that the audited accounts of the Companies representing that for the relevant contracts the assets are segregated and are not available to meet claims that arise out of any other business of the Company. The marketing material in relation to these contracts makes it clear that the ultimate object of the investment is going to be in the underlying mutual funds and that assets are going to be held in the segregated accounts. The Policy wording itself assures that the prospective Policyholder that the underlying assets representing the Policyholders' investments are protected by the segregated account. Mr Tidmarsh KC's contention that the prospective Policyholder should be taken to have agreed that his investments in the mutual funds should be part of the general account of the Company ignores the reasonable expectation of the investors and would be contrary to the primary object of the SAC Act.

171. In the circumstances the Court is satisfied, as submitted by Mr Davies KC, that, as a matter of record keeping, the Accumulation Units were both a measure of value of the Variable Assets that had been acquired pursuant to a particular Policy *and* could be used to identify the particular Variable Assets that had been acquired. In principle, therefore, such assets were capable of being effectively allocated to a segregated account.

Northstar Fixed Investments

172. In relation to fixed investments of Policies all parties are agreed that it is not possible for there to have been effective segregation of assets for the benefit of the fixed Policyholders. It appears that in relation to fixed investments the investor was given no choice in relation to the selection of the underlying investments to be purchased and as a consequence there was no linkage with any underlying assets. Fixed investment plans are described by the JPLs in their Northstar Report as follows:

> *""Fixed" investment plans were those that sought to guarantee a particular defined return to Policyholders over a set period of time. The Policyholder would provide funds to the Company, the Company would invest those funds in the*

manner set out at paragraph 48[8] *above, and the Company would then aim to use the proceeds of that investment to pay Policyholders a guaranteed return at a set interest rate over a set period of time. As set out in more detail in the walkthroughs..., it appears that Policyholders were not provided with a choice of specific underlying assets into which their funds were to be invested (the Contracts instead simply providing for a fixed percentage rate of return, the precise rate usually being dependent on the time period for the investment).*"

173. It is common ground that, in relation to fixed investments, there were no arrangements pursuant to which the underlying investments were connected to the particular Policies under which the original funds had been invested. Hence there are no records in the Companies' books which would allow such a connection to be made. The Court agrees that it follows that in relation to such fixed investments, the absence of records connecting any assets to any Policies means that it is simply not possible for there to have been effective segregation of assets for the benefit of the fixed Policyholders.

Northstar Indexed Investments

174. The Court agrees with the view expressed in the Northstar Opinion that there is no relevant distinction between indexed investments and fixed investments. In other words, if the assets purchased with the proceeds of fixed investments form part of the general account then so must the assets underlying the Principal Protected Amount. The investor's right is simply to the return of the Principal Protected Amount. It is not a right to the underlying Non-Variable Assets, and those Non-Variable Assets are not linked to the segregated account.

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[8] Relevant part of paragraph 48 provides: "*Prior to Mr Lindberg obtaining control of the Company, the Company's investment Policy was to invest approximately 75% of sums supporting fixed Contracts in a portfolio of liquid fixed income securities managed by Blackrock. The Policy was that the remaining approximately 25% of sums supporting fixed Contracts would be invested in a portfolio of higher-yielding investments, i.e. less liquid non-securities positions such as funds, loans, real estate and equities... Following the acquisition of the Company by Mr Lindberg, the majority of the liquid fixed income securities managed by Blackrock were sold. The majority of the sales occurred during the period between July 2018 and March 2019. The proceeds of these sales were invested in illiquid equity and debt instruments, mainly in special purpose vehicle structures, incorporated in the United States, under the control of Mr Lindberg.*"

175. The Court accepts that the position would be different where there was a deliberate allocation of particular assets to support a particular fixed (or indexed) Policy. This appears to have been the case in respect of the Warrants issued by Barclays to cover the Index Return Amount due under the Global Index Protect Product. It is noted in the Northstar Opinion that the Warrants were not purchased to support the Company's repayment obligations *generally* but, instead, were purchased for particular Policies. As in relation to the variable investments, the Court accepts that there is a direct correlation between an indexed investment and the acquisition by the Company of a Warrant. The Court agrees that by virtue of such a deliberate allocation the Warrants are segregated assets for the benefit of Global Index Protect Policyholders.

Nationwide Business

176. The Court's analysis at paragraphs 153 to 171 above in relation to the Northstar Variable investments and its conclusion that the Accumulation Units were those a measure of the value of the Variable Assets that had been acquired pursuant to a particular Policy and also could be used to identify the particular Variable Assets that had been acquired, applies equally to the Nationwide Business.

177. Likewise, the Court's analysis at paragraphs 172 to 173 above in relation to the Northstar fixed investments and its conclusion that the absence of records connecting any assets to any Policies means that it is simply not possible for there to have been effective segregation of assets for the benefit of the fixed Policyholders, applies equally to the Nationwide Business.

Metlife Business

178. We are concerned here with GVDA, VUL and GAP contracts. So far as Variable investments are concerned, the GVDA and VUL contracts state that the Separate Account holds *"assets funding the variable benefits for this and other contracts of the same type"* and that the Separate Account assets *"are not chargeable with liabilities arising out of any*

other business we may conduct". However, the contracts also provide that the assets *"are subject to the claims of creditors"*. As set out in paragraph 124 above, the reference to "*creditors*" is to creditors of the Separate Account. On this basis, the Court confirms that the Variable Assets do form part of the assets of the Separate Account in relation to the GVDA and VUL contracts.

