

NOTICE OF FILING

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File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v KEYSTONE ASSET MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 612 443 008)
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



BETWEEN:

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION
Plaintiff

**KEYSTONE ASSET MANAGEMENT LIMITED (RECEIVERS AND MANAGERS
APPOINTED) (IN LIQUIDATION) (ACN 612 443 008)**
First Defendant

PAUL ANTHONY CHIDO
Second Defendant

**CONTRADICTION'S SUBMISSIONS -
PROPOSED INTERIM DISTRIBUTION**

A. OVERVIEW

1. By paragraphs 4 and 5 of an interlocutory process dated 8 December 2025, the first defendant (**Keystone**) and its joint and several liquidators and court-appointed receivers, Jason Tracy and Glen Kanevsky of Alvarez & Marsal (**Appointees**)¹ (together, **Applicants**), seek judicial directions to the effect that they are justified and acting reasonably² - having now realised the Bell Potter Securities which Keystone held in its capacity as responsible entity and trustee of the Shield Master Fund (**SMF**) - in distributing up to 75% of the proceeds of sale of those securities to the holders of certain classes of units in the SMF, in proportion to each class's interests in the proceeds, without first paying 'Expenses' (as that term is defined in the SMF's constitution dated 28 April 2021)³ (**Interim Distribution Directions Application**).

¹ Mr Tracy and Ms Palaghia (Mr Kanevsky's predecessor) were appointed as joint and several receivers and managers of the property of Keystone by orders made 27 July 2024. Mr Tracy and Ms Palaghia were separately appointed as administrators of Keystone by orders made 5 September 2024. Creditors thereafter resolved to place Keystone into liquidation on 2 December 2024. Mr Kanevsky has since replaced Ms Palaghia as both receiver and manager and liquidator: First Tracy Affidavit at [5].

² Keystone seeks the relevant directions pursuant to s 601NF(2) of the *Corporations Act 2001* (Cth) (**Act**) and s 63 of the *Trustee Act 1925* (NSW). The Appointees seek directions pursuant to ss 19 and 23 of the *Federal Court of Australia Act 1976* (Cth), rule 14.23 of the *Federal Court Rules 2011* (Cth) and s 90-15 of the *Insolvency Practice Schedule (Corporations)*, being Schedule 2 to the Act.

³ As to the obligation to pay 'Expenses', including expenses allocated to wholly owned trusts of the SMF, see cll 13.2 to 13.4, 20.11 and 21.6(c) of the SMF constitution: First Tracy Affidavit at pp 60, 80, 82-83. '**Expenses**' means 'all expenses, costs, losses and liabilities of the Trust (whether paid or unpaid, actual or contingent, present or future), including, all expenses, costs, losses, liabilities and Taxes incurred by the Responsible Entity in establishing the Trust, Offering Interests, administering the Trust, winding up the

2. Falcon Capital Limited (in liquidation) (**Falcon**) has lodged a proof of debt in Keystone’s liquidation in the sum of \$99.63 million.⁴ The proof relates to the Chiodo Diversified Property Fund (**CDPF**), in which Falcon is the sole (or significant majority) unitholder and of which Keystone is trustee.⁵ The Appointees are yet to adjudicate that proof.⁶
3. In determining the proposed quantum of the ‘Interim Distribution Amount’ sought to be paid to eligible SMF unitholders now, ahead of creditors and whilst Keystone’s liquidation is ongoing, the Applicants have not made any provision for the claims the subject of Falcon’s proof.⁷ This is in contradistinction to the approach they have taken for other creditors’ claims, who the Applicants assume may be able to have recourse to SMF trust assets and for whom they have provisioned accordingly.⁸ The only reason given for treating Falcon differently, apart from the quantum of its claim, is the Applicants’ belief that ‘there was no material co-mingling of SMF and CDPF property, *and therefore* Falcon as a potential CDPF trust creditor will not have recourse to the Bell Potter Proceeds’.⁹
4. By orders made on 11 December 2025, Ross Blakeley and Paul Harland (**Contradictors**) in their capacities as joint and several liquidators of Falcon were appointed as contradictors to the Interim Distribution Directions Application.
5. In support of the Application, the Applicants rely on:
 - (a) an affidavit of Jason Tracy, one of the Appointees, made 7 November 2025 (**First Tracy Affidavit**); and
 - (b) a further affidavit of Mr Tracy made 29 January 2026 (**Second Tracy Affidavit**).
6. The Contradictors rely on:
 - (a) an affidavit of Ross Blakeley, one of the Contradictors, made 16 February 2026 (**Blakeley Affidavit**); and

Trust or otherwise performing its obligations under this constitution or the Applicable Standard’: clause 1.1 of the SMF constitution (exhibited to First Tracy Affidavit at p 30 ff, esp. 36). ‘**Trust**’ is defined to mean ‘the trust governed under the terms of this document’ (i.e., per clause 2.5, the SMF: First Tracy at p 43).

⁴ First Tracy Affidavit at [60(c)], [72]-[73]; First Tracy Affidavit at pp 119-121 (KWM cover letter), 122 (Falcon POD).

⁵ Blakeley Affidavit at [42], [48], [50].

⁶ First Tracy Affidavit at [77].

⁷ Second Tracy Affidavit at [61]-[64], [120(b)].

⁸ Second Tracy Affidavit at [120], esp. [120(b)].

⁹ Second Tracy Affidavit at [120(b)], [127]-[128] (emphasis added).

- (b) a confidential affidavit of Mr Blakeley made 16 February 2026 (**Confidential Blakeley Affidavit**).
7. The Contradictors sought to be appointed as contradictors in circumstances where they held concerns that the proposed interim distribution:¹⁰
- (a) is premature given the status of the Appointees' investigations (in particular, into the CDPF and with the conduct of which trust Falcon's proof is concerned); and
 - (b) may prejudice Falcon if:
 - i. there has been comingling of CDPF funds with SMF funds and funds can be traced from Falcon or the CDPF to the Bell Potter Securities directly and/or the assets of the SMF generally; and/or
 - ii. Falcon (as unitholder of the CDPF) has, or may have, claims against Keystone that gives Falcon recourse to the assets of the SMF (via subrogation to Keystone's right of indemnity against those assets).
8. Since their appointment, the Contradictors have conducted a comprehensive transaction matching, tracing and analysis. The Contradictors have now concluded that, with the possible exception of around \$114,000, it is highly unlikely that funds from Falcon or the CDPF were co-mingled with SMF unitholder funds *and* used to acquire the Bell Potter Securities.¹¹ The basis for the Contradictors' conclusion is set out in detail in the Confidential Blakeley Affidavit.
9. Notwithstanding that conclusion, the Contradictors maintain that the proposed interim distribution, without any provision whatsoever for Falcon's proof, is premature and carries too great a risk of prejudice to Falcon (and its underlying individual investors, including retirees) in circumstances where:
- (a) an analysis and tracing exercise has not yet been conducted in relation to the use of CDPF's funds, including to identify whether any of CDPF's funds were used to benefit the SMF (save that the Appointees have traced the source funds used to purchase the Bell Potter Securities);¹²

¹⁰ Blakeley Affidavit at [20].

