IN NZ MARKETS DISCIPLINARY TRIBUNAL **NZMDT 2/2020**

UNDER	NZ Markets Disciplinary Tribunal Rules
IN THE MATTER OF	breach of NZX Participant Rules 3.9, 8.1.1(c), 18.4.1, 18.4.2, 18.6.1(a)(i) and 18.6.1(b)
BETWEEN	**NZX LIMITED**
AND	**TIGER BROKERS (NZ) LIMITED** Respondent

DETERMINATION OF NZ MARKETS DISCIPLINARY TRIBUNAL
10 JULY 2020

NEW ZEALAND MARKETS DISCIPLINARY TRIBUNAL

Rachel Batters
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1. This is a decision of a division of the NZ Markets Disciplinary Tribunal (*the Tribunal*) comprising Nick Hegan (Division Chair), Nicola Greer and David Lane.

2. Capitalised terms that are not defined in this decision have the meanings given to them in the NZX Participant Rules (*the Rules*) or the Tribunal Rules as the case may be.

Procedural background

3. On 23 April 2020, NZX Limited (*NZX*) filed a statement of case (*SOC*) alleging that Tiger Brokers (NZ) Limited (*TBNZ*) had breached Rules 3.3.2, 3.9, 8.1.1(c), 18.4.1, 18.4.2, 18.5.1, 18.6.1(a) and 18.6.1(b).

4. On 30 April 2020, TBNZ requested a time extension to file its statement of response from 8 May 2020 to 29 May 2020 on the grounds that it had recently instructed its lawyers to act on this matter, the length and detail of the SOC, the wide-ranging allegations and the seriousness NZX attaches to those allegations. TBNZ submitted that it required the extra time sought in order to have a reasonable opportunity to respond. On 30 April 2020, the Division Chair granted the extension requested.

5. On 29 May 2020, TBNZ filed a statement of response (*SOR*) denying it breached the Rules on the basis that an account it held at DBS Bank (*the DBS Account*) did have trust status, but acknowledging it breached the Rules (i) until DBS was designated as a Bank by NZX; (ii) because Total Client Assets did not equal or exceed Outstanding Obligations on certain days; (iii) by not following NZX's direction; and (iv) by not correctly naming Client Funds Accounts it held at three other Banks. TBNZ requested an Oral Hearing be held as it was "*essential for the Tribunal to correctly ascertain the features of a trust account for the purposes of the Rules, whether the DBS Account had those features, and whether the acknowledgements provided by DBS confirmed that status*"[1]. TBNZ considered that whether the DBS Account had the requisite features of a trust account for the purposes of the Rules was a key factual issue in dispute and, in circumstances where serious allegations are made by NZX, an Oral Hearing was essential to respect the principles of natural justice.

6. On 4 June 2020, NZX filed its rejoinder (*Rejoinder*). NZX maintained that TBNZ had breached Rules 18.5.1 and 18.6.1(a) because the DBS Account was not a Client Funds Account and that TBNZ was obliged to provide an acknowledgment in the form required by the Rules and NZX. NZX did acknowledge that, "*based on the legal analysis in the [SOR[2]], Client Assets held in the DBS Account may have been held on trust as a matter of Singaporean law*"[3]. NZX submitted that an Oral Hearing was not "*essential to establish all the facts relevant to the matter*" as required under Tribunal Rule 6.5.2 and that an Oral Hearing should not be held. NZX considered that the Tribunal could decline to hold an Oral Hearing where a party has not given the notice prescribed in Tribunal Rule 6.5.2 and that the key points of difference between the parties relate to questions of interpretation of the Rules, rather than factual matters.

7. On 8 June 2020, TBNZ submitted a reply to the Rejoinder on the basis that NZX had made new allegations which should have been incorporated in the SOC or in an amended statement of case. TBNZ also reiterated that an Oral Hearing was essential in order for the Tribunal to properly determine the requirements, the relevant facts and whether or not TBNZ was in breach. TBNZ also sought confirmation that its reply would be considered by the Tribunal.

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[1] Paragraph 1.16 of the SOR.

[2] Paragraphs 2.28 to 2.37 of the SOR.

[3] Paragraph 52 of the Rejoinder.

8. On 10 June 2020, the Tribunal issued a minute to the parties in which it (i) confirmed that the submission made by TBNZ on 8 June 2020 would be considered; and (ii) advised TBNZ that, given NZX's acknowledgement that "*based on the legal analysis in the [SOR[4]], Client Assets held in the DBS Account may have been held on trust as a matter of Singaporean law*"[5], if it still believed an Oral Hearing was essential, then it must give the required notice to the Tribunal by 5.30pm 12 June 2020.

9. On 12 June 2020, TBNZ responded that "*Notwithstanding NZX's apparent acknowledgement that the DBS Account was, at all times, a trust account as a matter of law*"[6], there remained differences between the parties as to certain facts and that it considered oral submissions may assist the Tribunal. However, TBNZ advised that it was "*content to abide by the Tribunal's decision as to whether it would find an oral hearing of assistance in making its determination in this matter*"[7]. The notice requested by the Tribunal was not provided.

10. On 15 June 2020, the Tribunal advised the parties that as TBNZ had not provided the notice requested, the Tribunal would proceed to determine this matter by considering the documents provided in accordance with Tribunal Rule 6.5.1. The Tribunal noted that it would advise the parties if it required any further written submissions during its deliberation.

11. On 22 June 2020, the Tribunal issued a minute to the parties in which it noted that Rule 3.3.2 is an obligation imposed on the Managing Principal of TBNZ, rather than TBNZ itself. The Tribunal requested that both parties make submissions on whether TBNZ had breached Rule 3.3.2 or was otherwise said to be liable for the breach by its Managing Principal by 5.30pm 26 June 2020.

12. On 26 June 2020, the parties submitted a joint memorandum of counsel in which NZX requested that its allegation that TBNZ had breached Rule 3.3.2 be discontinued and stated that TBNZ had consented to this. The Tribunal records the discontinuation of NZX's allegation that TBNZ breached Rule 3.3.2.

Summary of factual background

13. TBNZ is a New Zealand registered Financial Service Provider whose online trading platform is primarily designed for investors to access international markets[8]. TBNZ is ultimately owned by UP Fintech Holding Limited (a company listed on the NASDAQ and registered in the Cayman Islands[9]).

14. TBNZ is an NZX Advising Firm, having been accredited by NZX on 18 January 2017 under its former name Top Capital Partners Limited[10]. As an NZX Advising Firm, TBNZ has been approved by NZX to provide investment advice and/or recommendations to its clients in respect of NZX Quoted Products. TBNZ must comply with the Rules[11].

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[4] Paragraphs 2.28 to 2.37 of the SOR.
[5] Paragraph 52 of the Rejoinder.
[6] The Tribunal notes that what NZX actually acknowledged was that "*Client Assets held in the DBS Account may have been held on trust as a matter of Singaporean law*".
[7] Paragraph 6 of Memorandum of Respondent in relation to Oral Hearing dated 12 June 2020.
[8] NZX noted in the SOC that TBNZ conducts minimal trading on the NZX Markets.
[9] Source: Companies Register, New Zealand Companies Office.
[10] TBNZ changed its name from Top Capital Partners Ltd to Tiger Brokers (NZ) Ltd on 1 June 2019. As a consequence earlier correspondence referenced in this determination refers to TBNZ as "Top Capital Partners Ltd", "TCPL' or "TCPA".
[11] Rule 2.1.

***The DBS Account*[12]**

February 2019

15. On 18 February 2019, TBNZ submitted a notification through the NZX Participant Portal that it had opened a Client Funds Account with DBS Bank (*DBS*)[13] (*the DBS Account*). TBNZ provided an acknowledgment letter from DBS dated 15 February 2019 (*15 February Acknowledgment*), which stated that:

> "*The Account* is designated as customer's/customers' accounts, and shall be distinguished and maintained separately from any other account in which Top Capital Partners Limited deposits its own moneys".*[14]

TBNZ advise that the form of this letter was based on acknowledgement letters from [redacted] and [redacted] that TBNZ had previously submitted to NZX and which NZX had not raised concerns with[15].

16. In an email dated 18 February 2019, NZX noted that the letter "*doesn't confirm that this is a Trust account. Has this been confirmed by DBS?*". In reply, TBNZ stated that while the letter did not use the word 'trust', it was a trust account in the New Zealand interpretation of that word. TBNZ also noted that "*We always run up against this because the Rules do not specify that the word 'trust' must appear in the letter of acknowledgment, the way that it does with 'client funds account' or 'client trust account'*". TBNZ added that if NZX specifically needed the word trust in the acknowledgment, TBNZ would need to see if DBS could make an exception[16].

17. NZX advised TBNZ in a subsequent email on 18 February 2019 that it was not satisfied that the 15 February Acknowledgement confirmed that the account was a trust account, just that it was distinguished from and maintained separately from TBNZ's own accounts. NZX queried why this confirmation from DBS would be an issue based on its understanding that a similar regulation applies in Singapore[17].