179. In relation to the GAP contract the Court agrees with the view expressed in the Northstar Opinion that the GAP contract intended that assets of the Separate Account would be segregated from the general assets of the Company. For example, it states that the Separate Account *"shall not be chargeable with liabilities arising out of any other Business that the Company may conduct"*, that *"[t]he Participants shall have no recourse to any rights or assets of the Company other than those credited or allocated to the Separate Account"* and that *"[t]he assets of divisions of the Separate Account are held for the exclusive benefit of the Participants in the Contract"*.

180. In relation to the establishment of a fixed investment account and variable investment account, the GAP provides that:

> ***"Separate Account***
> *The Separate Account was established by the Company pursuant to this Contract and the Citicorp International Insurance Company Ltd. Act, 1999, an Act of the Legislature of Bermuda (the "Act").* ***Pursuant to this Act, the Company shall establish and maintain a Separate Account with respect to this Contract****. The Separate Account shall not be chargeable with liabilities arising out of any other Business that the Company may conduct. The Participants shall have no recourse to any rights or assets of the Company other than those credited or allocated to the Separate Account.*
> ***Guaranteed Fixed Investment Option***
> ***Purchase Payments made to the Individual Accounts and allocated to this Option are invested in a non-unitized division of the Separate Account*** *and are not chargeable with liabilities arising out of any other Business that the Company may conduct.* ***If the assets in the division do not perform to meet the interest rate guarantees and obligations of the Company for the Guaranteed Fixed Investment Option, then the general assets of the Company will be available to meet these guarantees an obligations****. Participants do not share in the investment*

performance of assets allocated to this division of the Separate Account. Generally, the Company will invest in fixed income securities, including public and private bonds, and mortgages in the non unitized division of the Separate Account supporting the Guaranteed Fixed Investment Option.

Variable Investment Option

Purchase Payments made to the Individual Accounts and allocated to this Option will be invested in unitized division (s) of the Separate Account, which will invest exclusively in the shares of the Mutual Funds. *The assets of divisions of the Separate Account are held for the exclusive benefit of the Participants in the Contract. Income, gains, and losses, whether or not realized, from assets allocated to the Separate Account are credited to or charged against the Separate Account without regard to other income, gains, and losses of the Company."*

181. The Court agrees that the highlighted wording of the above provision of the GAP supports the view expressed in the Northstar Opinion that both the fixed and variable assets would be held in the Separate Account in distinct *"divisions"*. The contract provides, for example, that the Separate Account *"consists of divisions which either invests in shares of the Mutual Funds that comprise the Variable Investment Option or invests in fixed income securities and other investments that support the Guaranteed Fixed Investment Option. The Separate Account assets are kept separate from the general assets of the Company."*

182. However, the JPLs have advised that Non-Variable Assets have not been treated as part of the Separate Account. Non-Variable Assets acquired with the proceeds of fixed investments under the GAP contract are not identifiable from any other Non-Variable Assets of the Company. Accordingly, the Court agrees that as a practical matter (contrary the terms of the GAP contract) those assets have not been segregated within the Separate Account or any division of it. In my judgment, the reality is that, notwithstanding the terms of the GAP contract, only the Variable Assets form part of the Separate Account.

183. The Court also agrees that they express terms of the GAP highlighted above provides that where the fixed "*division*" of the Separate Account is inadequate to meet the claims of fixed investors, their recourse is to the general assets of the Company and not to the divisions of the Separate Account holding Variable Assets. Accordingly, the Court agrees

that in practice, fixed investors in the GAP contract are in the same position as those under the GVDA and VUL contract.

Omnia Business

Variable investments

184. The Court's analysis in relation to the issue of unitisation set out at paragraphs 153 to 171 above applies equally to the Omnia Business. Indeed, in relation to Omnia the JPLs considered how variable investments were linked to the performance of the underlying Variable Assets, and recorded their findings as follows:

> "*Policyholders selecting variable investment options would be allocated Units rather than any interest in the underlying Variable Assets themselves (with the partial exception of the Managed Product):*
> *The Custodian would purchase securities equivalent in value to the Policyholder's investment in the relevant fund;*
> *Units are a measurement used to calculate the value of the variable investment option;*
> *The value of a Unit would correlate to (and would therefore mirror) that of the securities in the reference mutual fund purchased by the Company; and*
> *Therefore, as the value of the underlying securities varied, so would the value of the Units. It is in this sense that the performance of that investment option was variable.*"

185. Accordingly, the Court concludes that the Variable Assets do form part of the segregated accounts in relation to the Omnia Business.

Fixed Investments

186. For the reasons set out in paragraphs 172 to 173 above, the Court confirms that the assets purchased with the proceeds of fixed investments (Non-Variable Assets) do not form part of the segregated accounts. The investors right is simply the right to receive repayment of the principal amount together with interest at a contractually agreed rate.

Indexed Investments

187. The Court confirms that the position as regards indexed instruments is identical to that which concerns fixed investments.

SWAP Policyholders

188. For the reasons set out in a separate Judgment, the premium in-kind, in the form of capital of Liffey, forms part of the segregated accounts linked to those Policyholders.

Miscellaneous

189. 13(g) raises the issue to what extent, if any, are the assets acquired by the relevant Company as part of, or pursuant to, its business of selling Policies to Policyholders to be held exclusively for the benefit of any such segregated accounts? The answer to this question would depend upon the terms of the relevant Policy.

190. In principle any insurance/reinsurance recoveries made by the Company in respect of the liability of a segregated account to its Policyholders will be an asset of the segregated account and necessarily has to be credited to the segregated account.