¹¹ Blakeley Affidavit at [21].

¹² Blakeley Affidavit at [52], [58], [61].

- (b) the Contradictors were only appointed as liquidators of Falcon on 9 April 2025 and their own investigations into its affairs, and the relationship between Falcon and Keystone, are ongoing and will likely take some time to conclude (with further public examinations of key Falcon directors scheduled to occur in April);¹³ and
- (c) the book value of Falcon’s investment in the CDPF represents 46% of the book value of its Australian investments and 22% of the book value of all its investments.¹⁴

10. The Contradictors’ position is that:

- (a) the Application should be adjourned until such time as:¹⁵
 - i. orders have been made directing the Appointees, in their capacity as liquidators of Keystone, to wind up the CDPF (e.g. pursuant to s 601NF(2) of the Act); and
 - ii. having been so appointed, the Appointees have conducted adequate investigations into the financial position of the CDPF and the use of CDPF funds (in the same manner as they have done with respect to the SMF and the ADPF in the ‘Keystone Financial Position Report’ dated 27 July 2024¹⁶),

because only at that point in time can the reasonableness and propriety of the proposed interim distribution be meaningfully assessed (and by which time, the taxation liabilities of Keystone and their impact on the quantum of the proposed interim distribution will presumably be known);¹⁷ and

¹³ Blakeley Affidavit at [22(c)], [86], [97].

¹⁴ Blakeley Affidavit at [52].

¹⁵ Blakeley Affidavit at [22]-[23], [116]-[118].

¹⁶ Being confidential exhibit JMT-2 to the affidavit of Mr Tracy made 12 August 2024. The report is dated the same day as the orders appointing Mr Tracy and Mr Kanvesky’s predecessor as receivers and managers of Keystone’s property, for limited defined purposes which did not extend to CDPF.

¹⁷ See Second Tracy Affidavit at [62], [115]-[118]. There appears to be significant uncertainty as to the extent of Keystone’s taxation liabilities. In circumstances where the Applicants propose to but have not yet (1) ‘approach[ed] the ATO’ with respect to the unspecified basis on which they ‘will provision for Keystone’s tax position’ - if such a basis has yet been determined by Keystone at all - nor (2) received ‘any feedback from the ATO’ in that connection, such that ‘the appropriate amount for tax’ to retain from the Bell Potter Proceeds remains unknown, it would appear that the proposed interim distribution cannot take place immediately in any event. The Applicants have not identified even a potential tax retention range.

(b) alternatively, if there is to be an interim distribution of up to \$100,812,385.63 (**Interim Distribution Amount**) from the Bell Potter Proceeds now,¹⁸ then a further \$82,497,115.65, comprising of:

- i. the sum of \$63,847,115.65;¹⁹ and
- ii. the sum of \$18.65 million,²⁰

should be retained from those proceeds, out of that portion of the Bell Potter Proceeds that would otherwise be payable to Bond Street Custodians Limited (**BSCL**) as trustee for Macquarie Financial Limited, and insofar as insufficient then first from that portion until exhausted, then from the balance of the proceeds, so as reduce any prejudice that Falcon would otherwise suffer in the event that it is ultimately found - once the relevant investigations have been concluded - that Falcon has a right to claim against the assets of the SMF; and

(c) in the further alternative to (b), if there is to be an interim distribution now, a further \$18.65 million should be retained.

11. The alternative \$82,497,115.65 million further retention would not significantly undermine the stated rationale of making an interim distribution now - being to alleviate hardship suffered by individual underlying investors in the SMF - because it could be in large part 'funded' from amounts otherwise payable for the benefit of Macquarie,

¹⁸ Second Tracy Affidavit at [61]-[62] (final row of table). Note the discrepancy between the definitions of "**Interim Distribution**" in the Tracy Affidavits and the amended interlocutory process dated 8 December 2025. The First Tracy Affidavit at [8(a)] defines the term broadly to mean "an interim distribution to unitholders who hold units in certain classes of the SMF (**Interim Distribution**)". The Second Tracy Affidavit adopts the same defined terms as the First Tracy: Second Tracy at [4]. In contrast, paragraph 4(a) of the amended IP defines Interim Distribution to mean "an interim distribution of up to 75% of the proceeds of realisation and sale of the Bell Potter Securities attributable to each class of the Fund (**Interim Distribution**)...". The proposed Interim Distribution Amount appears to be funded not only from the Bell Potter Proceeds, but also from other available cash-at-bank attributable to the relevant SMF unit classes (including amounts already in bank accounts attributed to those classes, before the proceeds were paid in): see Second Tracy Affidavit at [10], [62].

¹⁹ As to which, see the Blakeley Affidavit at [106(a)]; p 1026 of exhibit **RAB-1** thereto (balance sheet for the Trustee for the CDPF as at 13 April 2021). This balance sheet records assets of \$63,847,115.65 as at the day prior to the signing of the Retirement Deed, which provided for the handover of the CDPF from Falcon to Keystone.

²⁰ As to which, see the Blakeley Affidavit at [98]-[100]; p 933 of RAB-1 (spreadsheet). This represents the total amount of funds paid by Falcon to Keystone, or at Keystone's direction, pursuant to the Retirement Deed between them and others dated 14 April 2021 (**Retirement Deed**), by which (amongst other things), Falcon agreed to retire as trustee of the CDPF, Keystone agreed to be appointed as trustee of the CDPF, and Falcon further agreed to (1) transfer all trust assets held by it in its capacity as outgoing trustee of the CDPF to Keystone as incoming trustee of the CDPF; and to (2) invest \$20 million "into a new wholesale scheme operated by [Keystone] which will become the new Trustee of the CDPF": see the Blakeley Affidavit at [46], [87]; pp 370 - 380 of RAB-1 (Retirement Deed).

pending the finalisation of Keystone’s liquidation, such that the amounts to be received by other unitholders now would not be significantly impacted.

B. RELEVANT BACKGROUND

Background generally

12. Falcon was incorporated on 10 April 2006.²¹
13. Keystone was incorporated on 17 May 2016.²²
14. On 18 August 2016, First Guardian Capital Pty Ltd (**FGC**), a company related to Falcon, and Chiodo Corporation Pty Ltd (**Chiodo Corporation**) entered into a Development Agreement.²³
15. On 22 August 2016, the CDPF was established with Falcon as its trustee.²⁴ The Contradictors understand, based on their investigations to date, that the CDPF was established by Falcon and Paul Chiodo (a director of Keystone and the second defendant in this proceeding), for the purposes of investing in property development.²⁵
16. From 1 July 2017, Falcon offered units in the CDPF (then known as the ‘First Guardian Low Density Real Estate Fund’)²⁶ pursuant to an information memorandum.²⁷ Its initial unitholders comprised retail or wholesale investors.
17. On 3 July 2017, the First Guardian Australian Development Fund (**ADF**) was established with Falcon as its trustee.²⁸
18. Until 13 May 2019, the CDPF was known by a different name. On that date, it was renamed to the CDPF pursuant to a Deed of Variation.²⁹
19. That same day, Falcon entered into a **Funds Management Agreement** with FGC and the newly incorporated **CF Capital** Pty Ltd, a company related to Mr Chiodo and one of Falcon’s directors.³⁰

²¹ Blakeley Affidavit at [28]; pp [59] (Falcon company search dated 11 February 2026).

