

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

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



BETWEEN:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

and

KEYSTONE ASSET MANAGEMENT LTD (ACN 612 443 008) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)
First defendant

PAUL ANTHONY CHIDO
Second defendant

**RECEIVERS AND LIQUIDATORS' OUTLINE OF SUBMISSIONS
ON INTERIM DISTRIBUTION¹**

A INTRODUCTION

- 1 These submissions are made by Jason Tracy and Glen Kanevsky (**Appointees**) of Alvarez & Marsal Australia, the joint and several receivers (in this capacity, **Receivers**) and liquidators (in this capacity, **Liquidators**) appointed to the first defendant (**Keystone**).
- 2 The Appointees make these submissions in support of paragraphs 4 and 5 of the amended interlocutory process dated 8 December 2025 by which they seek directions and judicial advice as to a proposed interim distribution to unitholders in the SMF in an amount up to \$100,812,382.63 from the realisation proceeds of the Bell Potter Securities.²
- 3 The Appointees submit, in summary, that the proposed interim distribution is appropriate and justified as:
 - (a) **First**, properly construed, the SMF Constitution (as defined below) permits the making of an interim distribution in the nature proposed.
 - (b) **Second**, many of the underlying investors in the SMF are individuals approaching retirement age with low superannuation balances and who invested high proportions of their total superannuation in the SMF. Superannuation is a legislated

¹ These submissions adopt defined terms used the Appointees' outline of submissions dated 10 December 2025 (**December Submissions**) unless otherwise indicated.

² The Bell Potter Securities have been realised in accordance with the order made on 19 December 2025.

means for retirees to fund their living expenses in retirement. Investors have been prevented from redeeming their units in the SMF since February 2024, which has caused them significant hardship. The interim distribution will assist in alleviating that hardship.

- (c) **Third**, if the interim distribution is not made, members of the SMF will not receive a dividend until the conclusion of the winding up of the SMF which is expected to take up to five years. During that time, many underlying investors will be unable to access any of their superannuation invested in the SMF, such that their existing hardship will be amplified, defeating the purpose of superannuation as a means of funding living expenses in retirement.
- (d) **Fourth**, the Appointees have provisioned to retain sufficient realisation proceeds to meet the claims of known SMF creditors, and the likely costs and expenses of the winding up and receivership of the SMF, which are required to be paid in priority to distributions to unitholders under the SMF Constitution. The Appointees have not retained a provision for potential creditors whom they have assessed as non-SMF creditors as, for the reasons developed below, those creditors are unlikely to have any entitlement to share in the proceeds realised from the Bell Potter Proceeds. It is also consistent with the SMF Constitution which confers a discretion on the responsible entity whether to retain funds to meet contingent liabilities. The Appointees have, however, conservatively provisioned for a \$12 million contingency buffer to meet any unforeseen claims, costs or expenses.
- (e) **Fifth**, save for the liquidators of Falcon Capital Limited, who have been appointed as contradictors to this application, no other creditors or potentially affected parties have expressed any opposition to the proposed interim distribution.³

4 The Appointees rely upon the affidavits of Jason Tracy dated 7 November 2025 and 29 January 2026 (described as the Twelfth and Sixteenth Affidavits respectively).

B BACKGROUND

B.1 Structure of the SMF

5 The SMF is a registered managed investment scheme, regulated under Chapter 5C of the Corporations Act, that was registered on or around 5 July 2021.⁴ Keystone was (and

³ As to the provision of notice to potentially affected parties, see affidavits of Jason Tracy dated 10 December 2025, [22]-[25] and Thomas Kelly dated 18 December 2025, [8] to [14].

⁴ Tracy (7 November 2025), [20].

remains) the responsible entity for the SMF.⁵ The SMF is governed by a constitution dated 28 April 2021 (**SMF Constitution**).⁶

6 The interests in the SMF are described as units, and the members of the SMF are described as unitholders. There are five investment classes of units in the SMF (each, a **Class**), each with separate asset pools.⁷

7 The SMF had invested funds in a number of different assets, including all the units in the ADPF, the Bell Potter Securities, and interests in illiquid funds.⁸ The Bell Potter Securities are the only asset of the SMF that could be (and have now been) readily liquidated in order to make an interim distribution in a meaningful amount for unitholders.⁹

8 In accordance with the order made on 19 December 2025, the Appointees instructed Bell Potter to liquidate the Bell Potter Securities.¹⁰ The Bell Potter Securities have now been sold and the following proceeds of their realisation (**Bell Potter Proceeds**) have been deposited in interest-bearing accounts for the respective Classes in the following amounts:¹¹

(a) Conservative class	\$29,811,886.42
(b) Balanced class	\$59,525,815.98
(c) Growth class	\$96,930,383.10
(d) High growth class	\$9,622,879.21
(e) ADPC	\$Nil
(f) Total	\$195,890,964.71

B.2 Investors in the SMF

9 Until September 2025, the units in the SMF were held in the following ways:¹²

(a) “directly” by individuals or self-managed superannuation funds (Direct Unitholders);

⁵ Tracy (7 November 2025), [20].

⁶ Tracy (7 November 2025), Tab-1 of JMT-14.

⁷ Tracy (7 November 2025), [21].

⁸ Tracy (7 November 2025), [22].

⁹ Tracy (7 November 2025), [23].

¹⁰ Tracy (29 January 2026), [9].

¹¹ Tracy (29 January 2026), [9].

¹² Tracy (7 November 2025), [26].

- (b) indirectly where units were held for underlying investors through their membership of superannuation funds and investor-director portfolio services operated by the following entities (Fund Unitholders):
- (i) Macquarie Investment Management Limited (**MIML**) SMF were held by Bond Street Custodians Limited (**BSCL**) as custodian;
 - (ii) Equity Trustees Superannuation Limited (**ETSL**);
 - (iii) The Trust Company (PTAL) Ltd (**TTCL**);
 - (iv) HSBC Custody Nominees (Australia) Limited (**HCNL**).
- 10 There is some uncertainty as to the accuracy of the SMF unit register¹³ in respect of a small number of holdings.¹⁴ This uncertainty is the reason for the provision made in paragraphs 4(b)(i) and (ii) of the amended interlocutory process for a mechanism for the identification of unitholders entitled to receive the proposed interim distribution. This mechanism will enable the Appointees to rely upon the unit register except where the register records persons who they are satisfied no longer hold units in the fund, and to otherwise satisfy themselves that a claimant unitholder not recorded in the register holds units in an eligible Class. It is submitted that this is a reasonable and practical means of resolving any uncertainty about unitholding.
- 11 MIML’s clients indirectly invested in the SMF as members of either the Macquarie Superannuation Fund (**MSF**), a “platform” style superannuation fund, or an investor-directed portfolio service (**IDPS**), of which MIML is the trustee and operator.¹⁵
- 12 On 24 September 2025, MIML entered into an enforceable undertaking (**EU**) with ASIC. Under the EU, MIML committed to transactions in which the Macquarie group would acquire the SMF units then held by MIML for the economic benefit of members of the MSF and IDPS who invested in the SMF.¹⁶ These transactions have now been effected, and the units registered to BSCL are now held as trustee or custodian for Macquarie Financial Limited (**MFL**).¹⁷

¹³ See Tracy (7 November 2025); Tab-2 of Confidential JMT-15.