Consequences of Linkage

Northstar

14. To the extent that assets are linked or allocated to a segregated account established by Northstar, to what extent (if any) are they to be held for the benefit of the relevant segregated account, having regard (to the extent relevant) to:

- ***i. the requirements of the SAC Act (including, without prejudice to the generality of this issue, sections 17, 18 and 25 of the SAC Act);***
- ***ii. the requirements of any applicable Northstar Private Acts***
- ***iii. the terms of the Northstar Policies; and/or***
- ***iv. any other relevant circumstances or legal principles?***

The SAC Act and Northstar Policies (Northstar Business)

191. The primary consequence of linkage is that the assets of the segregated account are held exclusively for the benefit of the beneficial owner or counterparty and can only be applied to the liabilities of the segregated account. The scope of this rule is extended to how the assets of the segregated account are dealt with during the liquidation of the segregated account company. In relation to the Northstar Business this core feature is achieved by sections 17(2) and(2A), 17(5), 17(11), 17B(1), 18(11) and 25(1) of the SAC Act.

192. Section 17(2) and (2A) set out the primary provisions intended to achieve the object that the assets of the segregated account are held exclusively for the benefit of the beneficial owner or counterparty and can only be applied to the liabilities of the segregated account. These provisions provide that:

(a) 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.

(b) Any asset which is linked by a segregated account company to a segregated account 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 available only to meet liabilities to the account owners and creditors of that account.

(c) Any asset which is linked to a segregated account shall not be available or used to meet liabilities to the general shareholders or the creditors of the company who are not creditors with claims linked to that particular segregated account.

193. Section 17(5) regulates the extent to which a liability enforceable against a segregated account can be enforced against the assets of that segregated account (see: *Ivanishvili v Credit Suisse Life (Bermuda) Limited* [2022] SC (Bda) 56 Civ at [37]). Section 17(5) provides that once liability is affixed against a segregated account, that liability (a) can be enforced against the assets of that segregated account; (b) cannot be enforced against the assets of other segregated accounts of the company; and (c) *unless the parties otherwise*

agree in writing cannot be enforced against the general account of the segregated accounts company.

194. Sections 17(11) and 17B(1) emphasise that it is only liabilities which are *linked* to the segregated account which can be enforced against the assets of the segregated account. Section 17(11) provides that a liability is deemed to be a liability of the general account where either (a) that liability is not linked to a particular segregated account, or (b) there is, on grounds that are reasonable, uncertainty as to whether the liability is linked. Section 17B(1) further provides that there is implied in every governing instrument a term that no party shall seek 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.

195. Sections 18(11) and (13) provide that 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 and that an account owner's or counterparty's beneficial interest in the segregated account is freely transferable.

196. The effects of segregation continue after the appointment of a liquidator. Section 25(1) provides that:

> *"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 and 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."*

197. Turning to the Policies issued in relation to the Northstar Business, typically, as noted by Mr Davies KC, the Policies included the following definition of the term "*Segregated Account*":

"*A separate and distinct account pertaining to the assets and liabilities of this Contract which are segregated from the assets and liabilities of (i) any other segregated accounts, and (ii) the general account of the Company for the purposes of the SAC Act*".

198. The Policies then proceeded to provide as follows, in a section entitled, "*Segregated Account*":

> "*The Company shall establish and maintain a Segregated Account in respect of this Contract only*"
> "*Each Segregated Account is separate, distinct and identifiable from the other Segregated Accounts of the Company and the general account of the Company. The assets allocated to the Segregated Account are not chargeable with the liabilities arising out of the other Business of the Company, including any other Segregated Account or general account of the Company. No claim shall be made under any contract on the assets of any Segregated Account other than the one linked to such contract.*"

199. Having regard to the typical provisions in the Northstar Policies, there is a good basis to conclude that the intention and purpose of the segregation provisions under these Policies was that the assets would be part of the segregated accounts in respect of such Policies for the purposes of the SAC Act.

Nationwide and Citicorp Acts (Nationwide Business and Metlife Business)

200. As noted earlier at paragraph 43, the Nationwide and Citicorp Acts make substantially similar provisions in relation to the consequences of assets being linked to a segregated account. These Private Acts provide that:

201. A "Separate Account" is an account "*established or recorded in the records of the Company*" (section 2(1)(m) of the Nationwide Act and section 2(1)(l) of the Citicorp Act).

202. The Company must record, allocate or credit to the Separate Account "*such portion of the*

receipts or premium from or attributable to the related Policy and any other property of the Company including but not limited to rights of the Company under any contract derived from or purchased with such receipts or premiums as the related Policy may stipulate" (section 4(3) of the Nationwide and Citicorp Acts).

203. All income, interest or other gains earned from, and any property acquired by the investing or dealing of the assets forming part of a Separate Account shall be credited to that Separate Account (section 4(5) of the Nationwide and Citicorp Acts).

204. The assets standing to the credit of a Separate Account shall, after the deductions mentioned immediately above, be held by the Company subject to the provisions of the Act, for the sole purpose of paying any and all claims arising from or other amounts owing under the related Policy, and no other person shall have any right or interest in the asset (section 4(8) of the Nationwide Act and section 4(7) of the Citicorp Act).

205. Notwithstanding any statutory provision or rule of law to the contrary, on the commencement of proceedings to wind up (or, in the Nationwide Act, dissolve) the Company, the liquidator shall be bound to recognise the separate nature of each Separate Account pursuant to the provisions of the Act and shall not apply the property of any one Separate 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 any Policy or Policyholder other than that to which the Separate Account relates (section 8(e) of the Nationwide Act and section 10(4) of the Citicorp Act).