²² Blakeley Affidavit at [12]; pp [40] (Keystone company search dated 16 December 2025).

²³ Blakeley Affidavit at [72]-[74]; pp 535-545 of RAB-1 (Development Agreement).

²⁴ Blakeley Affidavit at [43], [43], [67], [73]; pp 225-271 of RAB-1 (CDPF trust deed).

²⁵ Blakeley Affidavit at [68].

²⁶ Blakeley Affidavit at [69], [83(b)].

²⁷ Blakeley Affidavit at [69]; pp 440-507 of RAB-1 (CDPF IM dated 1 July 2017).

²⁸ Blakeley Affidavit at [53]-[55].

²⁹ Blakeley Affidavit at [44], [83]; pp 368-369 of RAB-1 (Deed of Variation).

³⁰ Blakeley Affidavit at [82]-[83]; pp 864-874 of RAB-1 (Funds Management Agreement).

20. On 23 August 2019, the First Guardian Master Fund (**FGMF**) was established with Falcon as its trustee and responsible entity. The FGMF is a registered managed investment scheme and takes the form of a unit trust.³¹
21. The FGMF has various wholly-owned sub-trusts (i.e. trusts in which Falcon as trustee for the FGMF is the sole unitholder), including the ADF and CDPF.³²
22. In April 2021, the then unitholders in the CDPF (or the vast majority of them) transferred their units in that fund to Falcon in its capacity as trustee of the ADF and received units in the FGMF in return.³³ By this means, the CDPF became a sub-trust of the ADF and, through it, the FGMF.
23. On 14 April 2021, Keystone, Falcon, Chiodo Corporation Pty Ltd and others entered into a deed (**Retirement Deed**) with respect to the CDPF, which deed provided for the termination of both the Funds Management Agreement and the Development Agreement.
24. The recitals to the Retirement Deed relevantly stated:³⁴

The parties have resolved to end the Funds Management Agreement and the Development Management Agreement on the terms set out in this Deed with the intent of entering a new investment agreement whereby Falcon as trustee of the Australian Development Fund will invest into a new wholesale scheme operated by KAM [Keystone] which will become the new Trustee of the CDPF.

25. The Retirement Deed contemplated, amongst other things, that Falcon would shortly thereafter appoint Keystone as trustee of the CDPF, retire as trustee, and transfer CDPF trust assets to Keystone (clause 3.1).
26. The deed also contemplated that Falcon as trustee for the ADF would be the sole unitholder in the CDPF (clause 3.1(d)), and invest \$20 million ‘into CDPF’ in a series of instalments over the following 11 months (clause 3.5 and Schedule B).
27. That same day, 14 April 2021, Falcon transferred its shares in 75 Port Douglas Pty Ltd to Keystone.³⁵

³¹ Blakeley Affidavit at [30].

³² Blakeley Affidavit at [31], [42], [53]. But note that the CDPF unitholder register held by Keystone (and provided to Falcon in redacted form) indicates that Falcon holds ‘only’ 98.7% of units on issue in the CDPF: Blakeley Affidavit at [50]; pp 391 of RAB-1 (CDPF unitholder register as at 1 July 2024). According to that register, the remaining 1.3% of units on issue are held by eight other unitholders.

³³ Blakeley Affidavit at [49],[87]. See the footnote above.

³⁴ Blakeley Affidavit at [46]; pp 370-380 of RAB-1 (Retirement Deed).

³⁵ Blakeley Affidavit at [80], [89]; pp 609 (company search of 75 Port Douglas) and 883 of RAB-1 (ASIC Form 484). As at that date, Falcon held 49% of the shares on issue in 75 Port Douglas, it having already

28. On 28 April 2021, the SMF was established with Keystone as its trustee.³⁶
29. On 11 June 2021:
- (a) in accordance with clause 3.1 the Retirement Deed, Falcon retired as trustee of the CDPF and was replaced by Keystone by way of Deed of Variation;³⁷ and
 - (b) a representative of CF Capital emailed a representative of FGC regarding ‘the handover of the CDPF’ and stated that, once ‘the handover happens, [the CDPF] will be renamed ‘Advantage Diversified Property Fund’ [i.e. **ADPF**] which is what our Administrator knows it as’.³⁸
30. On 30 June 2021, Falcon transferred its shares in Augustine Terrace Glenroy Pty Ltd to Chiodo Corporation.³⁹ The table below records what ASIC records reveal about Falcon’s equity interests (in some of) the SPVs in which it invested as trustee of the CDPF, and when and to whom those shares were transferred.⁴⁰

SPV	Date Falcon issued shares and proportion of shares held	Date/s Falcon transferred shares and proportion of shares transferred	New shareholder
75 Port Douglas	19 December 2018 (100%)	20 November 2019 (51%) 14 April 2021 (49%)	Malana Management Pty Ltd (51%) Keystone (49%)
Augustine Terrace	7 May 2018 (100%)	30 June 2021 (100%)	Chiodo Corporation (100%)
Red Hill Terraces (Operations)	27 September 2016 (100%)	16 February 2017 (100%)	Pure Development (100%)
Red Hill Terraces	28 September 2016 (100%)	16 February 2017 (100%)	Pure Development (100%)

transferred 51% of its shareholding in that SPV to a company called “Malana Management Pty Ltd” on 20 November 2019. Falcon had also already transferred its shareholding in Red Hill Terrace (Operations) and Red Hill Terraces, which it acquired in September 2016, the month after the CDPF was created, to Pure Development and Project Management Pty Ltd (**Pure Development**) (a Chiodo-controlled company) on 16 February 2017.

³⁶ Blakeley Affidavit at [90]. The SMF constitution dated 28 April 2021 appears at pp 30-94 of the First Tracy Affidavit (Tab 1).

³⁷ Blakeley Affidavit at [48]; pp 370-380 of RAB-1 (Retirement Deed).

³⁸ Blakeley Affidavit at [92].

³⁹ Blakeley Affidavit at [80], [94]; pp 591 (company search of Augustine Terrace) and 897 of RAB-1 (ASIC Form 484).

⁴⁰ Blakeley Affidavit at [79], [80], [89], [94]. See also [91].