¹⁴ Tracy (7 November 2025), [32].

¹⁵ Tracy (7 November 2025), [35].

¹⁶ Tracy (7 November 2025), [36].

¹⁷ Tracy (7 November 2025), [37].

- 13 The following table sets out the number of units in the SMF by unitholder and the Classes in which the relevant units are held based on the best available unit register information for the SMF:¹⁸

Unit holder	Amount invested (\$)	Number of units (all Classes)	Classes
BSCL	318,328,265.19	305,443,065.98	Conservative, Balanced, Growth, High Growth
ETSL	133,327,267.26	119,226,804.27	Conservative, Balanced, Growth, High Growth
Direct Unitholders	16,435,431.31	16,129,890.41	ADPC
TTCL	11,667,620.86	10,414,803.58	Balanced, Growth, High Growth
HCNL	922,127.08	891,704.32	Growth

- 14 BSCL and ETSL hold a significant majority of units in the SMF for the investment services they offered to underlying investors (although the units held by BSCL are now beneficially owned by MFL). BSCL and ETSL hold over 97% of units in the Conservative, Balanced, Growth and High Growth classes of the SMF.
- 15 BSCL and ESTL have each expressed support for the proposed interim distribution,¹⁹ although ESTL has since revised its position to one of conditional support due to a potential conflict of interest between members of their superannuation fund in relation to the interim distribution.²⁰

B.3 Termination and winding up of the SMF

- 16 On 10 April 2025, the Receivers terminated the SMF, with the effect that it is in the process of being wound up in accordance with the SMF Constitution and s 601NE of the Corporations Act.²¹
- 17 In light of the complexity of the property of the SMF and its sub-funds, and the extent of the investigations and litigation required to recover that property, the Appointees estimate that the winding up of the SMF and completion of the receivership may take at least a further 2-3 years²² and up to 7 years.²³ This means that if investors — save for those

¹⁸ Tracy (7 November 2025), [27].

¹⁹ Tracy (7 November 2025), [40] and [84].

²⁰ Tracy (29 January 2026), [12] and [13].

²¹ Tracy (7 November 2025), [16].

²² Tracy (7 November 2025), [17].

²³ Tracy (29 January 2026), [64].

underlying investors who received payments in respect of their investment from MIML under the EU — were required to wait for the winding up to take its course before receiving any dividend, they would not receive any funds from the SMF for an extended period of time.²⁴

18 As is developed below, the Appointees submit that the substantial value realised from the sale of the Bell Potter Securities would allow for the making of the proposed interim distribution while retaining sufficient amounts to provision for:²⁵

- (a) Keystone’s known creditors – both its creditors in its own capacity and ‘trust creditors’ of the SMF to the extent that their claims might be satisfied from SMF trust assets; and
- (b) the current and future expected costs of the receivership and liquidation of Keystone.

19 The SMF Constitution contains provisions which are relevant to the winding up of the SMF. They include clauses 5.4, 5.5, 5.7 and 5.8 of the SMF Constitution, which relate to the rights of the respective Classes to the Bell Potter Securities, and provide as follows:

5.4 A Unit in the Trust confers on its holder an interest in the Class Assets corresponding to Units in that Class.

5.5 A Unit in the Trust does not confer on its holder an interest in Class Assets corresponding to Units of a different Class to that Unit.

...

5.7 The Responsible Entity may create and issue Units in the Trust with different rights and restrictions as set out in the terms of issue (Class). Subject to the terms of issue, each Unit confers on its holder identical rights to those conferred by each other Unit of that Class.

5.8 The Responsible Entity may divide issued Units in the Trust into different Classes.

20 Clause 21.6(c) and (d) sets out the manner of the application of SMF assets after termination of the SMF (ie in the winding up):

21.6 After the termination of the Trust, the Responsible Entity:

...

(c) must apply the Class Assets of each Class, or the proceeds from their realisation, to pay:

- (i) any corresponding Class Expense; and
- (ii) other Expenses (including Expenses associated with its remuneration, the remuneration of any Agent or Adviser employed in connection with the termination of the Trust and any other Expenses associated with the

²⁴ Tracy (7 November 2025), [17].

²⁵ Tracy (7 November 2025), [19].

termination of the Trust) which the Responsible Entity 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 the Responsible Entity;

(d) may, subject to Class rights, distribute the remaining Scheme Property or the net proceeds to Unitholders of the Trust in proportion to the number of Units of which they are the registered holder on the Termination Date, but the Responsible Entity may retain Scheme Property or their proceeds for contingent Expenses and liabilities.

21 'Expenses' are relevantly defined in clause 1.1 as 'all expenses, costs, losses and liabilities of the Trust (whether paid or unpaid, actual or contingent, present or future)...'.

22 Clause 13 of the SMF Constitution relates to distributions of income and capital generally. Clauses 13.10 and 13.42 relevantly provide as follows:

13.10 The Responsible Entity may distribute or cause to be distributed any amount (capital or income) by way of cash or in specie at any time on a pro-rata basis to the Unitholders of a Class according to the number of Units held by each Unitholder of that Class as a proportion of all Units of that Class on issue as at a time determined by the Responsible Entity..

13.42 The rights of a Member under this clause 13 are subject to the rights, obligations and restrictions attaching to any particular Unit or the Class of Units which they hold.

23 The Appointees submit that, on the proper construction of the Constitution, Keystone has the power to make an interim distribution of realisation proceeds to unitholders, subject to ensuring that the distribution does not interfere with the payment of Expenses — which may include trust creditors of the SMF and the Receivers' remuneration and expenses — in accordance with clause 21.6 of the SMF Constitution. The way that Keystone would ensure that the distribution would not interfere with the payment of Expenses is by provisioning funds for the known Expenses identified by the Appointees (as identified below) from the Bell Potter Proceeds and carving them out from the proposed interim distribution. This would allow for the payment of actual 'Expenses' in priority to any distributions to unitholders.²⁶ It is also consistent with cl 21.6(d) which, in respect of 'contingent Expenses and liabilities', confers on Keystone a discretion as to whether to retain realisation proceeds to satisfy such contingencies. Alternatively, it would be expedient for the Court to confer on Keystone a power to make an interim distribution of realisation proceeds to unitholders, subject to ensuring that the distribution does not interfere with the payment of Expenses.²⁷

²⁶ Consistently with *Naaman v Jaken Properties Australia Pty Ltd* (2025) 99 ALJR 295, [1] and [13] (Gageler CJ, Gleeson, Jagot, and Beech-Jones JJ), and [51] and [83] (Gordon, Edelman and Steward JJ).

²⁷ Under s 81 of the Trustee Act.