206. The Endorsement appearing in the Nationwide Policies is consistent with the principal consequences of the assets being linked to a segregated account. The Endorsement provides that:

> *"WHEREAS, it is desired that the provisions relating to separate accounts under the Nationwide Financial Services (Bermuda) Ltd. Act, 1998 (the "Nationwide (Bermuda) Act") apply to the Purchase Payments and other assets attributable to*

the Contract, ***so that such Purchase Payments and other assets have the protection of being legally segregated from other funds and assets of, or administered by, the Company;***

THEREFORE, the following matters and this Endorsement, as of the Date of Issue, shall form a part, and where appropriate, amend any contrary provisions of the Contract to which it is attached:

On and after the Date of Issue, ***the Company shall establish and maintain a separate account for the Contract*** *(the "Contract Separate Account") and* ***for the purposes of section 4(1) of the Nationwide (Bermuda) Act****, the Contract Separate Account shall be a Separate Account for the Contract. The rights and interests in the property of the Contract Separate Account shall be determined by the terms of the Contract as such terms shall stand from time to time.*

On and after the Date of Issue, premiums, deposits, contributions, investment income and other funds received and or attributable to the funding of the Contract shall be allocated to the Contract Separate Account. Any and ***all withdrawals made from the Contract Separate Account for the purposes of making a payment under the terms of the Policy*** *shall cease to form part of the property of the Contract Separate Account.*

4) At all and any times the Company shall maintain (or procure) proper records clearly identifying the property (and any part thereof) of the Contract Separate Account so as to allow the principal representative (as such expression is defined in the Nationwide (Bermuda) Act) to identify such property. ***The Company shall or may allocate to the Contract Separate Account all expenses, income, interest, gains (or losses) incurred or earned from investing or dealing with assets, investment income and other property belonging to or concerning the Contract Separate Account."***

207. Metlife Policies are discussed at paragraphs 120 to 124 above. In the main Metlife Policies also seek to preserve the main consequence of assets being linked to the segregated account. Thus, the Group Variable Deferred Annuity Contract provides for a "Separate Account" which in turn is defined as: "*an account established by us to hold assets funding the variable benefits for this and other contracts of the same type. Separate Account assets are equal to the reserves and other liabilities with respect of such contracts and are not chargeable with liabilities arising out of any other business we may conduct.* ***The assets of the Separate Account are [not] subject to the claims of creditors***."

Omnia and Sage Acts and Omnia Policies

208. Again, as noted earlier, at paragraph 44 above, in the case of Omnia, the Sage and Omnia Acts make substantially similar provisions for the consequences of assets being linked to a segregated account:

209. "*Linked*" is defined in the same expansive way as section 2 of the SAC Act (section 1(s) of the Omnia Act).

210. Where required under the terms of a Policy and in accordance with the terms thereof, the Company shall establish and maintain a Separate Account for such Policy or any particular class of Policies with a sub-account for each Policy forming a part of the said class (section 5(1) of the Sage Act and section 7(1) of the Omnia Act).

211. Subject to this Act, rights and interests in the property subject to a Separate Account shall be determined by the terms of the relevant Policy and no other rights or interests which might exist in the said property shall be recognised notwithstanding any statutory provision or rule of last to the contrary. Each Policy shall be deemed to have a provision incorporated therein to the effect that no claim under the Policy may be paid from the Assets or funds of any Separate Account not relating to such Policy (section 5(2) of the Sage Act and section 7(2) of the Omnia Act).

212. Notwithstanding any statutory provision or rule of law to the contrary, the liquidator shall deal with the property of a Separate Account in accordance with the Act [*but in the case of the Omnia Act, where an Asset or Liability is Linked to more than one Segregated Account, the liquidator shall deal with it in accordance with the terms of the relevant Governing Instrument or contract*] (section 14(a) of the Sage Act and section 25(1) of the Omnia Act).

213. Omnia Policies seek to give effect to the principle that assets linked to a segregated account can only be utilised for the purpose of discharging liabilities of that particular segregated account. Thus, the Universal Investment Plan specifically provides under the heading "*Segregated Account*":

"The Plan will be Linked to a Segregated Account established by Us when the Plan comes into force and which is separate, distinct and identifiable from the other Segregated Accounts and the General Account. No other Plans or contracts will be Linked to that Segregated Account. ***No claim shall be made under any Plan on the assets of any Segregated Account other than the one under which such Plan was issued. Each Segregated Account is an account containing assets and liabilities that are legally separated from the assets and liabilities of Our General Account and the other Segregated Accounts established pursuant to the Private Act.***

No other rights or interests shall exist with regard to the assets or funds in the Segregated Account except as determined by the terms of the Plan. ***No claim under the Plan may be paid from assets or funds of any other Segregated Account not relating to or Linked to the Plan and vice versa."***

Issue 3: To what extent, if any, do claimants in respect of any Segregated Accounts have claims against the general assets of each Company?