18. On 20 February 2019, TBNZ submitted a further acknowledgment letter from DBS dated 19 February 2019 (*19 February Acknowledgement*), which stated that:

> "*The Top Capital Partners Ltd maintains the following account…for its purpose of receiving and holding of client funds…We hereby give you a written acknowledgment that the Account is designated as customer's/customers' accounts, and shall be distinguished and maintained*

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[12] As the DBS Account was the only account found to have held Client Assets, NZX's allegations regarding a breach of Rules 18.5.1, 18.6.1(a) and 18.6.1(b) relate only to the DBS Account.
[13] DBS Bank is a multinational banking and financial services corporation headquartered in Singapore and whose holding company, DBS Group Holdings Limited, is listed on the Singapore Exchange.
[14] Annexure 3 of the SOC. TBNZ note in the SOR that the 15 February Acknowledgement was not formally assessed in the NZX Participant Portal as "rejected" by NZX until 9 September 2019 and that until that date it was listed as "pending NZX". NZX note in the Rejoinder that a notification received in the NZX Participant Portal is marked as "pending NZX' until it has been reviewed and it determines that no further information is required, at which point the status is updated to "acknowledged". NZX says that as at February 2019, there was no "reject" option and as such, the 15 February Acknowledgement was marked "pending NZX" until a manual "reject" option was developed by NZX in September 2019.
[15] Paragraph 2.7 of the SOR. NZX acknowledges in the Rejoinder that it had not previously objected to the "inadequate" wording in these letters but notes that this does not prevent it from deciding that the 15 February Acknowledgement was not compliant [paragraph 22].
[16] Annexure 5 of the SOC.
[17] Annexure 6 of the SOC.

separately from any other account in which Top Capital Partners Limited deposits its own moneys…"[18]

TBNZ noted that the letter had been modelled on its previously accepted acknowledgment letter from [redacted].

19. NZX replied that the 19 February Acknowledgement did not confirm the trust status of the account either and did not meet the requirements of Rule 18.6.1. NZX noted that it was also yet to receive confirmation of the trust status of the [redacted] account and the account name[19].

20. Numerous emails followed between the parties. In short, TBNZ submitted that the Rules do not require the word 'trust' to appear in the written acknowledgment and DBS's acknowledgement that the account was a designated customer account which is distinguished and maintained separately from TBNZ's capital account was sufficient. While NZX contended that DBS must acknowledge in writing that the account has trust status/is a trust account. NZX also queried the statement from DBS in an email sent to TBNZ[20] that "*Just to set things right, the account that TCPL opens with us is not a trust account*"[21].

21. On 22 February 2019, TBNZ provided further draft wording for NZX to consider, in particular stating "*We further confirm that the Bank has been informed by TCPL that the moneys in the Bank Account are held in trust by TCPL for the benefit of TCPL's clients*". This wording was not accepted by NZX despite similar wording appearing in acknowledgements from [redacted] and [redacted], which NZX had previously accepted[22].

22. NZX and TBNZ then discussed the matter by phone on 26 February 2019, during which conversation NZX appears to first raise the issue of whether DBS is a Bank as defined in the Rules. Following that discussion, TBNZ confirms in an email dated 26 February 2019 that it is satisfied that (i) the DBS Account is a trust account under the Financial Advisers Act 2008 (*FAA*) and the Rules, including on the basis that "*DBS have acknowledged that, a. the funds in this account are held on trust for TCPL clients, b. DBS is not entitled to combine the bank account with any other accounts, and c. DBS is not entitled to exercise any right or set off or counterclaim against the money in the account.*"; and (ii) DBS is a bank in satisfaction of the FAA and the Rules[23].

23. In reply, NZX noted that DBS had not acknowledged that the funds are held on trust for TBNZ clients, instead confirming that TBNZ "*has informed them*" that the funds are held in trust by TBNZ for the benefit of TBNZ's clients and that in order for DBS to meet the definition of "Bank" under the Rules it would need to be designated as a Bank by NZX[24].

24. In response, TBNZ reiterated its position that Rule 18.6.1(a)(i) does not require that the 'bank acknowledge that funds are held on trust for clients', that it was confident that the DBS Account had trust status as required under the FAA and the Rules and that it had obtained written acknowledgment of the trust status of

[18] Annexure 7 of the SOC.
[19] Annexure 8 of the SOC.
[20] Email of 20 February 2019 from DBS to TBNZ included in Annexure 19 of the SOC.
[21] TBNZ asked DBS to explain what it meant by "trust account" in its email of 20 February 2019. DBS's response is discussed below.
[22] NZX states in the SOC that neither acknowledgement contained the required wording, which should have been noted by NZX at the time they were submitted, and that they have now been replaced with appropriately worded letters.
[23] Annexure 33 of the SOC.
[24] Annexure 34 of the SOC.

the account in compliance with Rule 18.6.1(a)(i). TBNZ noted NZX's point regarding the need for DBS to be designated as a Bank for the purposes of the Rules and invited NZX to do so[25].

25. NZX stated by email on 28 February 2019 that "*…we are saying that TCPA needs to obtain from the Bank with which it holds the Client Funds Account an acknowledgement of the trust status of the account, including the naming of the account, and provide a copy of this to us. You say in your response that: "DBS have acknowledged that, the funds in this account are held on trust for TCPL clients" We do not agree that the wording in the letter you have provided says this. Instead, it refers to having been told by TCPA that TCPA holds the money in trust for its clients"*[26]. NZX requested that DBS provide amended wording and once this issue was resolved NZX would consider TBNZ's request to designate DBS as a Bank for the purposes of the Rules.

26. This is where correspondence on the matter appears to end, for now, with NZX and TBNZ in disagreement about whether the acknowledgement provided by DBS complied with Rule 18.6.1(a)(i) and with TBNZ aware that NZX, at that point, had not designated DBS as a Bank for the purposes of the Rules.

June 2019

27. On 11 June 2019, NZX Participant Compliance conducted TBNZ's annual on-site inspection. NZX says that as part of its 2019 inspection process, which it applied to all Participants including TBNZ, NZX sought to verify that all of TBNZ's Client Funds Accounts were correctly named and that all required Bank confirmations met the requirements of the Rules.

28. On 12 June 2019, TBNZ provided copies of its "CFA letters" including a signed letter dated 22 February 2019 from DBS (*22 February Acknowledgment*), with TBNZ commenting "*this one looks good to me*" and noting it was 'pending NZX' in the NZX Participant Portal[27]. The 22 February Acknowledgment stated that:

> "*We confirm that bank account number…("the Bank Account") has been opened by DBS Bank Ltd., Singapore ("the Bank") in the name of Top Capital Partners Limited ("TCPL"). We further confirm that the Bank has been informed by TCPL that the moneys in the Bank Account are held in trust by TCPL for the benefit of TCPL's clients.*
>
> *In this regard, we acknowledge that the Bank Account is designated as a "Client Funds Account". Accordingly:*
>
> - *the Bank is not entitled to combine the Bank Account with any other account(s), or to exercise any right of set-off or counterclaim against the money in the Bank Account in respect of any sum owed to it on any other account of Top Capital Partners Limited, or that of any other person; and*
>
> - *the title of the Bank Account sufficiently distinguishes the Bank Account from any other account that belongs to Top Capital Partners Limited.*
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> *Save as set out in the preceding paragraphs, the operation of the Account shall be in accordance with the Terms and Conditions Governing Accounts (Applicable for Business/Non-Individuals)."*[28]

[25] Annexure 35 of the SOC.
[26] Annexure 36 of the SOC.
[27] Annexure 37 of the SOC.
[28] Annexure 38 of the SOC.

29. On 21 June 2019, TBNZ provided copies of its balance sheet and bank statements for two sampled days of 19 and 20 March 2019. NZX observed that some of the accounts were not correctly named and that TBNZ appeared to be including funds held in accounts at DBS as Client Assets.

July 2019

30. Following a discussion between the parties on 4 July 2019, NZX emailed TBNZ on 5 July 2019 advising that during its review it came to NZX's attention that "*balances held in a bank account that does not meet the requirements of the Rules to be categorised as a Client Funds Account (CFA) were being included in the calculation of Client Assets for the purposes of Client Funds reconciliations – specifically the account held with DBS".* NZX noted that TBNZ may only hold Client Assets in a Client Funds Account and that it did not consider that the DBS Account (and accounts at two other banks) was a Client Funds Account as *"the letter from the bank does not meet requirements and/or the institution is not a recognised Bank as defined by the Rules".* NZX noted its intention to record this as a breach in its 2019 inspection report unless TBNZ could provide evidence that showed the accounts were not being included in the calculation of Total Client Assets. NZX also noted that "*it is our expectation that TCPA cease the use of any of the accounts that do not meet the CFA requirements of the Rules immediately"* [emphasis added][29].

31. TBNZ responded by email on 5 July 2019 asking for greater specification from NZX as to why it says that the bank letters and the banks in question (including DBS) do not meet its requirements and that it considered that TBNZ is in compliance[30].

32. In its reply of 5 July 2019, NZX noted its concerns that:

    a. DBS did not meet the definition of Bank in the Rules and that NZX had not designated DBS as a Bank under the Rules. NZX noted that it has only approved a bank once in the previous five years "*so we are establishing the process to be undertaken to enable you to apply for this*"; and

    b. as discussed in February 2019, NZX required *"the Bank to confirm the trust status of the account and the use of "…the Bank has been informed by [TCPA] that the moneys held in the Bank Account are held in trust by [TCPA] for the benefit of [TCPL]'s clients…" does not meet this requirement"*[31].

33. TBNZ responded by email on 9 July 2019 (i) asking NZX to move with immediate effect to designate DBS as a Bank under the Rules; and (ii) stating that its position remained that the DBS letter met the Rule requirements. TBNZ noted that "*I am afraid that we disagree with your interpretation of the Rules and the requirements of the acknowledgement letter regarding the trust status of client funds accounts*"[32].