31. On 5 July 2021, the SMF was registered as a managed investment scheme. Keystone has been its responsible entity since that time.⁴¹
32. In the period between April 2021 and February 2022, Falcon as trustee for the ADF advanced \$13.65 million to Keystone as trustee for the CDPF,⁴² and other sums totalling a further \$5m to CF Capital (an entity associated with Keystone (and its director, Paul Chiodo)) – which sums together total \$18.65 million - seemingly on behalf of or as directed by Keystone as trustee for the CDPF and pursuant to the Retirement Deed.⁴³ It is not known what became of these funds.
33. On 14 September 2021, Keystone issued or otherwise had by that date prepared a PDS for the offer of units in the ADPC of the SMF. The PDS relevantly stated that the SMF ADPC class ‘will invest in units in the Chiodo Diversified Property Fund’ (i.e. the CDPF).⁴⁴
34. On 18 October 2021, the ADPF was established with Keystone as its trustee. The ADPF appears to have invested in a number of the same SPVs (associated with Mr Chiodo) as the CDPF.⁴⁵
35. On 1 March 2022, Keystone issued an information memorandum for the offer of units in the ADPF.⁴⁶
36. In February 2024, Keystone suspended redemptions in the SMF.
37. In May 2024, Falcon suspended redemptions in the FGMF.⁴⁷
38. On 18 June 2024, ASIC commenced this proceeding against Keystone. Later in 2024, the Appointees became receivers and managers of Keystone’s property (but only for limited purposes)⁴⁸ as well as its liquidators.

⁴¹ First Tracy at [20]; pp 98-100 of First Tracy (Keystone ASIC MIS search).

⁴² Blakeley Affidavit at [54(d)], [98].

⁴³ Blakeley Affidavit at [54], [93]-[95].

⁴⁴ Blakeley Affidavit at [95].

⁴⁵ Blakeley Affidavit at [97].

⁴⁶ Second Tracy Affidavit at [34]; pp 1058-1081 of Second Tracy.

⁴⁷ Blakeley Affidavit at [37]-[38].

⁴⁸ As to which, see [77] below; Blakeley Affidavit at [22(a)], [111]-[112].

39. On 24 February 2025, ASIC commenced Federal Court of Australia proceeding VID199/2025 against Falcon and one of its three directors (with another of its directors subsequently joined) (**ASIC Falcon Proceeding**).⁴⁹
40. On 9 April 2025, the Court made orders winding up Falcon, appointing the Contradictors as its liquidators and directing the Contradictors to wind up the FGFMF, the ADF and various other funds.⁵⁰
41. On 10 April 2025, the Appointees notified SMF unitholders of the termination of the SMF.⁵¹
42. The Contradictors' investigations as liquidators of Falcon are still at an early stage and have to date been hampered by a lack of available funds.⁵²
43. It remains for the Contradictors to trace and analyse what became of funds it paid to or on behalf of Keystone as trustee for the CDPF, including so to identify whether any of CDPF's funds were used for the benefit of the SMF (in prima face breach of Keystone's duties as trustee of the CDPF).
44. The Appointees have said that they have not yet traced and analysed what became of all of the funds paid to or for the benefit of the CDPF.⁵³

The Chiodo Diversified Property Fund

45. The background to the CDPF is set out above. The key points are as follows.
46. On 22 August 2016, before Keystone established the SMF and Falcon established the FGFMF, Falcon (in collaboration with Paul Chiodo (a then director of Keystone and the second defendant in this proceeding)) created the CDPF with a seeming view to raising funds from the public to invest in property development projects associated with Mr Chiodo.⁵⁴ Falcon was the initial trustee of the CDPF.⁵⁵ Although significant further investigation is required, it appears that thereafter:

⁴⁹ Blakeley Affidavit at [24].

⁵⁰ Blakeley Affidavit at [25].

⁵¹ First Tracy at pp 96-97.

⁵² Blakeley Affidavit at [52], [57].

⁵³ Letter from the Appointees' solicitors to Falcon's solicitors dated 5 November 2025, esp. at [10]-[11]; First Tracy Affidavit at [77]; pp 127-129 (NRF letter).

⁵⁴ Blakeley Affidavit at [42], [68], [75].

⁵⁵ Blakeley Affidavit at [67].

- (a) Falcon sold units in the CDPF to investors and advanced at least part of the subscription funds raised to SPVs associated with Mr Chiodo undertaking property developments;⁵⁶
- (b) in return, and potentially amongst other things, Falcon became a shareholder, or the shareholder, in at least some of the SPVs to which it advanced funds (with further investigation required into the terms of Falcon's advances and sources and uses of the funds so advanced);⁵⁷
- (c) according to a balance sheet for the CDPF as at 13 April 2021, as at that date:⁵⁸
 - i. net of redemptions, unitholders in the CDPF had invested \$72,671,656.39;⁵⁹
 - ii. the CDPF's assets comprised cash at bank of \$203,919.67 and non-current assets in the form of investments in at least 8 property development projects then valued at \$63,643,195.98;
- (d) there was a 'restructure' of the CDPF in April 2021, being the month in which the SMF was established, whereby:
 - i. pursuant to a Retirement Deed dated 14 April 2021:⁶⁰
 - 1. Falcon agreed to retire as trustee of the CDPF and Keystone agreed to be appointed in its place by no later than 31 May 2021;
 - 2. Falcon agreed to transfer CDPF trust assets to Keystone and, in its capacity as trustee of the ADF, to invest (a further) \$20 million into the CDPF in a series of instalments, with the final instalment due on 15 March 2022;
 - ii. the initial unitholders in the CDPF (or the vast majority of them) transferred their unit holdings to Falcon in its capacity as trustee of the First Guardian Australian Development Fund (**ADF**), and received units in the First Guardian Master Fund (**FGMF**), of which the ADF was a sub-fund, in return, such that:⁶¹

⁵⁶ Blakeley Affidavit at [69], [74]-[77].

⁵⁷ Blakeley Affidavit at [73]-[80].

⁵⁸ Balance sheet for the CDPF as at 13 April 2021: Blakeley Affidavit at pp [1026] (balance sheet).

⁵⁹ \$91,370,726.58 less \$18,699,070.19 = \$72,671,656.39.

⁶⁰ Retirement Deed, cl 3.5(b) and Schedule B (instalment due dates): RAB-1 at pp 370-380.

⁶¹ Blakeley Affidavit at [87].

1. Falcon as trustee of the ADF became the sole (or 98.7%) unitholder in the CDPF;
 2. the initial unitholders retained an indirect interest in the CDPF, through the ADF, by reason of the FGMF holding all of the units on issue in the ADF;
- (e) thereafter, Falcon advanced \$18.65 million to or at the direction of Keystone, comprising around \$13.65 million advanced to Keystone directly and around \$5 million advanced to CF Capital.⁶²
47. The CDPF's annual report for the financial year ended 30 June 2023 is the most recent CDPF financial report available to the Contradictors. It was prepared by Keystone. It records:⁶³
- (a) that, as at 30 June 2023, the CDPF had over \$78 million in 'financial assets' comprising 'equity instruments' related to seven SPVs;
 - (b) in respect of each of the seven SPVs - under the heading '6. Financial Assets' - an 'investment cost' and a 'fair value'.
48. Under Australian Accounting Standards Board Standard 9 (AASB 9) concerning financial instruments, investments are initially recognised at 'cost' – usually the amount paid towards the investment – and subsequently remeasured to fair value, with the difference between investment cost and fair value going to 'other comprehensive income'. Accordingly, the 'fair value' line entries are not the total fair value of the asset, but instead an adjustment by way of incremental gain or loss (being the difference between the total fair value of the asset and the cost).⁶⁴
49. The annual report indicates the following 'investment costs' for the seven SPVs:⁶⁵

No.	SPV	Investment cost
1.	33 Davidson Port Douglas	\$5,643,660
2.	75 Port Douglas Road	\$22,438,533

⁶² With \$6.65 million of the total funds advanced, advanced after Keystone established the ADPF on 18 October 2021: Blakeley Affidavit at [99(d)].