16. To the extent that:-
(a) a segregated account is established in relation to a Policy, and
(b) assets are linked or allocated to that segregated account, what is the nature of the Policyholder's interest in those linked or allocated assets (particularly having regard, to the extent relevant, to the terms of sections 18(1), 18(10), 18(11) and 18(12) of the SAC Act and of any applicable Private Acts)? In particular:

> ***(i) Does the Policyholder solely have a right to take possession of the underlying segregated assets (or only to receive value equivalent to the actual value of the underlying segregated assets); or***
> ***(ii)Does the Policyholder have a right to receive a fixed monetary payment from the relevant Company in accordance with the terms of their Policy, with that right to payment being backed by the value of the underlying segregated assets; or***
> ***(iii) If neither of these, what is the nature of the Policyholder's entitlement to the underlying segregated assets (if any)?***

214. This issue was not fully argued by counsel on the basis that the determination of this issue was unnecessary to determine the practical issue whether a Policyholder can pursue a claim

against the general assets. For present purposes it is sufficient to note that section 18(10) of the SAC Act provides that a Policyholder linked to a segregated account has "*an undivided beneficial interest in the assets linked to a segregated account*". Section 18(10) provides:

> *"Except to the extent otherwise provided in the governing instrument, a beneficial owner has an undivided beneficial interest in the assets linked to a segregated account by the relevant transaction and shall share in the profits and losses of the segregated account in the proportion (expressed as a percentage) of the entire undivided beneficial interest in the segregated account owned by that beneficial owner."*

17. To the extent that a segregated account is established in relation to a Policy but those assets are insufficient to satisfy the relevant Company's liabilities to the relevant Policyholder in respect of that account, to what extent, if any, do Policyholders have claims against the general assets of the relevant Company (including its General Account), in accordance with:

> ***(a) the SAC Act;***
> ***(b) any applicable Private Acts (including, in the case of Omnia only and without prejudice to the generality of this issue, sections 10 and 13 of the Sage Act);***
> ***(c)the terms of the Policies; and/or***
> ***(d) any other relevant circumstances or legal principles?***

215. In the case of the segregation regime under the SAC Act, the legal position seems reasonably clear that section 17(5) precludes the Policyholder from having recourse to the general assets in the event of a shortfall in the segregated assets. Section 17(5) states as follows:

> ***"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 segregate 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.***"

216. It is reasonably clear that section 17(5) deals with liability arising out of a Policy issued to a Policyholder which is linked to a segregated account. The reference under section 17(5)(a) to the "*governing instrument*" indicates that the section includes dealings with the Policyholder and is not only concerned with dealings with third parties. The drafting concerning the scope of the liabilities that are covered by the section is extremely broad, encompassing liabilities that merely arise from "*a matter relating to*" a particular segregated account, or that are "*imposed in respect of or attributable to*" a particular segregated account.

217. Furthermore, as Mr Davies KC correctly submits, any argument that a claim by a Policyholder under the Policy should not be included in the scope of liabilities in respect of a particular segregated account for the purposes of section 17(5) is undermined by the terms of the Policies. For example, under the Policy for the Global VIP Product, the term "*Segregated Account*" is defined as "*A separate and distinct account pertaining to the*

assets and liabilities of this Contract which are segregated from the assets and liabilities of (i) any other segregated accounts, and (ii) the general account of the Company for the purposes of the SAC Act." The principal liability of Northstar to pay the Policyholder on the terms of the Policy must be a liability "*of this Contract*", and so that basic obligation is a liability to which a segregated account pertains, according to the definition.

218. Mr Davies KC correctly points out that this conclusion is consistent with the fact, as reported by the JPLs in the Northstar Report, that when Northstar re-registered as a Class C insurer, the reason that was given for the re- registration was that the "*Class D licence did not reflect the Company's risk profile, since the majority of its assets and liabilities were in segregated accounts with no recourse to the General Account*". The liabilities referred to were liabilities arising from the Policies issued in respect of the fixed investments.

219. Mr Collings KC and Mr Tidmarsh KC do not take issue with the terms of section 17(5) of the SAC Act but contend that the critical issue for the Court to determine is whether a segregated account has been established within the meaning of the SAC Act. If no relevant segregated account has been established, they argue, there can be no scope for section 17(5) to operate.

220. Mr Collings KC and Mr Tidmarsh KC argue that in order to establish a segregated account within the scope of the SAC Act it is essential that the relevant assets be *linked* to the segregated account. Without the relevant assets being linked to the segregated account there is, they argue, no effective segregation. Mr Collings KC contends that in that case it is "*only ostensible segregation*".

221. If there is no valid segregation of the assets, the assets and liabilities, argue Mr Collings KC and Mr Tidmarsh KC, belong to the general account. In that case, they argue, a Policyholder has a right to recover from the general account. In the present case all the fixed class Policyholders (whose assets are not linked to the segregated accounts) have a right, they contend, to recover from the general account. They also say that the question

of segregation should be considered when the Policyholder is seeking to make a claim against the segregated account. In the present case, they say the relevant time to consider whether there has been effective segregation is on the date of the appointment of the JPLs.

222. In support of this argument Mr Collings KC and Mr Tidmarsh KC place reliance upon the definition of "*segregated account*" in section 2 of the SAC Act. Section 2 provides:

> *""segregated account" means a separate and distinct account* ***(comprising entries recording data, assets, liabilities, rights and obligations linked to such account)*** *of a segregated accounts company maintained in respect of a beneficial owner or a counterparty in accordance with this Act."*

223. Mr Collings KC and Mr Tidmarsh KC contend that in order to constitute an effective segregated account within the meaning of the SAC Act there must be "*entries recording*" "*assets, liabilities, rights and obligations linked to such account*". They submit that unless there are "*entries recording*" "*assets... linked to such account*" no relevant segregated account can exist within the meaning of the SAC Act.