34. In its reply of 9 July 2019, NZX stated that in order to recognise a bank, it required a comparison of the regulatory environment and obligations that the bank is subject to against those which apply to banks in New Zealand, particularly with respect to client assets. NZX noted that it was still working on providing greater detail on the specific areas this comparison should cover, which it would provide to TBNZ in due course[33]. In regard to the DBS letter, NZX

[29] Annexure 42 to the SOC.
[30] Annexure 43 to the SOC.
[31] Annexure 44 to the SOC.
[32] Annexure 45 of the SOC.
[33] This information was provided to TBNZ on 18 July 2019.

stated that it was "*aware that you do not agree with our requirements in respect of the letter from the bank. However, we have clearly and categorically informed TCPA that the letter does not meet the requirements and that the institution does not meet the criteria of a Bank. On this basis the account is not a Client Funds Account (CFA) for the purposes of the Rules…To be absolutely clear NZXR expects TCPA to cease treating the accounts that we have noted as not meeting the definition of a CFA in the Rules as CFAs with immediate effect*" [emphasis added][34].

35. On 15 July 2019, TBNZ provided NZX with further information on DBS, including a table comparing "*DBS in Singapore with RBNZ banking requirements*"[35] and noted that it hoped NZX's requirements to designate DBS as a bank would not be overly onerous. TBNZ also noted that it had received legal advice from two separate New Zealand law firms who agreed with TBNZ's interpretation of the Rules. TBNZ noted that "*there is a trust relationship between [TBNZ] and its clients, established by virtue of NZ legal requirements, the [Rules], our client agreement and company declarations…NZX is reading in a requirement that the banks must state that the banks are holding client funds on trust. This requirement is not stated or implied in the Rules and is not a requirement of the Rules…Our interpretation of the Rules, which is supported by the legal advice which we have received, is that by the banks acknowledging that [TBNZ] is holding client funds on trust for its clients, the requirements of the Rules are met"*[36].

36. On 17 July 2019, NZX responded noting that it would review the matters TBNZ had raised and asked TBNZ to "*confirm that TCPA has ceased treating the accounts that NZXR has noted as not meeting the definition of a CFA in the Rules as CFAs (as per my email of 9 July)?*" [emphasis added][37].

37. Following a discussion between NZX and TBNZ[38], TBNZ advised NZX by email of 17 July 2019 that "*I'm afraid that I cannot provide [NZX] with the confirmation you request*", that it continued having discussions with its lawyers regarding this issue and that its response was consistent with the legal advice it had received.

38. Following receipt of this email, the Head of Market Supervision (*HoMS*) spoke with TBNZ's Managing Principal on 18 July 2019. During the call the HoMS records in a file note[39] that he advised TBNZ that it needed to (i) comply with the directions provided by NZX; (ii) provide NZX with the information it had requested that morning on the equivalence of Singapore's banking regime so that NZX could recoginse DBS as a bank under the Rules; and (iii) ensure that the account types used by TBNZ to hold client monies are "trust accounts" of the type required under the Rules. The HoMS file note records, among other things, that:

    a. TBNZ's Managing Principal queried whether TBNZ had been given a direction. HoMS confirmed they had;

    b. the HoMS tells TBNZ's Managing Principal that the Rules and the FAA require client monies to be held in "trust accounts", *"ie formal trust accounts maintained by the relevant qualifying bank"* and that NZX are not requiring banks to state that the banks held client funds on trust, but that

[34] Annexure 46 of the SOC.
[35] This table was not included in the annexures attached to the SOC.
[36] Annexure 47 of the SOC.
[37] Annexure 48 of the SOC.
[38] A file note of which is included as Annexure 49 of the SOC.
[39] Annexure 51 of the SOC.

the accounts are trust accounts. The HoMS noted that various examples of wording had been provided to TBNZ[40];

c. TBNZ's Managing Principal stated that "*we completely agree that these are not client funds accounts*"[41]; and

d. TBNZ agreed to prepare an action plan to provide the information regarding the banking regimes, to implement the direction and cease to use the DBS Account, and to engage with DBS to ensure the accounts were properly trust accounts and provide NZX with confirmation.

39. Further correspondence between the parties follows as documented in the SOC and TBNZ's action plan was provided to NZX on 31 July 2019.

August 2019

40. On 1 August 2019, NZX advised TBNZ by email that it still appeared to be holding client money in accounts that did not meet the criteria for Client Funds Accounts. TBNZ responded with confirmation that it had (i) excluded client money held in the DBS Account from its Client Assets calculation – as evidenced by its calculation for 31 July 2019 which showed Total Client Assets exceeding Outstanding Obligations; and (ii) transferred funds from the DBS Account to "appropriate" Client Funds Accounts[42].

41. On 1 August 2019, TBNZ provided a written acknowledgment from DBS dated 31 July 2019 (*the July Acknowledgement*) which stated that:

> *"Pursuant to NZX Participant Rule 18.6.1, we acknowledge that the bank account set out below is designated as "Client Funds Accounts" or "Client Trust Accounts":-*
>
> *a) The Accounts are trust accounts, and all monies deposited with us in the Account(s)* are held on trust for the benefit of customers of Tiger Brokers (NZ) Limited and the bank is not entitled to combine the Account with any other account(s), or to exercise any right of set-off or counterclaim against the money in the Account in respect of any sum owed to it on any other account(s) of Tiger Brokers (NZ) Limited, or that of any other person; and*
>
> *b) The title of the Account sufficiently distinguishes the Account from any other account that belongs to Tiger Brokers (NZ) Limited."*[43]

42. NZX confirmed by email on 6 August 2019 that it was satisfied with the July Acknowledgement but noted that DBS was not yet recognised as a Bank under the Rules. TBNZ confirmed by reply that this was "understood"[44].

DBS designated as a Bank

43. NZX advises that following various communications between it and TBNZ, NZX designated DBS as a Bank for the purposes of the Rules on 4 October 2019. NZX notes that this recognition could not be applied retrospectively.

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[40] This appears to contradict NZX's submission in the Rejoinder that the form of wording set out in Appendix 3 of the Guidance Note must be used.
[41] TBNZ note in the SOR that this was not a concession that the DBS Account was not a trust account but intended as a reference to DBS not yet having been "formally" designated as a Bank for the purposes of the Rules - Paragraph 2.20 of the SOR.
[42] Annexure 61 of the SOC.
[43] Annexure 62 of the SOC. The form of the acknowledgement is substantially the same as the wording set out in Appendix 3 of the Guidance Note.
[44] Annexure 63 of the SOC.

Financial Markets Authority

44. NZX advises in the SOC that in addition to its correspondence on this matter with TBNZ, it also had "significant correspondence" with the Financial Markets Authority (*FMA*) to confirm whether its expectations and views on the trust status of a Client Funds Account were similar to NZX's, given the equivalent requirement for client monies to be held in trust accounts under the FAA.

45. Under section 77P of the FAA, a broker must (i) hold client money on trust for the client; (ii) ensure that client money is paid promptly into a bank in New Zealand (or into any other prescribed entity) to a trust account of the broker; and (iii) ensure that client money is held separate from money held by or for the broker on its own account.

46. NZX advises that the FMA confirmed that under section 77P of the FAA, brokers must pay client money into a separate trust account and hold client property on trust[45] and that NZX should continue its investigation of TBNZ under the Rules, rather than referring the matter to the FMA. NZX says that it has provided the FMA with various updates on its investigation of TBNZ.

47. The Tribunal notes that NZX has not disclosed to TBNZ or the Tribunal any other details of its correspondence with the FMA on this matter.

Shortfalls as a result of holding Client Assets in DBS Account

48. On 5 August 2019, NZX requested that TBNZ provide all of its Capital Adequacy and Client Funds Calculations for every business day between 18 February 2019 and 30 July 2019. TBNZ provided the requested files on 5 August 2019[46].

49. NZX determined that from 22 February 2019 to 30 July 2019 (the dates on which TBNZ held Client Assets in the DBS Accounts) there were 28 days during which Outstanding Obligations exceeded Total Client Assets held and that the shortfall on these days varied between $197,580.67 and $11,122,464.65[47]. NZX noted that this amount takes into account and includes any Buffer TBNZ was holding in the DBS Account. TBNZ accepts in the SOR that excluding client monies in the DBS Account in TBNZ's calculations of Total Client Assets for the relevant period produces the shortfalls referred to by NZX.

Naming of Client Funds Accounts

50. On 5 July 2019, NZX advised TBNZ by email that a number of TBNZ's Client Funds Accounts were incorrectly named and that some appeared to have had their names changed since previous reviews. NZX stated its expectation that this be corrected immediately[48].

51. NZX states in the SOC that TBNZ responded on 9 July 2019 advising that it was in the process of obtaining confirmation of the account names from [redacted]. In response, NZX noted that it was seeking evidence for all of TBNZ's Client Funds Accounts.

52. On 15 July 2019, TBNZ confirmed that the names of its Client Funds Accounts were all "acceptable", aside from those held at [redacted], which it was awaiting

[45] Paragraph 95 of the SOC. TBNZ notes "*that is of course correct, and TBNZ complied with that requirement*" (paragraph 2.52 of the SOR).
[46] This information was not annexed to the SOC given its length, although NZX's analysis was provided as Annexure 64 to the SOC.
[47] Paragraph 98 of the SOC.
[48] Annexure 42 of the SOC.

updated information on[49]. NZX says that, following its direct engagement with [redacted], it received an updated letter from [redacted], which confirmed TBNZ's Client Funds Accounts were appropriately named[50].