⁶³ Blakeley Affidavit at [106]-[110]; p 1029 of RAB-1 (CDPF annual report).

⁶⁴ Blakeley Affidavit at [108].

⁶⁵ Blakeley Affidavit at [109].

No.	SPV	Investment cost
3.	Augustine Terrace Glenroy	\$3,366,693
4.	Nicholson Street Bentleigh	\$5,004,144
5.	Norwood Ponds	\$18,256,115
6.	Red Hill Terrace	\$2,187,311
7.	Warrigal Road Ashburton	\$13,874,817
TOTAL		\$70,771,273

50. Save for Falcon's shareholding in certain SPVs,⁶⁶ it is not known what CDPF trust assets were transferred from Falcon to Keystone following (or in anticipation of) Falcon's retirement as trustee of the CDPF. Nor is it known:
- (a) what became of whatever CDPF trust assets were transferred;
 - (b) what became of the further \$18.65m investment and whether any part of it (and/or other CDPF trust assets) was used for the benefit of the SMF; or
 - (c) what the CDPF trust assets now comprise.
51. The relationship between the CDPF and the ADPF – including whether (on the proper analysis) they are in fact one and the same fund, whether the CDPF was going to be or was renamed as the ADPF, whether the CDPF assets (whatever they comprised at the time) were transferred into the ADPF, whether ADPF's assets are or include a unitholding in the CDPF – is opaque to say the least. That relationship requires significant further investigation.⁶⁷

⁶⁶ Blakeley Affidavit at [79].

⁶⁷ Blakeley Affidavit at [97].

C. ANALYSIS

Overarching observations

52. Three overarching observations may be made about the proposed interim distribution at the outset.
53. *First*, it subverts the ordinary course of liquidation in that, if made, it would see certain SMF ‘equity’ holders (at least partially) paid out ahead of SMF creditors who may be entitled to be subrogated to Keystone’s personal right of indemnity against SMF assets.
54. Keystone’s liquidation is at a relatively early stage and the prospect of further creditors coming forward remains live.⁶⁸ There is a real risk that creditors for whom no provision is made by way of retention from the Bell Potter Proceeds will be irreparably prejudiced by the proposed early equity distribution.
55. As the Appointees acknowledge, the Bell Potter Securities were ‘the only asset of the SMF that could be readily liquidated’.⁶⁹
56. *Second*, the interim distribution is inconsistent with clause 21.6 of the SMF’s constitution.⁷⁰ Clause 21.6 concerning the winding up of the SMF following its termination. It relevantly provides that, in that scenario, Keystone (emphasis added):
- (a) must sell and realise the ‘Scheme Property’ (clause 21.6(b));⁷¹
 - (b) must apply the ‘Class Assets’,⁷² or the proceeds from their realisation, to pay:⁷³
 - i. any corresponding ‘Class Expense’;⁷⁴ and

⁶⁸ The latter risk being acknowledged in the First Tracy Affidavit at [121]-[122].

⁶⁹ First Tracy Affidavit at [23].

⁷⁰ c.f. First Tracy Affidavit at [46(b)]. See clause 21.6 of the SMF constitution at pp 82-83 of First Tracy.

⁷¹ Clause 1.1 of the SMF constitution defines ‘**Scheme Property**’ to mean ‘the ‘scheme property’ of the Trust as the term is defined in section 9 Corporations Act [sic]’: First Tracy at pp 34, 39. In turn, section 9 of the Act defines ‘**scheme property**’ of a registered scheme expansively to mean ‘(a) contributions of money or money’s worth to the scheme; and (b) money that forms part of the scheme property under provision of this Act or the ASIC Act; and (c) money borrowed or raised by the responsible entity for the purposes of the scheme; and (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b), (c) or (d)’.

⁷² Clause 1.1 of the SMF constitution defines ‘**Class Assets**’ to mean ‘for a Class of Units, any Scheme Property attributable to that Class of Units’.

⁷³ Clauses 21.6(c) and 21.6(d) of the SMF constitution: First Tracy at pp 82-83.

⁷⁴ Clause 1.1 of the SMF constitution defines ‘**Class Expense**’ to have ‘the meaning set out in clause 13.3(b)’. Clause 13.3(b) provides for Keystone to ‘identify all Expenses incurred in connection with those Class Assets and the Class of Units relating to those Class Assets (**Class Expenses**)’.

- ii. other Expenses ‘which [Keystone] reasonably determines are not referable to a specific Class and should be met from the Class Assets of that Class, in conjunction with the Class Assets of such other Classes (if any) as determined by [Keystone]’ (clause 21.6(c)); and
 - (c) may, subject to Class rights, distribute the **remaining** Scheme Property or the **net proceeds** to Unitholders in the SMF in proportion to the number of Units of which they are the registered holder on the Termination Date, but Keystone may retain Scheme Property or their proceeds for contingent Expenses and liabilities (clause 21.6(d)).
57. On its proper construction, and as is conventional, SMF’s constitution requires the payment of Expenses to precede any distribution of Scheme Property to unit holders.
58. *Third*, although the stated purpose of the application is to alleviate hardship likely being suffered by individual SMF unitholders who are retirees, the proposed interim distribution:
- (a) would not see a return to all SMF unitholders: no direct investor in the SMF (all of whom hold ADPC class units) will receive anything from the Bell Potter Proceeds; and
 - (b) overwhelmingly benefits Macquarie Financial Limited in its own right as the ultimate beneficial owner of around 70% of the units on issue in the classes of unitholders who do stand to receive a return. Macquarie is not an individual retiree suffering hardship.
59. The rationale for interim distribution is significantly undermined by these matters.

Beneficiaries of the proposed interim distribution

60. The purpose of interim distribution is said to be to alleviate hardship which many investors in the SMF are likely to be suffering by reason of the fact that the redemption of units in the SMF has been suspended since February 2024,⁷⁵ and the liquidation of Keystone will – the Appointees expect – take at least a further two or three years to complete.⁷⁶

⁷⁵ First Tracy at [11]-[12], [15], [39].

⁷⁶ First Tracy at [17]; c.f. the Applicants’ submissions at [3(c)] (5 years). The liquidation began on 2 December 2024.