224. In evaluating this argument, it is relevant to keep in mind that the issue is whether the Policyholders who entered into Fixed or Variable investments on terms that provided for segregated accounts are entitled, *as of right* to claim against the general assets. If this argument is rejected it does not necessarily mean that the Policyholders with Fixed investments may not pursue a claim against the general account by other means. They may, for example, have a cause of action against the Company for breach of duty to implement the effective structure. They may also be able to pursue "*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*" as provided for under section 18(16)(a) of the SAC Act.

225. As Mr Davies KC correctly submitted the argument that if there are no assets in the segregated account means that there is no segregated account, would have profound

consequences for the operation of segregated accounts and especially for the general creditors. The general creditors are often not creditors who have taken any investment risk and it would be anomalous to place them in the same account (the general account) as those creditors who have knowingly and voluntarily assumed investment risk.

226. The Court accepts Mr Davies KC's submission that on proper analysis of this issue a segregated account exists in respect of a Policy as soon as the Policy is entered into and the funds are committed, provided that the funds are connected in the Company's accounts and records to the Policy. The Court accepts that at the very moment, once the Policies are entered into and the funds are committed, there is a liability linked to the account, being the liability under the Policy. It is also the case that the assets had been allocated to the account and those are both items that may comprise a segregated account under the definition in SAC Act: assets and liabilities.

227. In relation to record-keeping, it is clear that a record was made by Northstar the moment those things happened, and the Company recorded the investment and it also recorded whether it was Fixed or Variable investment. The Northstar Report confirms that this was done as soon as the investment was made:

> *"169. Upon money entering the Master Trust Account, a member of the Operations team would note the funds received, review any supporting documentation, and then manually create an entry onto the "New Premium File" which reflected the allocation of the Policyholder's investment as set out in the supporting documents provided with the Policyholder's application. An example of entries on the New Premium File is set out in the table directly below:*
>
> *170. The New Premium File therefore recorded the allocation of a Policyholder's money between the fixed and variable portfolios. The Finance Team would subsequently review the information input into the New Premium File by the Operations Team (and the JPLs have seen evidence that this review took place from underlying documentary and email records)."*

228. The Court accepts the submission that by the time the entries are made in the New Premium File there is in existence a segregated account within the meaning of the SAC Act. It

follows that the Fixed Class, being Policyholders who made fixed investments on segregated account terms, must be treated as Policyholders with a segregated account. The existence of the Policy liability and the original investment, those being connected through these records, are a sufficient basis for the Court to conclude that the segregated account was indeed established. This conclusion is consistent with the expectation of all these Policyholders who invested on terms that the investment would be dealt with as a segregated account.

229. To illustrate the establishment of a fixed class segregated account, Mr Davies KC referred to the Northstar Global Interest Accumulator Investment Contract. The Contract provides that "*the Company shall establish and maintain a Segregated Account in respect of this Contract only. The rights and interests of the property of the Segregated Account shall be determined by the terms of this Contract*" and that the "*Purchase Payments, deposits, contributions, investment income and other funds received and or attributable to the funding of this Contract including all monies, shall be allocated and linked to the Segregated Account.*" The "*Segregated Account*" is defined in the Contract as "*A separate and distinct account pertaining to the assets and liabilities of this Contract which are segregated from the assets and liabilities of (i) any other segregated accounts, and (ii) the general account of the Company for the purposes of the SAC Act.*"

230. There can be little doubt that a person investing in the Northstar Global Interest Accumulator Investment Contract would understand that any monies paid by him by way of premium payment would be placed in a "*Separate Account*" which would be segregated from the general account of the Company. The Court accepts that as soon as the investor paid the premium to the Company and as soon as the Company established the "New Premium File" recording the premium in the Separate Account, a segregated account was established within the meaning of the SAC Act.

231. It is unfortunately the case that the segregated account has not operated properly and that the arrangements for segregation were defective in respect of the Fixed investments such that there has been no effective segregation of the assets after the initial entry in the "New

Premium File". As indicated earlier, an investor may have a claim potentially for breach of the Policy for failure to segregate the assets. However, in the Court's view, the Company's subsequent failure to maintain segregation of the assets to a particular segregated account does not have the result that the segregated account was never established under the SAC Act.

232. As noted earlier, Mr Collings KC and Mr Tidmarsh KC rely heavily on the definition of "*segregated account*" in the SAC Act and in particular on the words "*comprising or including entries recording data, assets, rights, contributions, liabilities and obligations linked to such account*" and it is said that in order to have a validly constituted segregated account, all elements mentioned above must exist at any given time. Mr Todd KC gave the example of an investor investing $100 in the fixed class and as a result of the records of the Company would record $100 as an asset and as a liability linked to that account. The Court accepts Mr Todd KC's submission that at this stage there would be a valid segregated account within the meaning of the SAC Act even though it does not have all the elements of the definition of a segregated account referred to above. For example, there would be no entry in relation to *rights, contributions or obligations* mentioned in the definition. The Court is satisfied that it is not essential that in order to establish a segregated account all the elements of the definition of segregated account must be present at any given time.

233. The Court is also satisfied that the mere fact that assets are not linked or cease to be linked to the segregated account does not result in the accounts ceasing to be a segregated account. For example, a segregated account may lose the entirety of its assets in trading losses. That fact alone would not result in a segregated account ceasing to be recognised as a segregated account within the meaning of the SAC Act. The same result would follow if the entirety of the assets were lost as a result of wrongful actions of a third party. In principle, the same result should follow if the assets of the segregated account were "lost" as a result of failure by the Company to properly segregate by keeping proper records and entries of the relevant assets.