C RELEVANT PRINCIPLES

C.1 Directions and judicial advice

- 24 The principles that govern applications for directions and judicial advice by insolvency practitioners, trustees and responsible entities of managed investment schemes were comprehensively addressed in *Australian Securities and Investments Commission v Keystone Asset Management Ltd (receivers and managers appointed) (in liquidation) (No 3)* [2025] FCA 1661, [8] – [12]. These principles are relied upon for the purpose of this application. A direction under s 601NF(1) of the Corporations Act was granted with respect to an interim distribution to members of a managed investment scheme in *LM Investment Management Limited v Whyte* [2019] QSC 233, [73]ff. Court-appointed receivers and managers of a pension administration and asset management business recently obtained judicial advice in relation to the making of an interim distribution in *Australian Securities and Investments Commission v Brite Advisors Pty Ltd (Receivers and Managers Appointed) (in liq) (No 3)* [2025] FCA 1635. In addition, under s 81 of the Trustee Act the Court may confer power (where that power would be otherwise absent) on a trustee to undertake a transaction in the management or administration of trust property, where it is expedient to do so. Expediency means expediency in the interests of the beneficiaries, and is a criterion of the widest and most flexible kind.²⁸

C.2 Trustee's right of indemnity

- 25 A trustee is personally liable for liabilities incurred in the execution of the trust.²⁹
- 26 The corollary of exposure to personal liability is the trustee's entitlement to be indemnified out of the trust assets, by way of recoupment of past expenditure or exoneration from existing liability, for expenses and liabilities properly incurred by the trustee in the execution of the trust.³⁰
- 27 Generally speaking, a trustee's right of indemnity arises under statute (Trustee Act, s 59), contract (SMF Constitution, cll 19.1 – 19.3) and at general law. In the context of a registered managed investment scheme, s 601GA(2) of the Corporations Act provides that any right of a responsible entity to be indemnified out of scheme property must be: (a) specified in the scheme's constitution; and (b) must be available only in relation to the

²⁸ *Riddle v Riddle* (1962) 185 CLR 202, 214 (Dixon J); see also 222 (Williams J).

²⁹ *Re Johnson* (1880) 15 Ch D 548, 552; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 324 (Latham CJ), 335 (Dixon JJ); *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367 (Stephen, Mason, Aickin and Wilson JJ).

³⁰ *Naaman v Jaken Properties Australia Pty Ltd* (2025) 99 ALJR 295, [1] and [13] (Gageler CJ, Gleeson, Jagot, and Beech-Jones JJ), and [51] and [83] (Gordon, Edelman and Steward JJ).

proper performance of those duties, and any other agreement or arrangement has no effect to the extent that it purports to confer such a right.

28 The trustee has a beneficial interest in the trust assets commensurate with its entitlement to indemnification which takes priority over the interest of beneficiaries in those assets.³¹

29 There is no direct access by the creditors to the assets of the trust, but in equity the creditors may be subrogated to the rights of the trustee against the trust assets.³² Accordingly, if and to the extent that the trustee's right of indemnity is unavailable, a creditor of the trustee has no derivative right of subrogation to claim against trust assets.

C.3 Limitations on the right of indemnity

30 The trustee's right of indemnity is subject to the limitation that the expenses must have been 'properly' incurred in the execution of the trust. This is reflected in the requirement in s 601GA(2)(b) that the responsible entity's right of indemnity must be available only in relation to the proper performance of its duties. It is also reflected in cl 19.1 of the SMF Constitution, which confers on the responsible entity an entitlement to be indemnified out of scheme property 'for any liability incurred by it in properly performing any of its duties and in properly exercising any of its powers in relation to the Trust'; see also cls 20.11 and 20.12.

31 The expression 'properly incurred' is derived from 19th century trust law.³³ In *Re Beddoe*,³⁴ Lindley LJ (at 558) said that this expression was equivalent to 'not improperly incurred', and Bowen LJ (at 562) introduced the notion of 'reasonably as well as honestly incurred'. This reflected the accepted view for most of the 20th century.³⁵

32 In *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)*,³⁶ the NSW Court of Appeal doubted the utility of a test expressed in terms of liabilities which were 'proper' or 'reasonable'. The issue in that case was whether a trustee could be indemnified for a liability for damages for breaches of the then s 52 of the *Trade Practices Act 1974* (Cth).

33 The Court of Appeal said that the terminology of proper and reasonable generally records a conclusion which has been reached on other grounds (at [8]), and that those terms are

³¹ Ibid.

³² *Jones v Matrix Partners Pty Ltd* (2018) 260 FCR 310, [34] (Allsop CJ) citing *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 335 (Dixon J).

³³ *Worrall v Harford* (1802) 8 Ves 4; (1802) 32 ER 250; *Chippendale, Ex parte; Re German Mining Company* (1853) 4 De G M & G 19; (1853) 43 ER 415; *Turner v Hancock* (1882) 20 Ch D 303.

³⁴ [1893] 1 Ch 547.

³⁵ *Nolan v Collie* (2003) 7 VR 287 (*Nolan*), [44].

³⁶ (2002) ATPR 41-864 (*Gatsios*).

notoriously open-ended (at [42]). Meagher JA (at [47]) regarded it as meaningless to endeavour to apply some hypothetical standard of propriety in ordinary commercial life, absent fraud or crime. His Honour said ‘I find it difficult to view occasional breaches of Trade Practices legislation as anything other than incidental aspects of ordinary commercial life’. Spigelman CJ (at [19]) disagreed with this proposition, but said that s 52 ‘is a vague and indeterminate statutory standard of a character that covers conduct of such a wide range of moral obloquy that the mere fact of contravention cannot of itself be determinative of the right to seek indemnity on the part of a trustee. For much the same reasons, a breach of a duty to a third party to exercise reasonable care cannot be determinative of whether there has been a breach of a trustee's duty to exercise reasonable care in the management of the trust’.

- 34 In *Nolan*,³⁷ the Victorian Court of Appeal (per Ormiston JA, with whom Batt and Vincent JJA agreed) sought to confine the reasoning in *Gatsios* to tort liabilities (at [50]), and to preserve the traditional test to be applied for costs and expenses (at [51]). The disagreement between the NSW and Victorian Courts of Appeal was noted by the High Court in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand*.³⁸ The orthodox test has since been endorsed by the Full Court of the Federal Court in *QB4 Capital Pty Limited v Guardian Securities Limited*.³⁹
- 35 As to the application of the orthodox test, in *Nolan*, Ormiston JA said (at [51]) ‘[a] significant number of trustees’ duties requires strict compliance so that failure to comply with that duty will necessarily lead to the conclusion that a particular cost, expense or liability has not been properly incurred. On the other hand, the more day-to-day functions of a trustee in the management of a trust require only that the trustee “exercise the same care as an ordinary, prudent person of business will exercise in the conduct of that business were it his or her own”’ (citations omitted).
- 36 The ‘core’ duties that require strict adherence in order to access the right of indemnity include: the duty to keep and render accounts; the duty not to allow a conflict between duty and interest; the duty not to obtain an unauthorised benefit from the trust; and the duty to adhere and carry out the terms of the trust deed.⁴⁰

³⁷ (2003) 7 VR 287.

