# NOTICE OF FILING

## Details of Filing

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## 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.

**IN THE MATTER OF PROSPERO MARKETS PTY LTD**

**(LIQUIDATORS APPOINTED) ACN 145 048 577**

**NSD1020/2024**

**PLAINTIFFS' OUTLINE OF SUBMISSIONS**

## Introduction

1. By the Amended Originating Process filed 20 September 2024, the liquidators of Prospero Markets Pty Ltd (**Company** or **Prospero**) seek directions pursuant to s 90-15(1) of the *Insolvency Practice Schedule (Corporations)* or, alternatively, section 63 of the *Trustee Act 1925* (NSW) in relation to the return of funds held on trust for the Company's clients (**Client Money**) and for remuneration approval in relation to the dealings relating to the trust funds.

2. The background to this application and to the winding up of the Company is described in the affidavits of Jonathan Keenan sworn 29 July 2024 (**First Keenan Affidavit**), 15 October 2024 (**Second Keenan Affidavit**) and 18 February 2025 (**Third Keenan Affidavit**).

3. The Company was wound up by ASIC on 10 April 2024 on just and equitable grounds relating to a range of concerns regarding compliance with obligations to file audited financial accounts and reporting under the laws and regulations governing holders of an AFSL: First Keenan Affidavit at [9]. The Company came under scrutiny of the federal authorities in relation to a related money laundering investigation: First Keenan Affidavit at [11]-[12]. That investigation concerned individuals involved in the operations of Prospero: First Keenan Affidavit at [13]-[17] and [32]-[45].

4. The Company ceased trading and all clients' positions were closed prior to the appointment of the liquidators: First Keenan Affidavit at [23].

5. The asset position of the Company is set out at [64] and [65] of the First Keenan Affidavit.

6. The Client Money is the amount of over $19million (First Keenan Affidavit table at [64] 'CBA Client Accounts' and [68] to [73]) held by the liquidators and governed by Subdivision A of Div 2 of Pt 7.8 of the *Corporations Act 2001* (Cth) (commencing at s

981A) as well as the relevant regulations in *Corporations Regulations 2001* (commencing at 7.8.01A).

7. The liquidators' objective is to distribute the Client Money to the clients of the Company without delay. The provisions referred to above regulate such distribution to some extent, including providing that if the money is insufficient it will be paid '*in proportion to the amount of each person's entitlement*' and if there is, on the other hand, money left over after distribution it is "*taken to be the money payable to financial services licensee*" (that is, payable to Prospero): s 981F and r 7.8.03(6)(d) and (e) '*How money to be dealt with if licensee ceases to be licensed etc*'.

8. Two types of issues arise in relation to which directions of the Court are sought:

    a. Legal issues:

        i. Determining whether the Client Money or the Company's general funds are the proper source of payment of the liquidators' remuneration and costs of the distribution of the Client Money (order 1); and

        ii. If the Client Money is the proper source of payment (creating a shortfall at distribution) whether the clients are unsecured creditors of the Company as to the balance of their entitlement (order 15).

    b. Pragmatic issues regarding distribution:

        i. Pooling the four AUD and USD bank accounts in which the Client Money is held and related currency conversion (orders 9 and 12);

        ii. Treatment of the persons who traded via the MT4 Offshore Database whom the liquidators do not consider having any entitlements to the Client Money but who, to date, lodged proofs of debt exceeding $4.9million (orders 10(a)(i)(B), 19 and 20);

        iii. Dealings with client balances under $100 (order 11);

        iv. Dealing with lack of fulsome records in relation to 'bonus' promotions (order 13);

        v. Dealing with unclaimed money (orders 14).

**Legal principles (directions pursuant to s 90-15 and Trustee Act, s 63)**

9. The liquidators seek directions pursuant to s 90-15 of subdivision B of Division 90 of the *Insolvency Practice Schedule*, which is Schedule 2 to the *Corporations Act 2001* (Cth) (the **Act**). That section permits the court to make "*such orders as it thinks fit in relation to the external administration of a company*". A non-exclusive list of factors which may be taken into account when exercising the power is contained in sub-section 90-15(4).