53. On 27 November 2019, NZX requested a copy of TBNZ's most recent completed Bank to Ledger reconciliation for Client Assets, including bank statements[51]. Following receipt of this information, NZX noted in an email to TBNZ of 28 November 2019 that, while it did not have any questions with regards to the accounts held at DBS and [redacted], it was not evident from the information provided that the accounts held at [redacted], [redacted], [redacted] and [redacted] (despite the confirmation from [redacted] noted above) were correctly named[52].

54. TBNZ provided confirmation in respect of its accounts with [redacted] on 28 November 2019 and advised that it was working with the other banks[53]. NZX advises in the SOC that TBNZ subsequently confirmed that all accounts were now properly named with (i) [redacted] on 16 December 2019; (ii) [redacted] on 31 December 2019; and (iii) [redacted] on 11 February 2020.

55. TBNZ notes in the SOR that it is not clear which bank accounts NZX says breached the naming requirements for Client Funds Accounts. TBNZ accepts that the Client Funds Accounts it held at [redacted], [redacted] and [redacted] were not named in accordance with Rule 18.6.1(a)(i).

Relevant Rules

56. Rule 3.9 states that:

> *"Each Market Participant must ensure compliance with all applicable Rules, any directions given from time to time by NZX and at all times observe Good Broking Practice."*

57. Rule 8.1.1(c) states that each Market Participant must at all times:

> *"…comply fully with all applicable Rules, any directions given from time to time by NZX and at all times observe Good Broking Practice;"*

58. Rule 18.4.1 requires Total Client Assets held in a Client Funds Account by a Market Participant Accepting Client Assets taken together with any Buffer must, at all times, equal or exceed that Market Participant's total Outstanding Obligations.

59. Rule 18.4.2 requires Total Client Assets held in a Client Funds Account by a Market Participant Accepting Client Assets taken together but excluding any Buffer must, at the end of each Business Day, equal that Market Participant's total Outstanding Obligations.

60. Rule 18.5.1 (Client Assets held on trust) provides that:

> *"Each Market Participant Accepting Client Assets must hold Client Assets on trust for its clients at all times."*

61. Rules 18.6.1(a) and (b) (Requirements for Client Funds Accounts) provide that:

> *"Each Market Participant Accepting Client Assets must:*

[49] Annexure 47 of the SOC.
[50] Annexure 66 of the SOC.
[51] Annexure 67 of the SOC.
[52] Annexure 68 of the SOC.
[53] Annexure 69 and 70 of the SOC.

(a) in respect of any Client Funds Account which is not a Depository Account:

(i) obtain from the Bank holding the Client Funds Account a written acknowledgement of the trust status of the account, and must ensure that the words "Client Funds Account", "Client Trust Account" or such other similar words as are required by legislation appear in the account name of that Client Funds Account; and

(ii) supply to NZX current copies of the written acknowledgement of the trust status of the Client Funds Account;

(b) not deposit Client Funds into an account that is not a designated Client Funds Account;"

62. In the Rules:

    a. Bank means "*(except for the purposes of Section 19), a registered bank in terms of the Reserve Bank of New Zealand Act 1989, a bank having recognition comparable to that of a registered bank under the Reserve Bank of New Zealand Act 1989 under the laws of Australia, the United States of America, Japan, Europe or the United Kingdom, or any other financial institution designated as a Bank by NZX for the purpose of these Rules"*; and

    b. Client Funds Account means "*a trust account held by a Market Participant Accepting Client Assets solely for the benefit of its clients at a Bank approved by NZX".*

63. Page 13 of the NZX Participant Guidance Note: Client Assets (December 2017) (*Guidance Note*) states that:

    "…each Market Participant must obtain from the bank holding the Client Funds Account a written confirmation acknowledging the trust status of the bank account and ensure that the words "Client Funds Account' (or similar words as required by legislation) appear in the bank account name. In addition, the written acknowledgement must be provided to NZX Compliance (Rule 18.6.1(a)(ii)). Refer to Appendix 3 for standard wording of the acknowledgement. Market Participants must obtain the written acknowledgement from its bank before using the account as a Client Funds Account." [emphasis added]

Accepted breaches

64. In the SOR, TBNZ:

    a. acknowledges that until NZX designated DBS as a Bank for the purposes of the Rules on 4 October 2019, it did not comply with the requirement to hold Client Funds in a "Bank" under the Rules[54];

    b. accepts that it breached Rules 3.9 and 8.1.1 by not following NZX's direction[55];

[54] Paragraph 3.10 of the SOR.

[55] Paragraph 3.17 of the SOR. TBNZ submits that this should be treated as a single alleged breach of a "clear" direction given on 9 July 2019, not multiple breaches as alleged by NZX.

c. accepts that it breached Rules 18.4.1 and 18.4.2 in respect of the shortfalls in TBNZ's Total Client Assets referred to in the SOC[56]; and

d. accepts a breach of Rule 18.6.1(a)(i) in respect of the naming of Client Funds Accounts held with [redacted], [redacted] and [redacted] [57].

Disputed breaches

65. NZX alleges that TBNZ breached Rules 18.5.1, 18.6.1(a) and 18.6.1(b) as a result of depositing Client Funds in the DBS Account before obtaining from DBS an adequate written acknowledgement of the trust status of the account.

66. TBNZ denies that it breached the Rules in relation to whether the DBS Account had "trust status" because, in summary, on a correct application of the common law in relation to trust accounts and the requirements of the Rules, at all times the DBS Account had "trust status" and that the February Acknowledgements confirmed that status for the purposes of the Rules. TBNZ's position is that there was no breach of Rules 18.5.1, 18.6.1(a)(i) or 18.6.1(a)(ii)[58]. TBNZ does not clearly state whether it considers there was a breach of Rule 18.6.1(b).

Submissions from NZX – disputed breaches

67. In the SOC, NZX submits that:

(1) the written acknowledgements provided by DBS were not sufficient;

68. NZX says that the February Acknowledgements did not confirm that the DBS Account was a trust account and did not meet the requirements of Rule 18.6.1 because they simply outlined that the account would be distinguished and maintained separately from any other TBNZ account.

69. NZX submits that Rule 18.6.1 explicitly requires the written acknowledgement of the trust status of the account. While a trust account will be distinguished and separately maintained, the simple fact that an account has those features, does not of itself determine trust status.

70. NZX considers that an account with trust status has "distinct features"[59] which protect investors in the event of a Market Participant's liquidation or insolvency. For this reason, the Rules explicitly require this acknowledgement. NZX considers that unless the written acknowledgement from a Bank confirms this trust status, the account will not be compliant with the Rules. NZX does not consider that any alternative wording suffices for the purposes of the Rules.

(2) confirmation of trust status was required by DBS and not TBNZ;

71. NZX says that TBNZ noted on a number of occasions through its correspondence that it was TBNZ who maintained the trust relationship with its clients and that TBNZ considered the funds in the DBS Account were held on trust for its clients. TBNZ considered that this arrangement was compliant with Rule 18.6.1. NZX

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[56] Paragraph 3.22 of the SOR.

[57] Paragraph 3.25 of the SOR.

[58] Paragraph 2.59 of the SOR.

[59] During the proceedings, TBNZ wrote to NZX asking what these "distinct features" were given that NZX appeared to rely on other unspecified features in its assessment that the DBS Account did not have "trust status". TBNZ submitted that these additional "distinct features" of a trust account were a material fact and should be disclosed. In response, NZX said it disagreed that it needed to expand on what these features were.

does not consider that this meets the requirements of the Rule. NZX submits that in these circumstances, TBNZ was the party acknowledging that the Client Funds were held on trust. NZX says that it is the Bank that must provide the acknowledgement, and that acknowledgement must relate to the status of the account, and not the consideration of how the Market Participant holds the funds. NZX also notes the email of 20 February 2019 from DBS in which it states that "*...the account that TCPL opens with us is not a trust account".*[60]

(3) TBNZ knew the DBS Account was not a trust account;

72. NZX notes that before TBNZ deposited Client Funds into the DBS Account it had received both the email referred to above from DBS and NZX's instruction that the written acknowledgment did not comply with the Rules. NZX submits that as a result, TBNZ knew that the DBS Account was not a trust account and that depositing funds into the account would breach the Rules. NZX refers to an email from TBNZ on 21 February 2019 which states that *"I understand that presently we do not have a letter from DBS acknowledging the trust status of the account, that is acceptable to NZX"*. Despite this, TBNZ did deposit funds into the DBS Account, which NZX considers is both a clear breach of the Rules and an aggravating factor in the breach. NZX also notes the statement from TBNZ's Managing Principal on 18 July 2019 that *"we completely agree that these are not client funds accounts"*[61]. Despite this, TBNZ was holding and continued to hold Client Funds in the DBS Account. NZX submits that these statements indicate that there was a conscious and intentional breach of the Rules by TBNZ.