³⁸ (2008) 237 CLR 66, [144] fn 156.

³⁹ (2023) 411 ALR 496 (*QB4 Capital*), [90] (Moshinsky, Stewart and Jackman JJ).

⁴⁰ *ASIC v Letten (No 17)* (2011) 286 ALR 346 (*Letten (No 17)*), [17] – [18] (Gordon J).

37 A trustee will not be deprived of their right of indemnity unless they have been shown to have acted improperly, with the onus resting on those who seek to deny the right.⁴¹ That is not to say that there needs to be a curial finding to that effect. It is submitted that, particularly in the context of a responsible entity, whose right of indemnity ‘must be available only in relation to the proper performance of those duties’, it is sufficient to demonstrate a *prima facie* breach of a ‘core’ duty in order to disentitle the responsible entity from indemnification. In this connection, there is a material distinction between: (a) on the one hand, the present case – in which, as developed below, any potential liability of Keystone to underlying investors for alleged misleading or deceptive conduct is likely to arise directly from substantial breaches of duty, being conduct by which Keystone contravened its ‘core’ duties as responsible entity, trustee and fiduciary – where the responsible entity is disentitled from being indemnified; and (b) on the other hand, liabilities arising from innocent or negligent misrepresentations made in the day-to-day management of a trust, which do not vitiate the indemnity.⁴²

D DIRECTIONS AS TO PROPOSED INTERIM DISTRIBUTION

38 The Appointees seek directions and judicial advice that they are justified in causing Keystone to make a proposed interim distribution from the proceeds realised from the Bell Potter Securities in the total amount of up to \$100,812,382.63 (subject to confirming Keystone’s tax exposure) to the Classes that hold an interest in those proceeds. The Appointees intend to retain the total amount of at least \$98,648,148.76 (subject to confirming Keystone’s tax exposure) from the proceeds of the Bell Potter Securities and other available assets of the SMF to meet the reasonably-estimated potential costs and expenses of the liquidation and receivership, and known claims of ‘trust creditors’ of the SMF. A breakdown of the proposed retention amount is set out in paragraph 62 of the 29 January 2026 Tracy affidavit.

39 The purpose of the proposed distribution is to alleviate the hardship which many of the underlying investors are suffering following distributions from the SMF having been suspended since February 2024, and generally to make an interim distribution to unitholders as soon as possible.⁴³ Many of the underlying investors in the SMF were individuals approaching retirement age with low superannuation balances and who

⁴¹ *Di Benedetto v Kilton Grange Pty Ltd* [2017] VSCA 119, [64] citing *Nolan*, [50]. See also *QB4 Capital*, [60].

⁴² Cf *Morgan, in the matter of Traditional Values Management Limited (in liq)* [2024] FCA 74 (*Traditional Values*), [65] (Butt J).

⁴³ Tracy (7 November 2025), [11].

invested high proportions of their total superannuation in the SMF.⁴⁴ The cessation of redemptions and payments to unitholders of the SMF since February 2024 is likely to have caused significant hardship for some of those individuals who, either directly or indirectly through financial services offered by institutions, invested in the SMF. The Appointees have received communications from individual investors explaining their serious financial hardship.⁴⁵

40 Although for some underlying investors (those who invested in the SMF via MIML) their hardship has been alleviated as a result of the *ex-gratia* payments made to them under the EU, the hardship considerations remain relevant with respect to underlying investors who invested via ETSL. Any interim distribution must be made commensurately to all unitholders; it is not possible to make interim distributions only to some unitholders but not others.

41 The dilemma facing the Appointees — and the impetus for approaching the Court in this application for directions and judicial advice — is that the interim distribution may create the risk of criticism by creditors of Keystone who might perceive that they would be adversely affected by the interim distribution. The identified risks are addressed in turn below.

D.1 Trust creditor risk

42 The first risk identified by the Appointees is that trust assets of the SMF will be depleted by the interim distribution such that, ultimately trust creditors of the SMF (that, is creditors of Keystone in its capacity as responsible entity of the SMF) who prove in the liquidation of Keystone might receive a lower dividend than they otherwise would but for the interim distribution.⁴⁶

D.1.1 Retention of provision for creditor claims

43 The Appointees have sought to ascertain the identity and amount of unsecured SMF ‘trust creditors’ (ie those creditors who would be entitled to be subrogated to Keystone’s right of indemnity to SMF trust assets) by reviewing proofs of debt submitted by creditors in the voluntary administration of Keystone and reviewing Keystone’s books and records more generally, as well as widely calling for proofs of debt from all known potential claimants for the purpose of the interim distribution by notice issued on or around

⁴⁴ Tracy (7 November 2025), [12].

⁴⁵ Tracy (7 November 2025), [39] and Tab-1 of Confidential JMT-15.

⁴⁶ Tracy (7 November 2025), [97(a)].

15 August 2015.⁴⁷ That represents the extent of the information about the SMF trust creditors that is known to the Appointees at present.

44 The Appointees' consideration of the material proofs of debt is identified in paragraphs 63 to 90 of the 7 November 2025 Tracy affidavit and paragraphs 119 to 122 of the 29 January 2026 Tracy affidavit.

45 The Appointees propose to retain the following amounts totalling \$13,966,433.99 to ensure that there are sufficient amounts held back to meet the following known claims of trust creditors of the SMF:⁴⁸

- (a) \$834,838.54 in respect of admitted claims;
- (b) \$2,402,057.96 in respect of claims that have not yet been adjudicated (except the proof of debt of **Falcon** Capital Limited, addressed below);
- (c) \$1,077,374.92 in respect of adjudicated and rejected creditor claims which remain within the appeal period;
- (d) \$9,189,426.10 of the claim of Chiodo Corporation Ptd Ltd (**Chiodo Corporation**), which was rejected and is currently subject to an appeal before the Supreme Court of Victoria, including the estimated costs of that appeal;
- (e) \$312,204.47 in respect of other claims that were incurred while Keystone was subject to the Court's orders dated 26 June 2024;
- (f) \$150,432 in respect of other claims that appear on Keystone's books and records but where no proof of debt has been received.

46 These claims include actual trust creditors, as well as some claims which may at this stage be considered to be contingent or potential, but as a matter of prudence the Appointees nonetheless propose to retain funds to meet them. They do not include the 'Underlying Investor Claims', for the reasons set out below.

47 Further, the Appointees have sought for BCSL, ETSL, HCNL and TTCL, being all unitholders in the Classes which hold the Bell Potter Proceeds, and certain of their related parties, to enter into deeds of subordination and release which subordinate any damages claims they may have against Keystone to the claims of other creditors in the event that an interim distribution causes other creditors of Keystone to receive lower dividends than

⁴⁷ Tracy (7 November 2025), [59] – [62].