234. Accordingly, the Court does not accept Mr Collings KC and Mr Tidmarsh KC's submission that the fact that the investments made with the assets of the Fixed Class were never properly linked to the segregated accounts necessarily means that the segregated accounts never existed within the meaning of the SAC Act. The Court rejects the further submission that as a result the Fixed Class investors, governed by the SAC Act, may seek direct recovery from the general account.

"Guarantees" relating to the repayment of principal and interest

235. The Court was referred to the Northstar Global Interest Accumulator Investment Policy and it was said that the Policy arguably guaranteed the repayment of the interest and the principal so that in the event that the segregated account could not meet those liabilities the Policyholder had direct access actually general account of the Company in respect of these liabilities.

236. With respect to the payment of the interest, the Policy provides that:

> *"Minimum Specified Interest Rate- The Company guarantees that the Specified Interest Rate will not be less than 1.50% per year."*

237. The Court agrees with Mr Todd KC and Mr Davies KC that, on its true construction, this clause is not seeking to "*guarantee*" payments from the general account in the event that there is deficiency in the segregated account. It is merely a covenant by the Company that the interest rate will never be less than 1.50% per year.

238. In relation to the repayment, the Policy provides that:

> *"Principal Guarantee- If the entire value of a Certificate is withdrawn, the Company guarantees that the Net Withdrawal Value will never be less than the Purchase Payment made, less the total of all prior Net Withdrawals from that Certificate. This Principal Guarantee will not apply if the Contract Owner has elected to waive the Principal Guarantee at the time of Application in exchange*

for an increase in the Specified Interest Rate associated with each Purchase Payment."

239. *"Net Withdrawal value"* is defined as *"The amount payable upon adjustment of the Contract Value or any* Gross *Withdrawal Amount for any Withdrawal Charge and/or the recapture of any Discretionary Payments."*

240. *"Discretionary Payment"* is defined as *"A discretionary payment that the Company may make in respect of any Certificate for the benefit of this Contract at the Company's discretion."*

241. *"Gross Withdrawal Amount"* is defined as *"The amount of a Withdrawal request, before any applicable Withdrawal Charge(s) and/or the recapture of any Discretionary Payment(s)."*

242. The Court agrees with Mr Davies KC's submission that on a proper construction of the clause the Company is not providing a guarantee that in the event the assets in the segregated account are insufficient to repay the amount due under this clause a Policyholder may have access to the Company's general account. On its true construction the Company is covenanting with the Policyholder that as long as the Policyholder has not opted for an increase in the Specified Interest Rate the principal "*will never be less than the Purchase Payment made, less the total of all prior Net Withdrawals from that Certificate*".

243. This interpretation of the relevant clause is consistent with the other provisions of the Policy emphasizing that the liabilities to a Policyholder are to be satisfied from the segregated account and in particular the Policyholder has no access to the general account. Thus, the central provision defining "*Segregated Account*" provides for a "*A separate and distinct account pertaining to the* assets *and liabilities of this Contract which are* ***segregated from*** *the* assets *and liabilities of (i) any other segregated accounts, and (ii)* ***the general account of the Company for the purposes of the SAC Act."***

Reinsurance recoveries

244. Mr Tidmarsh KC referred the Court to certain Nationwide Policies which provide for a death benefit consisting of an amount greater than the contract value. It appears that the amount in excess of the contract value was the subject of reinsurance whereby Nationwide would recover from the reinsurer the excess amount upon the death of a Policyholder. The reinsurance recovery would be linked to the account of a particular Policyholder since the reinsurance recovery made is upon the death of and by reference to a particular Policyholder. It is common ground that the contractual right under a contract of insurance/reinsurance is a contingent right, and the Court holds that that contingent right and/or the actual reinsurance recovery made is an "*asset*" of the particular segregated account. Assuming it was a requirement that, in order to constitute a valid segregated account, the segregated account must have assets linked to it, the Court holds that the right to make recovery from the reinsurer in respect of the death benefit would be sufficient to satisfy that requirement.

Nationwide Policies

245. In relation to the Nationwide Policies Mr Tidmarsh KC contends that there is no provision in the Nationwide Act which prohibits a Policyholder having access to the General Account of the Company in the event of deficiency in the segregated account. However, the general scheme of the Nationwide Act is for the establishment of segregated accounts for the benefit of the Policyholders. Section 4, headed "*Legal Separation of Property*" provides:

> *"4(1) Where required under the terms of a Policy, and in accordance with the terms thereof (but subject to the provisions of this Act), the Company shall establish and maintain a Separate Account for such Policy and, if the said terms permit, a Separate Account may relate to more than one Policy.*
>
> ...
>
> *4(3) The Company shall record, allocate or credit to the relevant Separate Account such portion of the receipt or premium from or attributable to the related Policy*

and any other property of the Company including but not limited to rights of the Company under any contract derived from or purchased with such receipts or premiums as the related Policy may stipulate.

...

4(8) The property standing to the credit of a Separate Account shall, after deduction of all amounts payable in accordance with subsection 4(7) thereof, be held by the Company subject to the provisions of this Act, for the sole purpose of paying all and any claims arising from or other amounts owing under the related Policy and for the benefit of any related Securityholder pursuant to the provisions of section 6 of this Act, if any, and no other person shall have any right or interest in such property."