61. The First Tracy Affidavit relevantly identifies that:

- (a) there are five classes of units on issue in the SMF - the Conservative Class, Balanced Class, Growth Class, High Growth Class, and Advantage Diversified Property Class (**ADPC**) – with each class having a separate pool of assets;⁷⁷
- (b) Keystone issued around 450 million units in the SMF across its five unit classes, for which unitholders collectively paid around \$480 million;⁷⁸
- (c) the SMF has invested funds in a number of different assets, including all the units on issue in the Australian Diversified Property Fund (**ADPF**) of which Keystone is also trustee (and in which it is the sole unitholder in its capacity as trustee of the SMF),⁷⁹ the Bell Potter Securities, and ‘interests in illiquid funds’;⁸⁰
- (d) the Bell Potter Securities are the only asset of the SMF that could be readily liquidated in order to make a meaningful interim distribution to unitholders;⁸¹
- (e) the value of SMF’s holdings in the Bell Potter Securities by unitholder class, as at 31 October 2025, was as follows.⁸²

SMF unit class	Bell Potter Securities
Conservative class	\$29,840,217 (15.16%)
Balanced class	\$59,327,866 (30.14%)
Growth class	\$96,926,366 (49.24%)
High growth class	\$10,748,583 (5.46%)
Advantage Diversified Property class (ADPC) ⁸³	\$0 (nil)
TOTAL	\$196,843,032

⁷⁷ First Tracy at [21], [24]. See also clause 5.7 of the SMF constitution regarding the creation of different classes of units in the SMF: First Tracy Affidavit at p 47.

⁷⁸ First Tracy at [27] (when figures are tallied); Blakeley Affidavit at [14].

⁷⁹ First Tracy Affidavit at [3]. Per the First Tracy Affidavit at [22] and [76], Keystone in its capacity as trustee for the SMF holds all of the units on issue in the ADPF.

⁸⁰ First Tracy at [22].

⁸¹ First Tracy at [23].

⁸² First Tracy at [24].

⁸³ First Tracy at [24], [51].

62. The Second Tracy Affidavit relevantly identifies that:

- (a) the Bell Potter Securities have now been sold and their sale, net of brokerage fees, has realised \$195,890,964.71 (**Bell Potter Proceeds**);⁸⁴
- (b) the Bell Potter Proceeds have since been paid into interest-bearing accounts attributable to the four unit classes with an interest in the Bell Potter Securities (namely, the Conservative, Balanced, Growth and High Growth classes (together, **Qualifying Classes**)) as follows:⁸⁵

SMF unit class	Bell Potter Proceeds
Conservative class	\$29,811,886.42 (15.22%)
Balanced class	\$59,525,815.98 (30.39%)
Growth class	\$96,930,383.10 (49.48%)
High growth class	\$9,622,879.21 (4.91%)
ADPC	\$0 (nil)
TOTAL	\$195,890,964.71

- (c) as at 27 January 2026, and inclusive of the Bell Potter Proceeds, the Qualifying Classes hold a collective \$199,492,219.41 cash at bank;⁸⁶
- (d) Keystone proposes to make an interim distribution of up to \$100,812,382.63 (**Interim Distribution Amount**) to unitholders in the Qualifying Classes from the Bell Potter Proceeds and available cash at bank, by paying so much of that amount as is attributable to each Qualifying Class, amongst unitholders in that class and in proportion to their interest in that class;⁸⁷ and
- (e) the Interim Distribution Amount – which equates to 51.46% of the Bell Potter Proceeds and 50.53% of the available cash at bank on 27 January 2026 – has been calculated on the basis of distributing all of the Bell Potter Proceeds and available cash at bank ‘after retaining for estimated costs and expenses in the liquidation and

⁸⁴ Second Tracy Affidavit at [9].

⁸⁵ Second Tracy Affidavit at [9].

⁸⁶ Second Tracy at [10].

⁸⁷ Amended interlocutory process dated 8 December 2025 at [4(b)]; Second Tracy Affidavit at [61]-[62]; Applicant’s submissions at [2].

receivership and potential creditor claims, with estimates calculated on a conservative basis'.⁸⁸

63. Unitholders of ADPC class units will not receive anything from the proposed distribution.⁸⁹ Those unitholders comprise all of the 'direct' investors in the SMF, made up of individuals and self-managed superannuation funds.⁹⁰
64. Rather, the proposed interim distribution stands to benefit only the four **Fund Unitholders**. The Fund Unitholders are, or in the case of Macquarie Investment Management Limited (**MIML**), were
- (1) MIML which, until 30 September 2025, held through its custodian (**BSCL**) 67.56% of all units on issue in the SMF (and 70.06% of all units in the Qualifying Classes), which units are now held by BSCL itself on trust for Macquarie Financial Limited (**MFL**);⁹¹
 - (2) Equity Trustees Superannuation Limited (**ETSL**) which holds 26.37% of all units (and 27.35% of all units in the Qualifying Classes);
 - (3) The Trust Company (PTAL) Ltd (**TTCL**) which holds 2.30% of all units (and 2.39% of all units in the Qualifying Classes); and (4) HSBC Custody Nominees (Australia) Limited (**HCNL**) which holds 0.20% of all units (and that same percentage of units in the Qualifying Class).⁹²
65. The table below shows which Fund Unitholders hold units in which Qualifying Classes, and the portion of Bell Potter Proceeds attributable to each of those classes:⁹³

SMF unit class	Unitholders of that unit class	Bell Potter Proceeds⁹⁴
Conservative	BSCL, ESTL	\$29,811,886.42 (15.22%)
Balanced	BSCL, ETSL	\$59,525,815.98 (30.39%)
Growth	BSCL, ETSL, TTCL, HNCL	\$96,930,383.10 (49.48%)

⁸⁸ Second Tracy Affidavit at [62].

⁸⁹ First Tracy Affidavit at [51] ('Because the ADPC investor class does not hold any Bell Potter Securities, investors in that class of the SMF will not receive anything from the proposed distribution').

⁹⁰ First Tracy Affidavit at [26]-[27].

⁹¹ Per the First Tracy Affidavit at [37(b)], BSCL now has legal title to MIML's former units and holds them as trustee or custodian for another Macquarie group entity, Macquarie Financial Limited.

⁹² First Tracy at [27]; Blakeley Affidavit at [14].

⁹³ First Tracy at [27].

⁹⁴ Second Tracy at [9]; Blakeley Affidavit at [15].

SMF unit class	Unitholders of that unit class	Bell Potter Proceeds ⁹⁴
High Growth	BSCL, ETSL, TTCL	\$9,622,879.21 (4.91%)
ADPC	All direct investors	Nil
TOTAL		\$195,890,964.71 (100%)

66. The Contradictors understand, based on publicly available information, that:
- (a) on 26 August 2025, ASIC commenced a civil penalty proceeding in the Federal Court of Australia against ETSL, in its superannuation trustee capacity, alleging failures in due diligence concerning the SMF (proceeding VID1107/2025) (**ASIC ETSL Proceeding**);⁹⁵
 - (b) the ASIC ETSL Proceeding remains on foot and is listed for case management on 25 February 2026;⁹⁶
 - (c) on 24 September 2025:
 - i. ASIC commenced a proceeding in the Federal Court of Australia against MIML in its superannuation trustee capacity, seeking certain declaratory relief (proceeding VID1280/2025) (**ASIC MIML Proceeding**);⁹⁷ and
 - ii. MIML offered to ASIC, and ASIC accepted, an undertaking under s 93AA of the *Australian Securities and Investments Commission Act 2001* (Cth),⁹⁸ being the enforceable undertaking (EU) referred to at paragraphs 36 and 37 of the First Tracy Affidavit;
 - (d) ASIC determined not to seek the imposition of a civil penalty against MIML in the ASIC MIML Proceeding:

‘in the exception circumstances of this matter, including: ...the level of cooperation demonstrated by Macquarie in agreeing to pay members 100%

⁹⁵ Blakeley Affidavit at [10(a)]; pp 34-36 of RAB-1 (**ASIC ETSL Media Release**). The media release is also accessible via this link: <https://www.asic.gov.au/about-asic/news-centre/find-a-media-release/2025-releases/25-176mr-asic-sues-equity-trustees-alleging-due-diligence-failures-relating-to-shield/>. A copy of the relevant originating process and statement of claim are available for download via the link.