⁴⁸ Tracy (29 January 2026), [120].

they would receive if an Interim Distribution were not made.⁴⁹ BCSL and ETSL have indicated in-principle support and the Receivers are endeavouring to obtain executed deeds before the hearing of the application. HCNL has indicated that it has yet to obtain instructions from their underlying clients and a substantive response from TTCL appears to be likely to be received soon.⁵⁰

- 48 The Appointees otherwise consider that the risk of any further unidentified SMF creditors coming forward is confined, given the widely circulated call for proofs of debt included text intended to emphasise the importance of creditors coming forward in light of the intended interim distribution.⁵¹ However, to guard against this risk, as a matter of prudence, the Appointees will also retain a contingency amount of \$12 million to cover any unidentified SMF trust liabilities.⁵²

D.1.2 Falcon Capital

- 49 By paragraph 3 of the order made on 11 December 2025, Ross Blakeley and Paul Harlond (**Falcon Liquidators**) in their capacity as joint and several liquidators of Falcon Capital Limited (in liquidation) (**Falcon Capital**) were appointed as contradictors with respect to paragraphs 4 and 5 of the amended interlocutory process.

- 50 On 4 September 2025, Falcon Capital submitted a proof of debt in the liquidation of Keystone claiming the amount of \$99.63 million.⁵³ In the covering letter from the former solicitors of the Falcon Liquidators, KWM, the basis for the claim was articulated as follows:⁵⁴

- (a) Keystone is trustee of the Chiodo Diversified Property Fund (**CDPF**);
- (b) as responsible entity of the First Guardian Master Fund (**FGML**), Falcon Capital holds units in the Australian Development Fund (**ADF**);
- (c) as trustee of the ADF, Falcon Capital invested significant amounts in the CDPF, and Falcon Capital's books and records state the value of this investment as \$99.63 million;

⁴⁹ Tracy (29 January 2026), [16].

⁵⁰ Tracy (29 January 2026), [17].

⁵¹ Tracy (7 November 2025), [116].

⁵² Tracy (29 January 2026), [138].

⁵³ Tracy (7 November 2025), JMT-14 Tab-8.

⁵⁴ Tracy (7 November 2025), JMT-14 Tab-8.

- (d) the CDPF and the ADF advanced funds for the purchase or development of a number of real properties (**Project Properties**) by special purpose vehicle companies;
 - (e) a large proportion of the funds advanced by the CDPF and the ADF for the acquisition of the Project Properties were not spent on the acquisition or development of the Project Properties, and large amounts were advanced to Robert Filipini and entities associated with him (**Filippini Assets**);
 - (f) Falcon Capital in its capacities as trustee of the ADF and beneficiary of the CDPF may have equitable proprietary interests in the Project Property and Filippini Assets; and
 - (g) Falcon Capital, as a beneficiary of the CDPF, has a contingent claim for equitable compensation and/or other remedies against Keystone for breaches of its duties as trustee of the CDPF for the amount Falcon Capital invested in the CDPF, net of any redemptions, which it estimates as \$99.63 million.
- 51 On 9 December 2025, the Falcon Liquidators' current solicitors, Mills Oakley, wrote to the Appointees' solicitors asserting that the proposed interim distribution was premature as the Falcon Liquidators do not yet have sufficient information to determine if Falcon Capital may be a creditor of the SMF based on co-mingling of SMF and CDPF property.⁵⁵
- 52 In response to this position, Mr Tracy deposes that the Appointees' investigations have identified:⁵⁶
- (a) only two external sources of inflows into SMF accounts:
 - (i) \$530,736,295 in investor application funds;
 - (ii) \$386,904 in ADPF redemptions;
 - (b) 'other inflows' of \$17,771,931 which are accounted for by the following explanation, which do not represent potential intermingling with CDPF assets:
 - (i) \$3,534,96 in income from investments ;
 - (ii) \$1,276,431 in interest on cash at bank;
 - (iii) \$12,900,537 where inflows are matched with subsequent outflows, which the Appointees understand to represent unit application funds received and

⁵⁵ Borland (10 December 2025). exhibit ACB-1 at pp. 5-10.

⁵⁶ Tracy (29 January 2026), [128] – [131].

refunded and incorrect account transfers. Whilst this amount is unusually high, the matched outflows indicate that the SMF did not retain the funds if they were sourced from co-mingled funds.

- 53 The Appointees have identified that the only amount of inflows into the SMF that *could* potentially, but has not in fact been established to, represent intermingled CDPF assets is \$386,904, and the Appointees consider that the \$12 million retention for contingencies is sufficient to cover any claim of the CDPF on this amount.⁵⁷

D.2 Non-trust creditor risk

- 54 The second risk identified by the Appointees arises because Keystone in its own capacity may have an entitlement to draw fees from SMF trust assets. By the depletion of SMF assets by the proposed interim distribution, it is possible that such entitlement may not be satisfied, with the result that the proceeds of that entitlement would not be available to non-trust creditors and so they may receive a lower dividend than they otherwise would.⁵⁸ To manage this risk, the Appointees have calculated Keystone’s maximum possible claim for management fees in the total amount of \$11,911,938.19.⁵⁹ This amount is also proposed to be retained in case Keystone has any right to draw management fees from SMF assets. The Appointees have not, however, formed any conclusive view on the entitlement of Keystone to claim management fees from SMF property.⁶⁰

D.3 Potential claims by underlying investors in the SMF

- 55 The third risk identified by the Appointees is that any claims by the “**Underlying Investors**” who invested in the SMF indirectly through a platform provided by MIML or ETSL (**Underlying Investor Claims**) might be entitled to have those claims paid from SMF trust assets through subrogation to Keystone’s right of indemnity from trust assets.⁶¹ If such claims did have access to Keystone’s right of indemnity, the risk of prejudice to Keystone’s creditors would be greater because the Appointees do not propose to retain any Bell Potter Proceeds to pay Underlying Investor Claims.⁶²

⁵⁷ Tracy (29 January 2026), [132].

⁵⁸ Tracy (7 November 2025), [97(b)].

⁵⁹ Tracy (29 January 2026), [96] – [113].

⁶⁰ See Tracy (29 January 2026), [114] where Mr Tracy identifies that this provision is conservative in light of the doubts held by the Appointees as to the existence and amount of Keystone’s entitlement to claim management fees.

⁶¹ Tracy (29 January 2026), [22].

⁶² Tracy (29 January 2026), [22].