(4) TBNZ knew NZX had not designated DBS as a Bank under the Rules;

73. NZX submits that under Rule 18.6.1(a), a written acknowledgement must be provided by a Bank as defined in the Rules. As DBS is located in Singapore it does not automatically meet the definition of a Bank in the Rules and needed to be designated by NZX. Until DBS received this designation, NZX notes that TBNZ could not consider any account held by DBS as a Client Funds Account. NZX highlighted this requirement to TBNZ on 26 February 2019 and its consequences on 27 February 2019. NZX submits that from this time, TBNZ was aware of this requirement and the consequence that any account TBNZ had with DBS would not be a valid Client Funds Account.

Submissions from TBNZ – disputed breaches

74. In the SOR, TBNZ submits that:

    a. the DBS Account is and always was a trust account as a matter of law; and

    b. what DBS described or was prepared to describe in the February Acknowledgements confirmed the "trust status" of the DBS Account for the purposes of Rule 18.6.1(a). This included DBS's express indication on 20 February 2019 that it was prepared to acknowledge that *"All moneys deposited in the [DBS] Account are held in trust by [TBNZ] for its customers and DBS cannot exercise any right of set off against the moneys for any debt owed by TBNZ to DBS"*[62].

(1) Trust status as a matter of law;

75. TBNZ submits that the combination of Rules 18.3.1, 18.5.1 and 18.6.1 require (i) the Market Participant (and not the Bank) to hold Client Assets on trust for its

[60] TBNZ addresses this correspondence in the SOR, as summarised below.
[61] TBNZ addresses this comment in the SOR, as summarised below.
[62] Annexure 20 of the SOC.

clients; and (ii) the Bank to provide the written acknowledgement of this trust status.

76. TBNZ submits that as neither the Rules or the Guidance Note define "trust status", it must be understood in the context of the position at law generally. TBNZ says that a "*trust account is a bank account into which a bank customer that is acting as trustee or fiduciary deposits beneficiary moneys, and that is designated in a manner that indicates the fiduciary nature of the account*"[63]. TBNZ notes that a trust account does not change the creditor/debtor relationship between the bank and its customer - the bank is not the trustee, its customer is.

77. TBNZ submits that as a matter of law, an account need not be specifically designated a "trust account" to be one - what matters is that the bank has notice of the circumstances giving rise to the trust. When it is not clear on the face of it that an account is a trust account, the person claiming trust status must prove that the moneys held in the account are, to the bank's knowledge, trust funds. This is a substance over form test.

78. TBNZ notes that the principal consequence of trust status is that money in the account is not available to the bank or third parties to meet the customer's debts, including in an insolvency. The significance of this status in this context is that it protects Client Funds because the bank has notice of the circumstances giving rise to the trust, and therefore cannot itself exercise (for example) a right of set-off in relation to the Client Funds[64].

79. As the DBS Account is a Singaporean bank account, TBNZ obtained an opinion from Audent Chambers LLC[65] who were instructed to advise on two questions:

    a. would a bank account with the characteristics described by DBS in the February Acknowledgements be considered to have the "status" of a trust account as a matter of Singapore law generally? And if so, offer comment on why DBS may have felt unable to describe the account as a "trust account?"[66]; and

    b. whether an account for client moneys has to be specifically described as a "trust account" to comply with Regulation 17 of Singapore's Securities and Futures (Licensing and Conduct of Business) Regulations, assuming they applied to TBNZ[67].

80. Subject to assuming that the DBS Account has the characteristics identified in Annexures 3, 7, 27 and 30 to the SOC[68], Audent Chambers says that the DBS Account would constitute a "trust account" under Singapore law because the characteristics of the DBS Account are such that, under Singapore law, TBNZ holds the funds in the DBS Account on trust for its clients and TBNZ has no beneficial interest in those funds. Audent Chambers considers that if a dispute did arise regarding the ownership of and entitlement to the funds in the DBS

[63] Paragraph 2.29 of the SOR.
[64] While DBS did not automatically qualify as a Bank as defined in the Rules (the list of countries with comparable banking systems does not include Singapore), TBNZ notes in the SOR that DBS holds a licence from the Monetary Authority of Singapore and that the Client Assets held in the DBS Account were at all times held in a jurisdiction with a comparable regulatory regime.
[65] A disputes practice based in Singapore. The opinion is co-authored by Harpreet Singh Nehal SC, who also sits on the Disciplinary Committee for SGX.
[66] The Tribunal notes that in offering their opinion on this matter, the authors state that they cannot be certain given that they had not spoken to the DBS representative who sent the email.
[67] The Tribunal is not certain of the relevance of the opinion on that question to its decision given the Singapore Regulations do not apply to TBNZ in respect of this matter.
[68] The Tribunal notes that annexures 27 and 30 of the SOC are emails from TBNZ, not DBS. The Tribunal considers that it would have been preferable for the opinion to have been based on the characteristics of the DBS Account as confirmed by the authors or by DBS itself.

Account, a Singapore Court would take the view that as a matter of substance, the DBS Account is in fact a "trust account" notwithstanding the fact that the DBS Account is not formally designated as a "trust account". As to why DBS stated in its email of 20 February 2019 that the DBS Account "*is not a trust account*", Audent Chambers surmise (without having spoken to the author of the DBS email) that DBS was simply trying to convey that DBS itself is not a trustee of the funds in the DBS Account.

(2) Rule requirements met;

81. TBNZ submits that the Rules applying to Client Funds Accounts do not create conditions for "trust status" that depart from or go further than the general legal requirements. TBNZ notes that in its SOC, NZX refers to "distinct features" of a trust account beyond the account being distinguished and maintained separately from accounts holding TBNZ monies, but does not say what those features are despite TBNZ's request to do so. TBNZ submits that if the intention were that the Rules prescribe an account type with "distinct features" not required by the common law, the Rules would have made express provision to that effect.

82. TBNZ notes that Rule 18.5.1 requires the Market Participant to hold Client Assets on trust, not the bank. Significantly, the Rule does not specify how Client Assets are to be held, except that they are to be held on trust. TBNZ complied with this Rule in relation to the DBS Account if the Client Assets deposited in it were held on trust, which they were.

83. The subject of the acknowledgement in both Rules 18.6.1(a)(i) and (ii) is the "trust status" of the account. TBNZ submits that the use of "status" reflects the substance over form approach of the common law. In the absence of a definition in the Rules of "trust", "trust account" or "trust status", the "trust status" must be determined by whether, at law, the account is a trust account. Accordingly, TBNZ says that an acknowledgement that describes the characteristics of a trust account confirms the "trust status" of that account.

84. TBNZ also submits that the Rules do not prescribe a form of acknowledgement. What is required is an acknowledgement from the Bank sufficient to confirm that it is on notice as to the trust nature of the funds held in the account. It is that notice that constrains the Bank's use or disbursement to third parties of the funds deposited in the account. TBNZ says it clearly obtained such an acknowledgement from DBS in February 2019.

(3) FAA requirements met;

85. TBNZ agrees that the "trust account" requirements of the Rules and the FAA are consistent. But notes that neither section 77P nor the FAA generally prescribes any different meaning of "trust account" than what the common law provides.

(4) DBS's understanding of trust status;

86. In its correspondence with TBNZ, NZX expressed its concern about DBS's unwillingness to specifically call the DBS Account a "trust account" and refers to DBS's email on 20 February 2019 in which it said the DBS Account was "*not a trust account*".

87. TBNZ sought responses from DBS to address questions on this matter[69]:

    a. on why DBS said the DBS Account was "*not a trust account*", DBS responded saying "*The accounts that [TBNZ] have with DBS SG is not a trust account i.e DBS is not holding the monies in trust or as a trustee. It*

[69] Annexure C of the SOR.

is an account that [TBNZ] opens to hold the funds that belongs to their clients, separate from their own monies. [TBNZ] is the one holding in trust for their end clients";

b. on whether the nature or status of the DBS Account had changed in any way between February 2019 and 31 July 2019, DBS responded that "*there is no change in the understanding, i.e, [TBNZ] is the one holding in trust for their end clients*"; and

c. on why DBS could confirm in the July Acknowledgment that the DBS Account was a trust account, DBS responded that "*[TBNZ] has shared that the wording is required by NZX for the acknowledgment letter and [TBNZ] has confirmed to us that they are the one who is required to hold the monies in trust on behalf of their end clients and not DBS*".

Subsequent submissions from NZX

88. In its Rejoinder, NZX maintains that TBNZ breached both Rules 18.5.1 and 18.6.1(a), but now on the basis that:

a. the DBS Account was not a Client Funds Account for the purposes of the Rules and as a result TBNZ was in breach of Rule 18.5.1 as Client Assets were not held on trust for its clients in a manner consistent with the Rules;

b. TBNZ was obliged to provide an acknowledgement in the form prescribed in Appendix 3 to the Guidance Note, and by NZX as a matter of Good Broking Practice, and by not doing so was in breach of Rule 18.6.1(a) from 18 February 2019 to 31 July 2019; and

c. the fact that TBNZ was later able to provide an acknowledgment in the form prescribed in the Guidance Note highlights that TBNZ could and should have provided that acknowledgment in February 2019.

89. NZX submits that it is fundamental that Market Participants comply with the specific requirements of the Rules for the protection of Client Assets. NZX argues that TBNZ's "substance over form" approach to interpreting the Rules is inappropriate, as certainty regarding what the Rules require is essential to ensuring that (i) investors have confidence that Client Assets are being appropriately protected; and (ii) NZX can effectively monitor compliance.