⁹⁶ ASIC ETSL Media Release (‘Editor’s Note 4’): pp 34-36 of RAB-1.

⁹⁷ Blakeley Affidavit at [10(b)]; pp 37-39 of RAB-1 (**ASIC MIML Media Release**). The media release is also accessible via this link: <https://www.asic.gov.au/about-asic/news-centre/find-a-media-release/2025-releases/25-215mr-macquarie-admits-to-shield-contraventions-and-commits-to-pay-affected-members/>. A copy of the relevant originating process, statement of agreed facts and admissions and the court enforceable undertaking are available for download on the linked page.

⁹⁸ Statement of agreed facts and admissions dated 24 September 2025 at [113], available at <https://download.asic.gov.au/media/voeecljl/25-215mr-asic-v-macquarie-investment-management-statement-of-agreed-facts-24-sept-2025.pdf>

of the amounts invested in Shield less any amounts withdrawn, without waiting for an outcome of the Shield liquidation nor proceedings against other parties involved'.⁹⁹

67. Around \$318.3 million of the c. \$480 million (66.22%) invested in the SMF was referable to amounts indirectly invested by MIML's clients across the four Qualifying Classes.¹⁰⁰
68. On 30 September 2025, the EU was effectuated with the result that:¹⁰¹
- (a) an entity in the Macquarie group – Macquarie Financial Limited (**MFL**) – acquired the beneficial interest in MIML's units in the SMF, and BSCL acquired legal title to those units;
 - (b) MIML's clients (who had indirectly invested in the SMF through the 'platform' styled the 'Macquarie Superannuation Fund' of which MIML was trustee, or via investor-directed portfolio services of which MIML was trustee) ceased to have any beneficial interest in MIML's unitholding in the SMF;
 - (c) those clients had credited to their MIML accounts two sums of money which together totalled the net amount of their indirect investment in the SMF, such that they have now been 'made whole' (in that, notwithstanding that the value of the SMF units once held on their behalf may have since diminished relative to the price paid for them).
69. It follows that those investors who held their interests in the SMF through MIML have already been paid out and no longer have any interest in the SMF.
70. While neither of the Tracy Affidavits identify what portion of the \$101 million Interim Distribution Amount would flow to BSCL and, through it, Macquarie Financial Limited, relative to the other Fund Unitholders and their underlying investors, it is apparent that the proposed interim distribution would overwhelmingly benefit Macquarie Financial Limited (by 'reimbursing' it amounts already paid to MIML's now remediated underlying investors), rather than individual indirect investors.
71. Having regard to the above calculations, and depending the quantity of units BSCL holds in each of the Qualifying Classes as a proportion of the quantity of units in each of those

⁹⁹ ASIC MIML Media Release (3rd bullet point): pp 37-39 of RAB-1.

¹⁰⁰ First Tracy at [27]; Blakeley Affidavit at [14].

¹⁰¹ First Tracy at [36]-[37].

classes, it might be expected that something in the order of 70% of the Interim Distribution Amount ($\$100,812,382.63 * 0.70 = \$70,568,667.84$) would, if the distribution were made as proposed, be paid to BSCL for the benefit of a Macquarie entity.

72. The Tracy Affidavits do not reveal the number of indirect investors who ‘sit behind’ ESTL, TTCL and/or HCNL, or the financial circumstances of any of those investors. While the First Tracy Affidavit does exhibit correspondence from select investors,¹⁰² it is apparent that:

- (a) all of the correspondence pre-dates the effectuation of the EU (i.e. 30 September 2025) by some time; and
- (b) insofar as it is possible to discern on the face of the correspondence how the relevant investor invested in the SMF, most correspondence was sent by MIML clients.

73. Accordingly, the stated rationale for the proposed interim distribution – to alleviate hardship for individual investors resulting from their inability to redeem unit holdings in the SMF¹⁰³ – is in large part irrelevant to the current proposal, because the overwhelming majority of Interim Distribution Amount would in fact be paid to Macquarie for its own benefit.

74. While it is correct that the SMF constitution does not permit Keystone to discriminate between unitholders *intra* class, in practical terms such an outcome can be achieved by way of s 90-15 directions (in the same way that the interim distribution itself, which otherwise appears contrary to SMF’s constitution, is sought to be achieved).¹⁰⁴

75. Any prejudice could be later remedied by way of ‘true up’ when final distributions are made.

Interim distribution now, without provision for Falcon claims, premature

76. The CDPF is not presently being wound up.¹⁰⁵

¹⁰² First Tracy at [39]; pp 356-363 of First Tracy (confidential correspondence).

¹⁰³ First Tracy at [15].

¹⁰⁴ As to the function of s 90-15 directions, see generally *Morgan, in the matter of Traditional Values Management Limited (in liq)* [2024] FCA 74 at [26]-[29] (Button J).

¹⁰⁵ Blakeley Affidavit at [22(a)].

77. While the Appointees have acted as receivers and managers of Keystone’s property since 27 August 2024, including property held in its capacity as trustee of the CDPF, the purpose of their appointment was and remains limited by court order:¹⁰⁶ it relevantly extends only to identifying, collecting and securing property held by Keystone in its capacity as trustee of the SMF, the ADPF or the Quantum PE Fund.¹⁰⁷ It does not extend to property held by Keystone in its capacity as trustee of the CDPF.
78. As noted above, the Contradictors *qua* Falcon liquidators have not yet undertaken an analysis and tracing exercise in relation to the use of CDPF’s funds, including to identify whether any of CDPF’s funds were used to benefit the SMF.¹⁰⁸ Importantly, nor have the Appointees, despite Keystone being the trustee of the CDPF since June 2021.¹⁰⁹
79. In circumstances where Keystone’s establishment of the SMF and ADPF coincided with its assumption of its role as trustee of the CDPF and the making of various payments by Falcon to, or seemingly otherwise on behalf of, Keystone as trustee for the CDPF, there is a real prospect that Keystone as trustee for the CDPF - in prima facie breach of trust – may have applied the funds so advanced by Falcon towards the acquisition or service of SMF assets, or in payment of SMF expenses (insofar as this occurred outside of the bank accounts held by the SMF analysed by the Appointees in the Keystone Financial Position Report).¹¹⁰ This requires further investigation.
80. If further investigation revealed that funds advanced by Falcon were used by Keystone towards the acquisition or service of SMF assets, or in payment of SMF expenses (insofar as this occurred outside of the bank accounts held by the SMF analysed by the Appointees in the Keystone Financial Position Report):
- (a) Falcon would have a claim against Keystone ATF the CDPF **and** against Keystone ATF the SMF as a knowing recipient of funds of trust funds paid in breach of trust; and

¹⁰⁶ See generally *ASIC v GDK Financial Solutions Pty Ltd* [2006] FCA 1415; 236 ALR 699 at [29]-[33] (Finkelstein J).