10. The question of whether to exercise that power is to be answered by reference to the principles that applied to the exercise of the discretions previously contained in s 479(3) and s 511 of the Act: *Re Walley (as administrators of Poles & Underground Pty Ltd and Icon Plant Pty Ltd)* [2017] FCA 486 per Gleeson J at [41].

11. In *Re Ansett Australia Ltd and Korda* (2002) 115 FCR 409, concerning s 479(3), Goldberg J stated at [65]:

> *"[T]he prevailing principle adopted by the courts, when asked by liquidators and administrators to give directions, is to refrain from doing so where the direction sought relates to the making and implementation of a business or commercial decision, either committed specifically to the liquidator or administrator or well within his or her discretion, in circumstances where there is no particular legal issue raised for consideration or attack on the propriety or reasonableness of the decision in respect of which the directions are sought. There must be something more than the making of a business or commercial decision before a court will give directions in relation to, or approving of, the decision. It may be a legal issue of substance or procedure, it may be an issue of power, propriety or reasonableness, but some issue of this nature is required to be raised. It is insufficient to attract an order giving directions that the liquidator or administrator has a feeling of apprehension or unease about the business decision made and wants reassurance. There must be some issue which arises in relation to the decision. A court should not give its imprimatur to a business decision simply to alleviate a liquidator's or administrator's unease. There must be an issue calling for the exercise of legal judgment."*

12. The Court may give directions to provide guidance on matters of law or to protect the administrators (or liquidators) against accusations that they have acted unreasonably: *Re Renovation Boys Pty Ltd* [2014] NSWSC 340 at [5] (***Renovation Boys***).

13. It follows that s 90-15 provides a proper basis for the Court to make orders of the kind which the liquidators seek in the present case.

14. The appropriateness of that course is underscored by the circumstance that some of the persons using the MT4 Offshore Platform (as defined in the First Keenan Affidavit at [29(b)] and [55] to [57]) have alleged, but not established, that the Company was holding money for their benefit (as well as for the benefit of the persons using the MT4 AU Clients Platform) so that the giving of directions will protect the liquidators from accusations of unreasonable conduct by any persons who used the MT4 Offshore Platform whom the liquidators do not consider to have any entitlements to the Client Money.

15. The relevant principles relating to s 63(1) of the *Trustee Act 1925* (NSW) were usefully summarised by Markovic J in *Kelly (Liquidator), in the matter of Halifax Investment Services Pty Ltd (in liquidation) v Loo* [2021] FCA 531 at [17] to [19]:

> *"Section 63(1) of the Trustee Act 1925 (NSW) (Trustee Act) enables a trustee to apply to the Court for an opinion, advice or direction on any question in relation to the management or administration of the trust property or the interpretation of the trust instrument.*
>
> *The principles in respect of judicial advice to trustees were considered in Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66 (Macedonian Orthodox Church). There, the plurality (Gummow ACJ, Kirby, Hayne and Heydon JJ) observed at [56]-[60] that there is no limitation on the power of the Court to give judicial advice pursuant to s 63 of the Trustee Act but there is one jurisdictional bar to relief under the section. That is that an applicant "must point to the existence of a question respecting the management or administration of the trust property or a question respecting the interpretation of the trust instrument": see Macedonian Orthodox Church at [58].*
>
> *At [64] of Macedonian Orthodox Church, the plurality observed that s 63 of the Trustee Act operates as an exception to a court's ordinary function of deciding disputes between competing litigants and affords a facility for providing private advice to a trustee, noting that it is private advice because, as is evident from the operation of s 63(2) of the Trustee Act, its function is to give personal protection to the trustee. Section 63(2) of the Trustee Act provides that, if the trustee acts in accordance with the opinion advice or direction, the trustee shall be deemed, so far as regards the trustee's own responsibility, to have discharged its duty as trustee in the subject matter of the*

*application provided that the trustee has not been guilty of any fraud, wilful concealment or misrepresentation in obtaining the opinion, advice or direction."*

**Issues**

16. Below I will deal with the matters in the following order:

    a. *First*, the issue as to whether the liquidators' remuneration and expenses should be paid from the Client Money or from the general funds of the Company;

    b. *Second*, the other substantive directions sought in relation to pragmatic issues arising in relation to the distribution of the Client Money;

    c. *Third*, the quantum of the liquidators' remuneration and costs which the court is asked to approve.