- 56 For the reasons developed below, the Appointees submit that it is appropriate not to retain realisation proceeds in respect of the Underlying Investor Claims because they are contingent claims that are likely to arise from substantial breaches of duty by Keystone that would disentitle it from recourse to its right of indemnity and, thus, prevent Underlying Investors from being subrogated to that right. It is also consistent with cl 21.6(d) of the SMF Constitution, which confers a discretion on the responsible entity as to whether to retain funds to meet ‘contingent Expenses and liabilities’.
- 57 The Appointees emphasise at the outset that their contention that no right of indemnity would arise for the Underlying Investor Claims is not put forward for the purpose of preventing Underlying Investors from accessing trust assets. To the contrary, the whole purpose of the application is to distribute trust property to the Underlying Investors. The Appointees’ concern is that, if they were to retain realisation proceeds in a sufficient amount to pay out all potential Underlying Investor Claims, then any interim distribution would be impossible. The potential aggregate quantum of the Underlying Investor Claims would be of such magnitude that a sufficient provision could not be retained from the Bell Potter Proceeds. This would frustrate or substantially diminish the proposed interim distribution. It is to be recalled that the interim distribution is to be made for the ultimate benefit of Underlying Unitholders — save with respect to those who invested via MIML who have now recouped their underlying investment under the EU — for the purpose of alleviating the hardship to those investors caused by being deprived of their superannuation (or other savings), many of whom are now at retirement age without access to their investment in the SMF. As Mr Tracy deposes, “it would be a perverse outcome for the assertion of [Underlying Investor Claims] to prevent the making of an Interim Distribution or reduce its quantum where the Interim Distribution is sought primarily to alleviate hardship for underlying investors”.⁶³

D.3.1 Assumptions regarding basis for Underlying Investor Claims

- 58 Such Underlying Investor Claims as have been submitted have not articulated the basis of a claim against Keystone. Although a number of proofs of debt have been lodged by Underlying Investors asserting claims in the nature of damages, those proofs are confined to bare assertions and do not disclose any case theory or particulars. In the absence of any articulated claim, the Appointees are unable to assess the nature or aggregate quantum of Underlying Investor Claims. For the purposes of this application, as a matter of prudence,

⁶³ Tracy (7 November 2025), [96].

the Appointees proceed on the assumption that Underlying Investors may assert substantial damages claims against Keystone reflecting their investment losses in the SMF.⁶⁴

59 As presently understood, any such claims would be advanced by Underlying Investors (rather than the top-level registered unitholders) and would therefore not depend upon causes of action available only to members of a registered scheme: see e.g. Corporations Act, s 601MA. Rather, the claims may be framed by reference to alleged defects in product disclosure statements issued by Keystone for the relevant Classes between 2021 and 2024, or other alleged misleading or deceptive conduct in contravention of the various applicable prohibitions under the Corporations Act and ASIC Act.⁶⁵

60 Without making any admissions, the Appointees have identified statements in those PDSs which may be claimed to have been misleading or materially incomplete. For example:⁶⁶

- (a) the target asset class allocations in the PDSs do not accurately reflect the proportion of the relevant Classes' assets there were invested in the ADPF; and
- (b) statements in the PDSs that Keystone's arrangements with related entities in relation to the Classes' assets are on arm's-length commercial terms, which are inconsistent with arrangements with the ADPF (expanded upon below) whereby:
 - (i) Keystone as trustee of the ADPF had advanced \$212 million (as at 30 November 2023, the nearest date to the most recent PDSs) to related-party SPVs under loans to fund development projects without taking security until February 2024; and
 - (ii) the placing of ADPF-sourced funds in accounts of Chiodo Corporation Pty Ltd (**Chiodo Corporation**) and the subsequent use of those funds was, at best, highly irregular.

61 The Appointees are presently unable to assess matters such as reliance by individual investors or other claimant-specific issues affecting liability or quantum in the absence of any claims having in fact been properly articulated by Underlying Investors.

62 Notwithstanding the assumption that significant claims may be asserted, the Appointees seek directions to make the interim distribution on the basis that Keystone would not be

⁶⁴ Tracy (29 January 2026), [24] – [26].

⁶⁵ Tracy (29 January 2026), [26].

⁶⁶ Tracy (29 January 2026), [26].

entitled to claim an indemnity (and therefore those claims would not have access to Keystone's indemnity from SMF trust assets), because those contingent claims are likely to involve conduct by Keystone in conflict of interest (or related breaches) and/or in bad faith.

D.3.2 Overview of the ADPF

- 63 If Underlying Investors have damages claims against Keystone, those claims are likely to arise principally from Keystone's conduct in relation to the ADPF, which is expected to account for the SMF's largest investment losses. The SMF invested approximately \$305 million in the ADPF from total net unitholder investments of \$482 million, and unless the Appointees succeed in litigation concerning the ADPF, recoveries are likely to be limited to returns from the ADPF Developments and may fall below the Appointees' low-case estimate of \$20,566,345. By contrast, recoveries from the SMF's non-ADPF assets are expected to be comparatively strong, with anticipated realisations largely driven by the realisation of Bell Potter Securities, notwithstanding that the SMF's other non-ADPF investments are likely to result in losses.⁶⁷
- 64 Between 6 April 2022 and 31 May 2024, Keystone in its capacity as responsible entity for the SMF transferred \$304,948,416 to accounts held by Keystone in its capacity as trustee of the ADPF for the purchase of units in the ADPF for the benefit of the SMF. The SMF held all of the units in the ADPF.⁶⁸
- 65 Between 11 April 2022 and 14 June 2024, Keystone in its capacity as trustee of the ADPF made payments of at least \$305,691,108 to Chiodo Corporation. The Appointees' investigations indicate that ADPF funds constituted at least 88.6% of all deposits into Chiodo Corporation's accounts.⁶⁹
- 66 Of the amounts transferred to Chiodo Corporation, at least \$289,672,803.36 was recorded in the ADPF's accounting records as amounts drawn under loans for the purpose of funding property development projects (**ADPF Developments**) by eleven special purpose vehicle project entities (**SPVs**).⁷⁰
- 67 Despite the very large amounts being advanced under the loans, no security was taken by Keystone in respect of the loans until February 2024. Most of the loans initially provided

⁶⁷ Tracy (29 January 2026), [29] – [30].

⁶⁸ Tracy (29 January 2026), [32].

⁶⁹ Tracy (29 January 2026), [36].

⁷⁰ Tracy (29 January 2026), [37].

for interest to be payable on completion of the development project, and this was amended in February 2024 in a manner indicating interest may be repayable on demand. No interest was collected.⁷¹ Further, the lending occurred while third parties held first-ranking security over the land subject to the development projects for three of the SPVs.⁷² It is a serious breach of fiduciary duty to pay trust money by way of a loan which is unsecured and without collecting interest.⁷³

D.3.3 Role of Paul Chiodo and Ilya Frolov

68 Paul Chiodo:⁷⁴

- (a) has been an indirect 50% shareholder of Keystone at all times during the SMF's operation;
- (b) was a director of Keystone between 27 April 2020 and 27 May 2024 and was described in the Qualifying Class PDSs as an executive director;
- (c) was a director of CF Capital Investments Pty Ltd (**CF Capital**), which was appointed by Keystone as investor manager for the SMF, between 10 May 2019 and 17 June 2024, and was described in Qualifying Class PDSs as its investment director;
- (d) is the sole director and indirectly the sole shareholder in Chiodo Corporation;
- (e) was the sole director of nine of eleven of the SPVs; and
- (f) holds an indirect shareholding in all but one of the SPVs via interposed corporate shareholders.