90. NZX states that it does not dispute that it is the Market Participant, and not the Bank, who is the trustee required to hold the Client Assets on trust for its clients. NZX however contends that it did not accept the February Acknowledgements because they stated that TBNZ "had informed" DBS, rather than DBS itself acknowledging, that the funds were held on trust by TBNZ. NZX does acknowledge, however, that based on the legal analysis in the SOR, Client Assets held in the DBS Account "*may have been held on trust as a matter of Singaporean law*"[70].

Subsequent submissions from TBNZ

91. In its reply to the Rejoinder, TBNZ submits that in the absence of any elaboration in the Rules or the Guidance Note of what is meant by "trust status", the test must by definition be one of substance. This approach is supported by the definition of Good Broking Practice which requires "*conduct…which complies with the spirit and intent of the practices, procedures and requirements as set by NZX*".

[70] Paragraph 52 of the Rejoinder.

92. TBNZ notes that Appendix 3 of the Guidance Note provides "standard wording of the acknowledgement" and is not "mandatory" as NZX submits in its Rejoinder. The only place the wording is referred to as "prescribed" is in the heading to Appendix 3 itself, which, other than setting out the wording itself, does not suggest or confirm that the wording must be used. TBNZ submits that Appendix 3 represents a "safe harbour" for acknowledgements and that other forms of wording can be used to ensure compliance with the Rules. TBNZ also notes that, in any event, NZX's own approach in engaging with TBNZ reflects that departure from the wording in Appendix 3 is acceptable so long as Rule 18.6.1(a) is substantially complied with.

93. TBNZ notes that the Rejoinder also suggests, for the first time, that NZX's staff can, at their discretion, prescribe alternative forms of wording that must be complied with. TBNZ says that suggestion is entirely inconsistent with NZX's submission that certainty requires formal compliance with prescribed wording and its appeal to administrative efficiency. The true position is that any wording that complies with the requirement of Rule 18.6.1(a) to acknowledge the trust status of the account, including but not limited to the wording in Appendix 3 or suggestions made by NZX's staff, complies with that Rule.

Tribunal findings as to breach

94. The Tribunal must consider whether:

    a. Client Assets held in the DBS Account were being held on trust for TBNZ's clients at all times in compliance with Rule 18.5.1; and

    b. TBNZ breached Rule 18.6.1(a) and/or Rule 18.6.1(b).

Application of Rule 18.5.1 – were client funds held on trust?

95. NZX initially submitted that TBNZ was "*aware that the DBS Accounts were not trust accounts*". However, in its Rejoinder, NZX acknowledges that Client Assets held in the DBS Account "*may have been held on trust as a matter of Singaporean law*", but says that TBNZ was still in breach of Rule 18.5.1 because Client Funds were not being held "*in the manner contemplated by the Rules*" i.e. in a Client Funds Account.

96. TBNZ submits that at all times the DBS Account was a trust account at law and that Client Assets deposited in it were held on trust. Accordingly, TBNZ's position is that there was no breach of Rule 18.5.1. TBNZ says that Rule 18.5.1 does not specify how Client Assets are to be held, except that they are to be held on trust.

97. The Tribunal notes that NZX does not specify in its submissions what characteristics an account must have to be considered a trust account under the Rules or what characteristics the DBS Account lacked which meant that it was not a trust account under the Rules. Nor does NZX specifically respond to the submissions made in the opinion from Audent Chambers LLC. In the absence of submissions on these points from NZX and in light of NZX's acknowledgement noted above, the Tribunal is not satisfied that NZX has demonstrated that Client Assets held in the DBS Account were not being held on trust.

98. In any event, the nature of the DBS Account was confirmed by DBS in the July Acknowledgement, which states that from its perspective "*The Accounts are trust accounts, and all monies deposited with us in the Account(s)* are held on trust for the benefit of customers of Tiger Brokers (NZ) Limited…*"[71]. DBS has

[71] Annexure 62 of the SOC.

confirmed, at TBNZ's request, that there was no change from its perspective in the nature or status of the DBS Account between February 2019 and 31 July 2019[72].

99. The Tribunal considers that Rule 18.5.1 does not itself require that Client Assets that are client monies are held in a Client Funds Account. Rather, the requirement is simply that such assets are held on trust. The fact that the DBS Account was not a Client Funds Account until 4 October 2019 (when NZX designated DBS as a Bank for the purposes of the Rules) is, however, relevant to whether TBNZ breached Rule 18.6.1(b), as discussed below.

100. Accordingly, the Tribunal has not found TBNZ to have breached Rule 18.5.1 based on the information provided. Accordingly, the alleged breach is dismissed.

Application of Rule 18.6.1

101. Under Rule 18.6.1(b), TBNZ must *"not deposit Client Funds into an account that is not a designated Client Funds Account"*.

102. The DBS Account was not a Client Funds Account until NZX had designated DBS as a Bank for the purposes of the Rules on 4 October 2019[73].

103. Accordingly, the Tribunal finds that TBNZ breached Rule 18.6.1(b) by depositing Client Funds in the DBS Account before it was a designated Client Funds Account from 22 February 2019 to 30 July 2019.

104. Under Rule 18.6.1(a), TBNZ must "*in respect of any Client Funds Account which is not a Depository Account*" [emphasis added] (i) obtain from the Bank holding the Client Funds Account a written acknowledgement of the trust status of the account; and (ii) supply that acknowledgement to NZX.

105. Given the Tribunal's finding that the DBS Account was not a Client Funds Account until DBS was designated as a Bank on 4 October 2019, TBNZ cannot have been in breach of Rule 18.6.1(a) prior to that date, by which stage TBNZ had obtained and supplied to NZX a written acknowledgment from DBS that the DBS Account was a trust account (the July Acknowledgement). The fact that the DBS Account was not a Client Funds Account until 4 October 2019 is also the reason that NZX alleges, and TBNZ accepts, that TBNZ breached Rules 18.4.1 and 18.4.2.

106. As the Tribunal has found TBNZ not to have breached Rule 18.6.1(a) in respect of the DBS Account, it is not required to determine whether the February Acknowledgements were sufficient to comply with Rule 18.6.1(a)(i). However, given the submissions made by the parties in regard to the requirements for acknowledgements under Rule 18.6.1(a)(i), the Tribunal makes the following observations.

107. The Tribunal does not consider that an acknowledgement must be in the form set out in Appendix 3 of the Guidance Note. The Guidance Note is intended to provide guidance on NZX's interpretation of the Rules and while the "standard wording" in Appendix 3 can be presumed to comply with Rule 18.6.1(a)(i), the Rules do not stipulate that the acknowledgement must be in that form.

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[72] Annexure C of the SOR.

[73] While TBNZ does not expressly state in its SOR that it breached Rule 18.6.1(b), it does acknowledge that "*until NZX formally designated DBS as a Bank on 4 October 2019, it did not comply with the requirement to hold Client Funds in a "Bank" under the [Rules]"* - paragraph 2.45 of the SOR.

108. The Tribunal does not consider that TBNZ was required, as a matter of Good Broking Practice, to provide an acknowledgement in the form set out in Appendix 3 of the Guidance Note. The Tribunal notes that at no time during its correspondence with TBNZ did NZX stipulate that the acknowledgement must be in the form set out in Appendix 3 of the Guidance Note. It is also apparent from the submissions that NZX had previously accepted acknowledgements from other Banks that were not in the form set out in Appendix 3 of the Guidance Note (see paragraphs 15 and 21 above). The Tribunal also notes that Good Broking Practice, as defined in the Rules, requires conduct which complies with the "*spirit and intent*" of the practices, procedures and requirements set by NZX in any Guidance Note, rather than compliance with the letter of any Guidance Note.

109. TBNZ submits that what is required to comply with Rule 18.6.1(a)(i) is an acknowledgement from the Bank sufficient to confirm that it is on notice as to the trust nature of the funds held in the account - *"what counts in terms of "trust status" at common law is whether the characteristics of a trust account are present. By definition, an acknowledgement that describes the characteristics of a trust account confirms the "trust status" of that account"*[74]. As noted above, NZX does not specifically address what is required to adequately acknowledge the trust status of an account for the purposes of Rule 18.6.1(a)(i), and as a result the Tribunal is not in a position to reach a decision on that point. While an account may be a trust account at law, the Tribunal considers that the purpose of Rule 18.6.1(a)(i) is investor protection; as such the acknowledgement should make it clear that the Bank is aware that the account is a trust account so that there is no prospect of the Bank claiming on funds in the account in the event of the Market Participant's insolvency. Investors should not be in a position of potentially having to prove an account is a trust account in those circumstances. To the extent that the Rules may be open to interpretation[75] or are being applied inconsistently, NZX may wish to consider introducing a Rule or Procedure which does prescribe the form of acknowledgement required.

Penalty

110. Given the Tribunal's finding that TBNZ breached Rule 18.6.1(b) and TBNZ's acknowledgement that it breached Rules 3.9, 8.1.1(c), 18.4.1, 18.4.2 and 18.6.1(a)(i)[76], the Tribunal must consider the appropriate penalty in the circumstances of this case.

Penalty Band

111. NZX submits that this matter falls within Penalty Band 3 of the Tribunal Procedures (serious breach). TBNZ submits that this matter most appropriately falls within Penalty Band 1 of the Tribunal Procedures (minor breach).

112. Procedure 9 of the Tribunal Procedures provides guidance on the appropriate financial penalty to be imposed by the Tribunal for breaches of the Rules. The Tribunal will consider factors relating to the nature of the breach and the conduct of the respondent when determining the appropriate penalty band.