**Source of funds for remuneration and expenses and potential shortfall (orders 1 and 15)**

17. Proposed order 1 relates to the source from which the liquidators' costs and remuneration of the distribution of the Client Money should come (Client Money or general Company funds). Order 15 relates to the consequences of such costs/remuneration coming out of the Client Money (creating a shortfall of that money where there was none).

*Order 1 - source of funds for remuneration and expenses*

18. Order 1 seeks:

    *Order pursuant to s 90-15 of the IPS-Corp and/or s 63 and s 81 of the Trustee Act that, subject to orders [2] to [8] below, the Plaintiffs are justified in using and applying the following funds to pay their remuneration, and cost and expenses relating to the dealings with the Client Money:*

        *(a) the funds held in the CBA Client Accounts* [Client Money]*; or, alternatively,*

        *(b) the funds held in the General Liquidation Account* [Company's general funds].

19. I note, to avoid any confusion, that this order relates only to the expenses (and remuneration) relating to the distribution of the Client Money. The expenses (and remuneration) relating to the general liquidation work have been separated by the liquidators, approved by the creditors, and are intended to be separately paid from the Company's general funds in the usual way (see the updated Estimated Outcome Statement

prepared by the liquidators on 18 February 2025, annexed to the Third Keenan Affidavit at [7] and Exhibit JSK-3 at p.2 (**Updated EOS**), Scenario 1 in section '*Estimated Cost of Liquidation (Incl. GST)*').

20. Accordingly, Order 1 relates only to the costs of the work done by the liquidators in relation to the Client Money (the trust asset of the Company) (see Updated EOS, Scenario 1, section '*Trust Assets*' entries commencing with '*Less:…*").

21. If all the remuneration and expenses are paid:

    a. **From the general funds** - a surplus of Client Money will likely arise (Scenario 2 in the Updated EOS). In this scenario to treatment of the surplus is regulated by *Corporations Regulations 2001* r 7.8.03(6)(e) ('*How money to be dealt with if licensee ceases to be licensed etc'*), with the result that that money will be '*taken to be money payable to the financial services licensee'*. This is what the proposed order 10(b)(iii) reflects and no specific direction is sought;

    b. **From the Client Money** - a shortfall of Client Money arises (Scenario 1 in the Updated EOS). The consequences of any such shortfall are dealt with in paragraphs 35 to 42 below in the section in relation to the proposed order 15.

22. In the wording of order 1 the liquidators do not take a position whether their remuneration and the expenses of the distribution should be paid from the Client Money or from the general Company funds. They are prepared to accept the Court's determination in this regard. However, to assist the Court, I set out below the relevant principles in relation to the payment of fees from the general liquidation account, trust accounts or a combination of both.

23. <u>Legal principles relating to the source of payment:</u> The relevant principles were summarised and applied in many first instance decisions: see for example, Gleeson J in *Kelly, Re Halifax Investment Services Pty Ltd (In Liq) (No 6)* [2019] FCA 2111 at [6] (***Halifax***) (where the costs were ultimately paid from the trust asset), Black J in *In re MF Global Limited (in liq) (No 2)* [2012] NSWSC 1426 at [55] (***MF Global***) (where the costs were ultimately paid from the trust asset); McLelland J in *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 685-689 (***GB Nathan***) (where the costs were paid from the general funds of the company).

24. The question of the payment of costs and remuneration from trust assets was considered also in some detail at the appellate level by the Full Court of the Supreme Court of South Australia in *Re Suco Gold Pty Ltd (in liq)* (1983) 7 ACLR 873 (***Suco Gold***) in relation to a position of a company which acted as trustee of two unit trusts relating to gold mining projects and had no separate corporate assets. The Court concluded that the costs should be paid from the trust assets.