69 Ilya Frolov:⁷⁵

- (a) has been an indirect 50% shareholder of Keystone at all times during the SMF's operation;
- (b) was a director of Keystone between 27 April 2020 and 29 December 2023 and was described in the Qualifying Class PDSs as an executive director; and

⁷¹ Tracy (29 January 2026), [38].

⁷² Tracy (29 January 2026), [39].

⁷³ *Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd* [2015] VSCA 9; (2015) 318 ALR 302, [223]-[224], [233], [236].

⁷⁴ Tracy (29 January 2026), [40].

⁷⁵ Tracy (29 January 2026), [41].

- (c) was a director of CF Capital between 10 May 2019 and 29 December 2023 and was described in PDSs as its executive director.

D.3.4 Application of ADPF funds by Chiodo Corporation

70 The Appointees' investigations have shown that a significant portion of the funds invested by the SMF in the ADPF were improperly diverted for non-development purposes or other non-investment purposes by Chiodo Corporation in the following circumstances:⁷⁶

- (a) approximately \$158 million was paid to accounts held by Robert Filippini and City Built Pty Ltd (**City Built**) (of which Mr Filippini was the sole director and shareholder) where:
- (i) there are no written contracts between Chiodo Corporation and City Built or Robert Filippini with respect to any of the ADPF Developments;
 - (ii) between 17 January 2022 and 28 May 2024, City Built issued invoices to Chiodo Corporation which referred to construction costs and expenses purportedly incurred in connection with the ADPF Developments and other developments with a purported total value of \$142,798,772.90 (including GST);
 - (iii) Robert Filippini did not hold a building licence until 29 May 2024;
- (b) the Appointees' investigations, including through expert reports valuing the work done on the ADPF Developments, indicate that the value of construction work undertaken on the ADPF Developments was approximately as follows (being substantially less than the amount of \$158 million purportedly paid to Mr Filippini and City Built in respect of construction costs for these developments):
- (i) 33 Davidson: \$3,604,795 excluding GST;
 - (ii) Norwood Ponds: \$7,542,000 excluding GST;
 - (iii) Warrigal Road: \$1,525,000 excluding GST;
 - (iv) Nicholson Street: \$4,248,000 excluding GST;
 - (v) Augustine Terrace: \$1,099,000 excluding GST;
 - (vi) Red Hill Terrace: no construction work from 21 January 2022;
 - (vii) 75 Port Douglas: no construction work from 23 January 2022;

⁷⁶ Tracy (29 January 2026), [43].

- (viii) Luxurious Resort: no construction work undertaken;
 - (ix) Chiodo K'Gari: no construction work undertaken;
 - (x) Proposed Venice Transaction: no construction work;
- (c) at least \$65 million was paid to lead generators for the purpose of sourcing new investors;
- (d) at least \$7.5 million was paid towards personal expenses of Mr Chiodo or operating expenses of Chiodo Corporation;
- (e) at least \$15.7 million was paid to other entities controlled by Mr Chiodo and Mr Frolov;
- (f) at least \$4.8 million was paid towards celebrity appearance fees, agents fees, travel costs and operating costs by 24Calibre Pty Ltd.
- 71 The Appointees have caused Keystone as trustee of the SMF to commence proceedings:⁷⁷
- (a) against Robert Filippini and City Built Pty Ltd, their related parties, Chiodo Corporation and Mr Chiodo with respect to the payments at described at 70(a) above;
 - (b) against Mr Frolov and related parties in relation to payments to Mr Chiodo and Mr Frolov's related entities with respect to the payments described at paragraph 70(e) above.
- 72 In the Filippini proceeding and Frolov proceeding (which are pending in this Court), it is alleged *inter alia* that Keystone breached its duties as responsible entity of the SMF and trustee of the scheme property to avoid conflicts of interest and duty and not improperly use its position to gain an advantage for itself or cause detriment to the members of the SMF by investing SMF funds in the ADPF and acquiescing in the payments from the ADPF the Chiodo Corporation.

D.3.5 Keystone's breaches of duty disentitle it from indemnity for Underlying Investor Claims

- 73 The duties of Keystone in respect of the SMF are set out in clause 3 of the SMF Constitution. Relevantly, clause 3.2 of the SMF Constitution provides that "[t]he Responsible Entity must manage Scheme Property and perform its obligations to the Trust

⁷⁷ Tracy (29 January 2026), [44].

under this document and the Applicable Standards”. The definition of “Applicable Standards” includes those applicable under the Corporations Act.

74 The statutory obligations to which Keystone is subject as responsible entity of the SMF under s 601FC(1) of the Corporations Act are thus picked up and applied equally in the SMF Constitution as duties to which Keystone is subject as trustee under that instrument. Those duties — which are appropriately characterised as ‘core’ duties in the nature referred to in *Nolan* and *Letten (No 17)* — include:

- (a) to act honestly: s 601FC(1)(a);
- (b) to exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity’s position: s 601FC(1)(b); and
- (c) to act in the best interests of the members and, if there is a conflict between the members’ interests and its own interests, give priority to the members’ interests s 601FC(1)(c).

75 Clause 3.2 of the SMF Constitution also picks up as a duty to which Keystone is subject as trustee, the obligation under s 601LA of the Corporations Act — which adopts the provisions of Chapter 2E of the Corporations Act *mutatis mutandis* in relation to managed investment schemes, subject to some express modifications — that a responsible entity of a managed investment scheme can only give a financial benefit to a related party if it obtains the approval of members in accordance with the prescribed process, and gives the benefit within 15 months of that approval, or otherwise if the benefit falls within the prescribed exceptions. Relevantly, here, those exceptions include where the benefit is given on terms that: (a) would be reasonable in the circumstances if the responsible entity and the related party were dealing at arm’s length; or (b) which are less favourable to the related party than the terms referred to in (a).

76 Although clauses 18.3(b) and 18.4 of the SMF Constitution — which are relied upon in the defences in the Frolov proceeding — purport to permit conflicted dealings by Keystone in its capacity as responsible entity and trustee of the SMF, the provisions are expressed to be subject to the Applicable Standards and thereby yield to the duties identified above.

77 It is submitted that, by the conduct identified in the preceding sections above, there is a *prima facie* case that Keystone engaged in widespread substantial breaches of:

- (a) its duties under s 601FC(1) to act honestly, to act with the requisite standard of care and skill, and not to prefer its interests to the interests of members of the SMF; and
- (b) the related party dealing prohibition under ss 601LA and 208 of the Corporations Act.