246. Further and in any event the Court accepts Mr Davies KC's submission that the Nationwide Policies are now governed and have to operate in accordance with the SAC Act. As noted earlier, section 8(1)(a) of the SAC Act governs the Nationwide Business and that "*the provisions of this Act shall apply to that company and, to the extent of any inconsistency between this Act and the provisions of that Private Act, the provisions of this act shall prevail.*"

247. As also noted earlier, section 17(5)(e) of the SAC Act makes it clear that unless otherwise expressly agreed in writing by the affected parties, a liability of a segregated accounts company to a person arising from a transaction or matter relating to a particular segregated account shall not "*extend to, and that person shall not in respect of that liability, be entitled to have recourse to, the general account.*"

Metlife Policies

248. In relation to the Metlife Policies, Mr Tidmarsh KC referred the Court to the Global Asset Portfolio and contended that the Policy expressly allowed the Policyholder to have access to the general account of the Company in the event of deficiency in the segregated account. In relation to the "Guaranteed Fixed Investment Option" the Policy provides that:

> *"If the assets in the division do not perform to meet the interest rate guarantees and obligations of the Company for the Guaranteed Fixed Investment Option,* ***then***

the general assets of the Company will be available to meet these guarantees and obligations"

249. "*Guaranteed Fixed Investment Option Value*" of an "*Individual Account*" is defined in the Policy as "*equal to the Account Value for such Valuation Period of all amounts allocated to the Fixed Investment Option.*"

250. "*Account Value*" is defined in the Policy as:

> *"For each Participant electing to participate in the Guaranteed Fixed Investment Option, the Account Value attributable thereto* ***is equal to the sum of such Participant' Net Purchase Payments and all interest credited thereto*** *that has been allocated to such election less the sum of all transfers, partial withdrawals, partial withdrawal charges and all other charges attributable to such election - all as of a Valuation Date; and for each Participant electing to participate in the Variable Investment Option, the Account Value attributable thereto is equal to the value of the Variable Units in each such Participant's Individual Account as of the Valuation Date."*

251. Having regard to the definition of "*Account Value*" the Court accepts Mr Tidmarsh KC's submission that in relation to the Global Asset Portfolio, the Policyholder does indeed have access to the general account of the Company in the event that the relevant segregated account does not have sufficient assets to discharge the Company's liability to the Policyholder both in respect of the principal and the accrued interest.

Omnia Policies

252. The Omnia Act itself does not make any express provision regarding claims by the Policyholders in respect of the general account of the Company. Accordingly, it is a matter of consideration of the relevant Policies issued by the Company.

253. Under the Universal Investment Plan the Policy specifically provides for a "Segregated Account" and states that:

> *"The Plan will be Linked to a Segregated Account established by Us when the Plan comes into force and* ***which is separate, distinct and identifiable from the other Segregated Accounts and the General Account****. No other Plans or contracts will be Linked to that Segregated Account.* ***No claim shall be made under any Plan on the assets of any Segregated Account other than the one under which such Plan was issued. Each Segregated Account is an account containing assets and liabilities that are legally separated from the assets and liabilities of Our General Account and the other Segregated Accounts established pursuant to the Private Act."***

254. In the event of liquidation of the Company, the Policy provides that:

> *"Notwithstanding any statutory provision or rule of law to the contrary, in the winding up of the Company the liquidator shall deal with the assets and liabilities which are Linked to the Segregated Account only in accordance with the Private Act and accordingly the liquidator shall ensure that the assets Linked to the Segregated Account are not applied to the satisfaction of liabilities Linked to any other Segregated Account or to the General Account."*

255. The Court accepts Mr Davies KC's submission that these provisions emphasise the "*firewall*" or "*iron curtain*" between the assets and liabilities of a particular segregated account and the assets and liabilities of other segregated accounts and the general account of the Company.

256. The Court was also referred to the Guaranteed Index Plan which again emphasises the "firewall" between the assets and liabilities of a segregated account and the general account of the Company. Thus, the "Segregated Account" is defined as:

> *"The account established and recorded pursuant to Bermuda law which (i) shall be evidenced in the records of the Company and (ii) is* ***separate and distinct from*** *the other separate accounts of the Company and* ***the general account of the Company*** *and maintained for the purposes of all Plan Owners."*

257. Mr Davies KC also referred the Court to the Guaranteed Rate Plan which has the same definition of "*Segregated Account*" as noted above in relation to the Guaranteed Index Plan.

258. The Court agrees with the submission of Mr Davies KC that, on proper construction of the Omnia Policies the position is the same as the application of section 17(5) of the SAC Act. It follows that the Policyholders of the Omnia Policies have no direct access to the general account of the Company in the event of deficiency in the segregated account. This is of course without prejudice to any other cause of action those Policyholders may have as discussed earlier.

259. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 28th day of July 2023

NARINDER K HARGUN
CHIEF JUSTICE

Appendix 1: Private Acts

AND IN THE MATTER OF NATIONWIDE FINANCIAL SERVICES (BERMUDA) LTD. ACT 1998

AND IN THE MATTER OF THE CITICORP INTERNATIONAL INSURANCE COMPANY LTD. ACT 1999, AS AMENDED BY THE CITICORP INTERNATIONAL LIFE INSURANCE COMPANY, LTD. AMENDMENT ACT 2004

AND IN THE MATTER OF THE NORTHSTAR FINANCIAL SERVICES (BERMUDA) LTD. ACT 2008, AS AMENDED BY THE NORTHSTAR FINANCIAL SERVICES (BERMUDA) LTD. AMENDMENT ACT 2018

AND IN THE MATTER OF THE SAGE LIFE (BERMUDA) LTD. (SEGREGATED ACCOUNTS) ACT 1999

AND IN THE MATTER OF THE OMNIA (BERMUDA) LTD. (SEGREGATED ACCOUNTS) CONSOLIDATION AND AMENDMENT ACT 2004