¹⁰⁷ Blakeley Affidavit at [22(a)], [111]-[112]; p 1047 (orders of Moshinsky J made 27 August 2024). ‘Investor Funds’ is defined to mean ‘monies provided to [Keystone] in its capacity as responsible entity of the SMF’.

¹⁰⁸ Blakeley Affidavit at [52], [57]. Their ability to do so is limited by several factors, including the fact that Falcon retired as trustee of the CDPF and was replaced by Keystone in June 2021.

¹⁰⁹ See letter from the Appointees’ solicitors to Falcon’s solicitors dated 5 November 2025, esp. at [10]-[11]: First Tracy Affidavit at [77]; pp 127-129 (NRF letter).

¹¹⁰ As set out above, it is accepted however that the Bell Potter Securities were not purchased using CDPF money.

(b) Keystone could avail itself of its right of indemnity from SMF assets to satisfy that claim (to which Falcon could be subrogated).

81. Contrary to the Appointees' submissions, it is not the case that Keystone's right of indemnity in respect of such a claim would necessarily be lost by reason of the 'clear accounts' rule. There is clear authority to the effect that where a trustee acts improperly in incurring a liability to a third party, but that conduct benefited the trust estate, the trustee will have a right of indemnity in respect of that liability, to the extent of that benefit. As Brooking J observed in *RWG Management Ltd v Commissioner for Corporate Affairs*:¹¹¹

a trustee is entitled to be indemnified in respect of a liability improperly incurred **to the extent that the incurrence of the liability benefited the trust estate.**¹¹²

82. The improper expenditure of CDPF trust funds to aid the SMF would be an example of such a liability.

83. It is not hard to see the rationale for this position. Suppose a trading trust has \$100 in assets. The trustee misleadingly induces an investor to make a loan of \$1m to the trust, on the condition that double the amount lent will be repaid when the business becomes profitable. By the time the misrepresentation is discovered, the business has failed. It has \$500,000 in assets remaining, but there is no hope of tracing the investor's \$1m into those assets.¹¹³ If there was no right of indemnity for the investor's claim as a creditor, and there were no other creditors of the trustee, the remaining assets would be available to the trust's beneficiaries. If the trustee was insolvent, the investor would receive nothing. That would be perverse. The true principle is that, because the investor's funds directly benefit the trust estate, the investor is entitled to be subrogated to the trustee's right to be indemnified from the assets of the trust. That is so whether or not the trustee is personally liable to reimburse the trust for some reason, and thus regardless of whether there is a 'clear account' between the trustee and the trust.¹¹⁴

¹¹¹ [1985] VR 385, 396 (Brooking J). There is also a very strong argument that the clear accounts 'rule' is in fact (or should be) a matter of discretion only, and that a reason for not exercising the discretion to disallow a trust creditor's claim to be subrogated to the trustee's right of indemnity is the fact that the creditor's funds benefited the trust estate: Jha, Pranay, A "Clearer" Accounts Rule: Challenging the Inflexible Application of the Clear Accounts Rule' (2024) 47(3) Melbourne University Law Review 635.

¹¹² See too *Nolan v Collie* (2003) 7 VR 287 (CA) at [40] per Ormiston JA.

¹¹³ Thereby preventing the investor from claiming a proprietary right in the remaining assets consequent upon a rescission of the investment contract.

¹¹⁴ As an aside, there is no authority in support of the proposition that 'it is sufficient to demonstrate a *prima facie* breach of a 'core' duty in order to disentitle the responsible entity from indemnification'

84. For these reasons, and having regard to the fact that Falcon’s liquidation is still in its first year with investigations ongoing, it is premature to allow the proposed interim distribution at all without making provision for Falcon’s claims against Keystone – and otherwise to the extent of \$82,497,115.65 million.
85. Such provision can be made without impacting the quantum of distribution which underlying investors who may be facing hardship would receive by ‘funding’ the provision from amounts otherwise payable to BSCL for the benefit of MFL.

D. CONCLUSION

86. The Contradictors respectfully submit that the Interim Distribution Directions Application should be adjourned until such time as the Appointees have been to appointed to wind up the CDPF and undertaken adequate investigations into the use to which CDPF assets have been put, and alternatively, allowed only on the condition that \$82,497,115.65million further provision is made on account of Falcon’s claims against Keystone in its capacity as trustee of the CDPF.
87. For the above reasons, the making of the proposed interim distribution now:
- (a) subverts the ordinary course of a liquidation, in which creditors are paid so many cents in the dollar on their admitted claims as the relevant fund(s) allow(s), after the adjudication of their claims and the determination of any appeals therefrom, and only thereafter, if and when creditors have been paid 100c in the dollar on their claims (plus any applicable interest), do equity holders share rateably in any surplus;
 - (b) is not permitted by the SMF’s constitution, which on its proper construction requires the prior determination and payment of “Expenses”;
 - (c) may significantly prejudice Falcon;
 - (d) cannot be justified – or at least justified solely – by reference to the alleviation of hardship being suffered by investors in the SMF because:
 - i. not all investors in the SMF stand to benefit from the proposed distribution – direct investors (i.e. individual unitholders) will receive nothing at all;

(Applicants’ submissions dated 29 January 2026 at [37], bold emphasis added). An obligation on the trustee to account to the trust must be ‘established’ before it can affect the trustee’s right to indemnification: *Boensch v Pascoe* (2019) 268 CLR 593 at [9] (Kiefel CJ, Gageler and Keane JJ).

- ii. the majority of the other investors in the SMF, being indirect investors whose investment in the SMF was intermediated through a Fund, have already been made whole and are no longer suffering any hardship (and indeed, no longer have any interest in the SMF at all);
 - iii. on the Contradictors' best estimate, around 70% of the funds to be distributed would in fact be distributed to BSCL for the benefit of Macquarie Financial Limited (which acquired its units (1) knowing that Keystone is in liquidation; (2) knowing that unit redemptions had long since been suspended; and (3) as part of what appears to be a compromise of proceedings commenced against MIML by ASIC), rather than to the remaining underlying individual investors; and
 - iv. there is no evidence that Macquarie Financial Limited is experiencing any hardship;
- (e) does not appear immediately possible in any event, given the unknown quantum of Keystone's taxation liabilities (for which it is accepted provision must be made from the Bell Potter Proceeds).

Date: 16 February 2026

**J P Moore
S M Hooper**

Mills Oakley