78 The contraventions arise most acutely from the following conduct, dealings and considerations:

- (a) allowing the transfer of approximately \$305 million of SMF funds to the accounts of the ADPF, and from there to Chiodo Corporation's accounts, involved a conflict between Keystone's duties to members and its officers' and ultimate shareholders' (i.e. Mr Chiodo and Mr Folov's) interests and was plainly not in the best interests of the SMF's members, including in circumstances where:
 - (i) until 4 February 2024, when security was taken, Keystone was aware that the loan documents for the ADPF Developments between Keystone and the SPVs were unsecured, and such loans could not properly be characterised as having been made on 'arm's length' terms or in the exercise of the applicable standard of care owed by Keystone to members;
 - (ii) Paul Chiodo was the sole director and ultimate shareholder of Chiodo Corporation, and the sole director and a shareholder of most of the SPVs, giving him the benefit of control of the funds by the unsecured loans from the ADPF, and reducing the oversight of the uses to which the funds were applied;
 - (iii) significant payments from ADPF funds were made to interests associated with Mr Frolov and Mr Chiodo without any appreciable benefit to members of the SMF;
 - (iv) in respect of the payments in the amount of approximately \$67 million to lead generators, there was similarly no appreciable benefit to members of the SMF;
- (b) the amount of \$305 million was vastly disproportionate to the amount of development work and expenses that had been undertaken or incurred with respect to the ADPF Developments, such that the advancing of this amount under the ADPF Loans was plainly unnecessary for its legitimate uses.

- 79 As already explained, without having received any Underlying Investor Claims that articulate a basis for liability to be visited upon Keystone, it is difficult for the Appointees to determine the nature and quantum of such claims that may be advanced by Underlying Investors in the future. This notwithstanding, the Appointees have identified (without admission) that potential Underlying Investor Claims for misleading or deceptive conduct or associated causes of action are most likely to arise from misleading statements and omissions in the various SMF PDSs issued by Keystone. Those statements include, significantly, that Keystone's arrangements with related entities in relation to the Classes' assets were on arm's-length commercial terms.⁷⁸
- 80 Using an Underlying Investor Claim for misleading or deceptive conduct arising on this basis as an example, there is a clear 'causal connection between the alleged breach of duty [i.e. the grave and dishonest breaches of duty identified above] and the liability or expense in respect of which indemnification is denied [i.e. the liability in respect of the Underlying Investor Claim].'⁷⁹ That obvious and significant causal connection is sufficient to disentitle Keystone from access to its right of indemnity, under cl 19.1 of the SMF Constitution (indemnity for any liability incurred in properly performing Keystone's trust duties and properly exercising its powers), to satisfy the Underlying Investor Claims, and distinguishes the hypothetical liability of Keystone for a claim of this nature from the more anodyne misleading or deceptive conduct claims considered in *Gastios* and *Traditional Values* for which the right of indemnity remained available.
- 81 At this stage, the Appointees are not in a position to identify the complete universe of all potential Underlying Investor Claims that may be advanced, nor whether all such claims would be causally connected to the breaches of Keystone's 'core' duties as responsible entity and trustee of the SMF identified above. However, the Appointees submit that, in circumstances where the identified breaches were endemic and infected the SMF's entire investment in the ADPF, the Court should accept that it is unlikely Keystone could have recourse to its right of indemnity in respect of most conceivable Underlying Investor Claims.
- 82 For these reasons, the Appointees submit that potential Underlying Investor Claims should be characterised as claims against Keystone in its own right, for which any right of indemnity from SMF assets would be denied. Accordingly, the Appointees submit that

⁷⁸ Tracy (29 January 2026), [26(d)].

⁷⁹ *Re Jacks Corner Pty Ltd (in liq)* [2023] NSWSC 1340, [64] (Williams J) citing *Re Staff Benefits Pty Ltd* [1979] 1 NSWLR 207, 214 (Needham J); *Gastios* [2002] ATPR 41-864, [18] (Spigelman CJ).

they should not be required to retain any amounts from the interim distribution to provision for Underlying Investor Claims.

D.3.6 Keystone's breaches of duty disentitle it from indemnity for Unitholder Damages Claims

- 83 To the extent that the Appointees are unable to obtain the sought-for deed polls from each Qualifying Class unitholder, the Appointees submit that the above analysis would also apply to Unitholder Damages Claims, and they should be characterised as claims against Keystone in its own right, for which any right of indemnity from SMF assets would be denied, and not subject to any retention of funds.

D.4 Provision for costs and expenses of the winding up and receivership of the SMF

- 84 The Appointees also propose to retain provisions to cover potential costs and expenses of the winding up and receivership of the SMF in the following amounts:⁸⁰

- (a) Invoiced custodian fees: \$19,957.19
- (b) Invoiced NRFA fees and disbursements: \$4,206,186.11
- (c) Forecast custodian fees: \$480,000
- (d) Forecast legal fees and disbursements: \$17,911,334.62
- (e) Forecast receivership and liquidation remuneration and expenses: \$10,971,095.63
- (f) Potential adverse costs claims: \$19,500,000
- (g) Potential cross-undertaking liability: \$Nil
- (h) Potential taxation liability: TBD.

- 85 The Appointees have given cross-undertakings as to damages in the Filippini proceedings in relation to two freezing orders, one in relation to assets with a total value of up to around \$160 million and another in relation to the amount of \$514,641.10.⁸¹ In light of the exceptions to the relevant freezing orders and / or proposals made by the Appointees to move frozen cash into interest-bearing accounts, the Appointees do not foresee claims under the cross-undertakings and so do not propose to provision for claims.⁸² However,

⁸⁰ Tracy (29 January 2026), [62].

⁸¹ Tracy (29 January 2026), [44(a)], [80], [91].

⁸² Tracy (29 January 2026), [90], [92]-[93].

this view is provisional pending receiving responses to enquiries to the respondents to the freezing order regarding any loss they may suffer from the orders.⁸³

- 86 There is significant complexity in Keystone’s tax position as a result of inadequacies in its books and records, historical breaches of administrative requirements of an “attribution managed investment trust”, and the situation where the SMF’s investment in the ADPF was predominantly not used for the intended investment purposes. The Appointees intend to determine the amount of the retained for Keystone’s tax liabilities following any feedback from the ATO to give the Appointees comfort that their estimates of potential tax liabilities will not be exceeded.⁸⁴

E CONCLUSION

- 87 For the reasons identified above, the Appointees submit that the proposed interim distribution is appropriate and justified as a practical measure to alleviate the hardship suffered by many investors who would otherwise have to wait years before receiving any distribution, and that the amounts the Appointees propose to retain are sufficient to avoid the risk of any prejudice to the rights of creditors of the SMF or other interested parties. The Appointees respectfully submit that the Court ought thus grant the directions and judicial advice sought in paragraphs 4 and 5 of the amended interlocutory process.⁸⁵

Date: 29 January 2026

O Bigos

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⁸³ Tracy (29 January 2026), [90], [92]-[93].

⁸⁴ Tracy (29 January 2026), [115]-[117].

⁸⁵ In addition to s 601NF(2) of the Corporations Act and s 63 of the Trustee Act (which are referred to in paragraph 4 of the amended interlocutory process), s 81 of the Trustee Act is also relied upon.