Obligations breached

113. The Tribunal considers that the requirement for Market Participants to only deposit Client Funds in a Client Funds Account is a fundamental obligation under the Rules. It ensures that the investor protections afforded by the Rules apply to the Client Funds. TBNZ has also accepted breaching other Rules in relation to the DBS Account by not complying with an NZX direction to stop using that

[74] Paragraph 2.46 of the SOR.
[75] Although the Tribunal notes that it has not previously been called upon to opine on this issue.
[76] With regards to the naming of Client Funds Accounts held with [redacted], [redacted] and [redacted].

account for Client Funds and by not complying with Rules 18.4.1 and 18.4.2 in relation to maintaining Total Client Assets equal to or exceeding its Outstanding Obligations. TBNZ also failed to correctly name Client Funds Accounts held with [redacted], [redacted] and [redacted]. The Tribunal considers that any Market Participant holding Client Funds in a manner which does not comply with the Rules has the potential to damage investor confidence in the transparency and integrity of the NZX Markets.

Conduct of TBNZ

114. The Tribunal is very concerned by the conduct of TBNZ in this matter.

115. Regardless of whether TBNZ disagreed with NZX's view on the trust status of the DBS Account and whether the February Acknowledgements were sufficient, TBNZ was aware that NZX had not designated DBS as a Bank and therefore was aware that the DBS Account was not a Client Funds Account when it deposited Client Funds into that account in February 2019. TBNZ submits that the period between NZX raising the fact that DBS was not a Bank on 26 February 2019 to 4 October 2019 when it was designated as a Bank was largely attributable to NZX for (i) not having an existing process in place; and (ii) for not accepting the February Acknowledgements. The Tribunal notes, however, that it was TBNZ who deposited Client Funds in the DBS Account knowing that DBS had not been designated as a Bank and well before it made any inquiries with NZX in July 2019 to identify what the designation process would entail. TBNZ acknowledges that it should have confirmed NZX's approval of DBS as a Bank for the purposes of the Rules before opening the account with DBS[77].

116. Even when this breach was discovered by NZX and notified to TBNZ on 5 July 2019[78], TBNZ failed to rectify the matter and did not move the Client Funds to an account that was recognised as a Client Funds Account until 30 July 2019. This was despite repeated requests from NZX, including what TBNZ calls a "*clear direction*" to do so on 9 July 2019. The Tribunal is concerned that TBNZ's submissions seek to minimise this failure to act on the basis that it was not required to comply because it considered NZX's direction was based on an error of law (in respect of whether the DBS Account had trust status)[79] and that NZX's lack of process for approving DBS was equally relevant to assessing the severity of TBNZ's non-compliance[80].

117. The Tribunal considers that regardless of whether the Client Funds were being held on trust (which is a requirement under the FAA in any event), it was clear that TBNZ was in breach of the Rules because the DBS Account was not a Client Funds Account. Accordingly, the direction cannot be said to be based on an error of law. The Tribunal notes that as a matter of Good Broking Practice a Market Participant cannot simply ignore a direction from NZX and continue, in this case, to commit a clear breach of the Rules if it disagrees on a matter of interpretation. TBNZ could have complied with the direction, while reserving its position on the trust status of the DBS Account. The Tribunal also notes that at the time NZX's direction was made, TBNZ had not even made inquiries on what

[77] Paragraph 3.10 of the SOR.
[78] The parties disagree on how many directions NZX gave to TBNZ. NZX says TBNZ refused to comply with directions it gave by email on 5 July 2019 and 9 July 2019, followed up on by email on 17 July 2019 and again during the phone call between the HoMS and TBNZ's Managing Principal on 18 July 2019. TBNZ says these allegations should be treated as a single alleged breach of direction on 9 July 2019, when it accepts that a "clear" direction was given by NZX, not multiple breaches. The Tribunal considers that there was one direction - that TBNZ stop using the DBS Account as if it was a Client Funds Account - which had to be repeated multiple times because TBNZ failed to comply.
[79] Paragraph 3.13(b) of the SOR.
[80] Paragraph 3.18 of the SOR.

the designation process would be and had already deposited Client Funds in the DBS Account.

118. By knowingly breaching the Rules and then failing to promptly rectify its position, even after a direction by NZX, the Tribunal considers that TBNZ has shown wilful disregard of its obligations under the Rules. In the Tribunal's view, given the nature of the breach and TBNZ's conduct, this matter cannot be characterised as a minor administrative or operational breach as suggested by TBNZ. The Tribunal considers that the breach of the Rules by TBNZ most appropriately falls within Penalty Band 3.

Financial penalty

119. Under Penalty Band 3, a penalty in the range of $0 to $500,000 may be imposed. NZX submits that a penalty of $225,000 is appropriate. TBNZ submits that if the Tribunal considers that TBNZ's conduct falls within Penalty Band 2 or 3 then the penalty should not exceed $80,000.

120. To determine the appropriate penalty within Penalty Band 3, the Tribunal must consider the aggravating and mitigating factors in this case.

Aggravating factors

(1) Breach was intentional;

121. The Tribunal considers that TBNZ's breaches of the Rules in relation to the DBS Account and failure to comply with NZX's direction were intentional.

122. The correspondence between the parties in February 2019 ended with TBNZ aware that DBS had not been designated as a Bank for the purposes of the Rules. Despite this, TBNZ still deposited Client Funds in the DBS Account. TBNZ has not explained why it did this, other than to say that the breaches were unintentional and that it sought to comply with the Rules, but that the parties' positions simply differed. TBNZ says it received (oral) legal advice from two law firms (it does not disclose who those firms are or what information it provided them with) that the DBS Account was a trust account for the purposes of the Rules. Regardless of the parties' differing views on that issue, the fact remains that TBNZ was aware that the DBS Account was not a Client Funds Account when it deposited Client Funds into that account in February 2019. That action cannot be described as anything other than intentional.

123. The Tribunal also considers that TBNZ's failure to comply with NZX's direction was intentional. Despite repeated requests from NZX to stop treating the DBS Account as a Client Funds Account, TBNZ failed to do so until 30 July 2019. The failure to comply was deliberate with TBNZ advising NZX on 17 July 2019 that "*I'm afraid that I cannot provide [NZX] with the confirmation you request*" and with TBNZ's Managing Principal advising the HoMS on 18 July 2019 that "*we completely agree that these are not client funds accounts*" [81].

(2) Breach was not self-reported;

124. NZX became aware that TBNZ had been using the DBS Account as a Client Funds Account since February 2019 during its inspection of TBNZ in June 2019. TBNZ was aware, or ought to have been aware, that the DBS Account was not a Client Funds Account at that time and did not self-report its breach even when the matter was raised by NZX in July 2019.

[81] TBNZ says in the SOR that this was consistent with the factual position that NZX had not "formally" designated DBS as a Bank for the purposes of the Rules [paragraph 2.20].

(3) Breach continued to occur once discovered;

125. NZX notified TBNZ on 5 July 2019 that the DBS Account was not a Client Funds Account. Despite repeated requests from NZX, including what TBNZ accepts was a "clear" direction on 9 July 2019 and direct engagement between the HoMS and TBNZ's Managing Principal on 18 July 2019, TBNZ failed to move the Client Funds to a recognised Client Funds Account until 30 July 2019.

126. TBNZ did not explain why it did not remove Client Funds from the DBS Account until 30 July 2019, other than its submission that "*any continuation is attributable to the mistaken position NZX took in relation to [Rule] 18.6.1(a)(i)*"[82]. The Tribunal is concerned that TBNZ has sought to minimise its failure to comply with the direction by essentially blaming NZX. As noted above, TBNZ could have complied and reserved its position on the trust status issue. TBNZ was clearly aware that DBS had not been designated as a Bank, yet still delayed moving the Client Funds to a recognised Client Funds Account. The 15 Business Day delay in complying with NZX's direction is a breach of Good Broking Practice and falls well short of the conduct the Tribunal expects of a Market Participant.

(4) Breach occurred over an extended period of time;

127. TBNZ says that NZX's characterisation of the breach continuing for 108 Business Days is "incomplete". TBNZ says that throughout this period it continued to hold the Client Assets on trust at all times and engaged with NZX as to the "formal" approval of DBS as a Bank (which it says NZX had no process for doing so).

128. To the contrary, the Tribunal notes that from late February 2019 until 30 July 2019 TBNZ was clearly in breach of Rule 18.6.1(b) and that the correspondence shows that TBNZ did not engage with NZX about DBS's designation as a Bank between the end of February 2019 and when NZX brought the matter to TBNZ's attention on 5 July 2019. The breach of Rule 18.6.1(b) also led to the breaches of Rules 18.4.1 and 18.4.2 on 28 separate days during this period.

(5) NZX considers that TBNZ hindered its investigation;

129. NZX submits that TBNZ hindered its investigation because TBNZ's responses were unhelpful and the lack of constructive engagement by TBNZ meant that it was difficult to resolve the ongoing breach. NZX says that TBNZ did not cooperate with its investigation to the standards expected of a Market Participant in such circumstances, and was slow to take appropriate action. TBNZ disagrees that it hindered NZX's investigation, but says that the differences in views are why NZX may have considered its responses "unhelpful".

130. It is clear to the Tribunal that the parties had differing views on whether, in particular, the funds held in the DBS Account were being held on trust, which likely contributed to NZX's view that TBNZ had been "unhelpful". The Tribunal considers any conduct by a respondent which hinders NZX's investigation into an alleged breach to be very concerning. NZX has not, however, specified what behaviour TBNZ exhibited during its investigation of the breach and referral of this matter to the Tribunal which demonstrated that TBNZ had not cooperated[83]. In the absence of this, it is difficult for the Tribunal to consider this to be an aggravating factor of any weight.

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[82] Paragraph 4.8 of the SOR.

[83] The Tribunal notes that the difficulty NZX had in resolving the ongoing breach after it first requested TBNZ cease using the DBS Account has already been considered by the Tribunal in its comments above on TBNZ's conduct.

(6) Previous breach of the Rules;

131. NZX submits that TBNZ had four unrelated breaches of the Rules from 2017 to 2019, which were concluded without referral to the Tribunal. As those matters could be described as minor and differ from the circumstances of the present matter, the Tribunal does not consider that TBNZ's previous breaches of the Rules are an aggravating factor of any weight.

Mitigating factors

(1) No demonstrated financial loss to clients;

132. NZX submits that as an insolvency event did not eventuate, any risk to TBNZ's clients was not realised. TBNZ submits that its clients were not even potentially at risk given that the Client Funds held in the DBS Account were held on trust as a matter of law and accordingly its clients' interests were at all times protected.

133. TBNZ also submits that the Client Funds held in the DBS Account "*were at all times held in a jurisdiction with a comparable regulatory regime*" and that the Client Funds had the benefit of the protections afforded by regulatory requirements and oversight comparable with New Zealand[84]. TBNZ submits further that *"NZX could not reasonably have withheld its designation of DBS as a Bank for the purposes of the Participant Rules."*[85] The Tribunal notes, however, that by not complying with the Rules, TBNZ could have put Client Funds at risk had the bank used not met NZX's requirements and that TBNZ should not have assumed or inferred that NZX's approval of DBS would be a "formality".

(2) No financial benefit or commercial advantage to TBNZ;

134. TBNZ submits that it gained no financial benefit as a result of the breach. NZX says that it is not aware of any financial benefit or commercial advantage to TBNZ arising from the breach.

135. The Tribunal notes that while the breach may not have occurred with the intention of obtaining financial gain or commercial advantage, the DBS Account was being used as part of TBNZ's business operations. TBNZ has not provided an explanation as to why the DBS Account continued to be used when it was not a Client Funds Account.

Other factors not considered relevant

136. TBNZ submits that it is a relatively new Market Participant (although it has been an NZX Advising Firm since January 2017) and while the issues referred to in the SOC occurred early in the conduct of its New Zealand business, there is "*no suggestion similar breaches will reoccur*". TBNZ has not, however, detailed what steps it has taken to implement or enhance processes, systems, or procedures to ensure similar breaches do not occur in the future. The Tribunal also notes that the issues which arose with the naming of TBNZ's Client Funds Accounts at [redacted], [redacted] and [redacted] occurred despite all of the earlier correspondence between the parties with regard to Rule 18.6.1(a) and the DBS Account.

137. TBNZ accepts that it breached Rules 18.4.1 and 18.4.2. However, it says that this breach was "technical" because "*at all times in fact TBNZ held "total client assets" (lower case), on trust, in excess of its Outstanding Obligations"*[86]. The Tribunal considers that this fact does not constitute a mitigating factor, but rather reflects the absence of an aggravating factor.

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[84] Paragraph 3.11 of the SOR.
[85] Paragraph 3.7 of the SOR.
[86] Paragraph 3.23 of the SOR.

Previous Tribunal decisions

138. The Tribunal considers that the previous decisions described in the SOC are of limited applicability to this matter, given that they differ factually from the present matter and were all determined at least a decade ago and before the implementation of the current Tribunal Procedures in 2016, which significantly changed the penalty bands applying to breaches of the Rules.

139. The Tribunal recently approved a settlement between NZX and ASB Securities Limited (*ASBA*) under which ASBA agreed to pay a financial penalty of $80,000 for its admitted breaches of Rules 4.5.5, 9.1.1(c), 10.6.1(d), 10.7.1 and 10.8.1(a) (*NZMDT 1/2020 NZX v ASBA*). In that case, certain ASBA client online share trading accounts were vulnerable to unauthorised viewing or to Orders being placed by individuals who no longer had authority to access or transact on those accounts as a result of system and process issues with ASBA's online share trading platform. The Tribunal considered that there had been a breach of fundamental obligations under the Rules and that the matter fell within Penalty Band 3. The Tribunal noted as aggravating factors in that case that (i) while no actual harm to clients was identified, a number of client accounts were potentially vulnerable; (ii) the breach occurred over an extended period; and (iii) the breach resulted from a lack of effective processes, systems and procedures. However, the Tribunal also found that there were a number of mitigating factors in that case including that ASBA had (i) not breached the Rules intentionally; (ii) reported the issues to NZX when they were identified; (iii) resolved the issues once identified; and (iv) cooperated with NZX's investigation.

Summary

140. The Tribunal considers that having regard to all of the factors noted above, including that TBNZ breached a fundamental obligation under the Rules by depositing Client Funds in an account that it was aware was not a Client Funds Account and by intentionally failing to comply with a direction from NZX to rectify the breach, a financial penalty of $160,000 is appropriate in the circumstances of this case.

141. The Tribunal considers that the penalty proposed by NZX of $225,000 was too high given that the Tribunal did not find TBNZ in breach of Rule 18.5.1 or Rule 18.6.1(a) in relation to the DBS Account. The Tribunal, however, considers that the penalty proposed by TBNZ of $80,000 was too low given the aggravating factors noted above, in particular that the Tribunal considers that TBNZ has shown a wilful disregard of its obligations under the Rules. The Tribunal also considers that the nature of the obligations breached and the conduct of TBNZ justify a markedly higher penalty than was agreed in the ASBA case referred to above.

Public censure

142. NZX submits that a public censure of TBNZ is appropriate in this case given that the breach falls within Penalty Band 3. NZX also notes that there is an educative value to the market in releasing a public censure. NZX submits that a private reprimand is not appropriate in this case given the aggravating factors.

143. TBNZ submits that as the breach falls into Penalty Band 1, a public censure is not appropriate and to the extent that there is an educative value in a censure this could be achieved by an anonymised summary of the determination. TBNZ notes that if the Tribunal finds that the breach does not fall within Penalty Band 1, it appreciates that the default position is that a public censure will be issued. However, it says that any educative value a public censure may have needs to be balanced against:

a. no harm to the public or damage to public confidence having been caused;

b. TBNZ not having been involved in repeated breaches or having shown disregard for the Rules; and

c. the detriment to TBNZ of being publicly censured.

144. TBNZ also submits that any public censure should be measured, reflect the nature of the conduct and be accompanied by a full explanation of the circumstances in which the breach arose.

145. The Tribunal has considered the guidance set out in Tribunal Procedure 9.3. In particular, that the name of a respondent is likely to be published when:

a. the impact of the breach has caused the public to be harmed and/or has damaged public confidence in the sector or the breach had the potential to cause harm to the public or the potential to damage public confidence in the sector; and/or

b. the respondent has been involved in repeated breaches and shown disregard for the Rules; and/or

c. the respondent committed a breach that falls within Penalty Band 2 or Penalty Band 3 of Procedure 9.

146. Having regard to the guidance set out in Tribunal Procedure 9.3, the Tribunal considers that it is appropriate in this case to publicly censure TBNZ as the breach falls within Penalty Band 3. The Tribunal also considers that TBNZ has shown a disregard for the Rules by intentionally breaching Rule 18.6.1(b) and by failing to comply with NZX's direction.

147. The Tribunal notes that its public censure of TBNZ will be released together with a copy of this determination in full.

148. NZX submits that any public censure by the Tribunal should be released in both English and Mandarin given that TBNZ's clients are predominantly Chinese. The Tribunal will release its public censure and determination in its usual manner through the Market Announcement Platform. Any translation and wider dissemination of the public censure and determination can be undertaken by NZX if it so chooses.

Costs

149. NZX submits that TBNZ should pay the costs of NZX (being $38,000) and the costs of the Tribunal. TBNZ submits that in the event the Tribunal finds no breach in relation to the trust status issue, the Tribunal should order that the parties meet their own costs and for the costs of the Tribunal to be borne equally by TBNZ and NZX to reflect the difference of legal interpretation taken by the parties.

150. Generally, where a respondent is found to have breached the Rules the Tribunal is likely to award the actual costs of NZX and the Tribunal against that party. However, the Tribunal will assess costs in the circumstances of each case.

151. In this case, the Tribunal does not consider that the issue of costs turns solely on whether it has found a breach of Rule 18.5.1, as submitted by TBNZ, particularly given that the Tribunal has found, and TBNZ has accepted, a number of other breaches of the Rules. Given the circumstances of this case, the Tribunal

considers it appropriate to order TBNZ to pay the costs of NZX and the costs of the Tribunal in considering this matter. The Tribunal notes that its finding in relation to the trust status of the DBS Account is already reflected in the penalty it has imposed.

Orders

152. The Tribunal orders that TBNZ:

a. be publicly censured in the form of the announcement attached to this determination (which will include a full copy of this determination);

b. pay $160,000 to the NZX Discipline Fund;

c. pay the costs and expenses incurred by the Tribunal in considering this matter; and

d. pay the costs and expenses incurred by NZX in considering this matter.

DATED 10 JULY 2020

Nick Hegan, Division Chair, NZ Markets Disciplinary Tribunal