25. Two comments should be made at the outset about the authorities.

26. *First*, commonly, but not always (see, for example, *GB Nathan* where both sources of funds – trust and general - were available) the question arose where there were no general company funds at all and the liquidators therefore sought for all costs and remuneration (of the general liquidation and the trust distribution) to be paid from the funds the company held on trust. This is not such a case, here there is choice between the two sources, each of which could cover the costs and the direction is sought only in relation to the trust distribution component.

27. *Second*, the cases often refer to a distinction between a company which is a trustee of a trading trust (like in *Re Suco Gold*), on the one hand, and a company which, in addition to its general business, holds funds on trust (like in *GB Nathan*). Which category Prospero falls into is relevant to the proper application of the applicable authorities.

28. Prospero operated a foreign exchange over the counter derivative issuing business, offering margin foreign exchange contracts and contracts for difference. It was in the operation of that business that it held, as trustee, the Client Money required in relation to the financial products it offered: First Keenan Affidavit at [18] to [22]. Prospero was not a trading trust although, as was the position in *Halifax* (at [31]-[32]), given the nature of its business and the crucial role of the Client Money, Prospero acted as a trustee to a significant extent (in that its main business activities involved transactions with the Client Money being invested, kept and returned).

29. In the present circumstances the summary of principles by Black J in *MF Global* (at [55]) is most helpful:

    a. *"The court has an inherent equitable jurisdiction to allow a trustee remuneration, costs and expenses out of trust assets, which extends to a person such as a liquidator*

*which is for practical purposes controlling a trustee: Re Appln of Sutherland [2004] NSWSC 798; (2004) 50 ACSR 297; Trio Capital Ltd (admin apptd) v ACT Superannuation Management Pty Ltd above*";

b. "*…that jurisdiction may not be exercised where the company does not solely act as trustee and has sufficient beneficial assets to meet the liquidators' remuneration, costs and expenses, and where the work done by the liquidator in relation to trust assets may properly be treated as done for the purposes of winding up the company's affairs. The principle that, where a company has assets which are not held on trust, the liquidator's costs should usually fall on its non-trust assets was recognised in Re GB Nathan & Co Pty Ltd (in liq) (1991) 24 NSWLR 674 at 685–689 and the authorities were considered by Young CJ in Eq in Re Greater West Insurance Brokers Pty Ltd [2001] NSWSC 825 ; (2001) 39 ACSR* 301".

c. *"In Re French Caledonia Travel Service Pty Ltd (in liq) [2003] NSWSC 1008; (2003) 59 NSWLR 361; 48 ACSR 97 at [212], Campbell J noted the possibility that such costs could be shared between the distributable property of the company and trust assets, but it was not necessary to decide that question in the circumstances of that case."*

30. The possibility of the responsibility being shared between the general funds and the trust assets comes, as noted above, from Campbell J's judgment in *In Re French Caledonia Travel Service Pty Ltd (in liq)* [2003] NSWSC 1008; (2003) 59 NSWLR 361; 48 ACSR 97 at [212]:

> *[212] To the extent that the liquidator does work which would entitle him both to remuneration as liquidator, and also to payment in accordance with the principle recognised in Berkeley Applegate, there is a situation where two funds – the distributable property of the company, and the trust assets – are each liable to bear that expense. If two funds are both liable to meet an expense, principle ordinarily requires that there be contribution between the two funds in meeting that expense. As this is a case where there are no assets of the company available to meet the liquidator's general expenses it is not necessary to decide whether, if there were both trust assets, and other assets of the company, available to meet expenses of the liquidator which fell into this "overlap" area, there is any reason to deny the application of contribution in*

*the case of the liquidator of a corporate trustee. (Arguments for denying it and requiring the liquidator to resort primarily to the non-trust assets, so far as liquidator's remuneration were concerned, though possibly not concerning out-of-pocket expenses, might possibly be put by analogy with a trustee's inability to make a profit from his trust. An argument against denying it might be put that the trust beneficiaries ought not freeload on the general creditors concerning an expense for their mutual benefit.) (…)"* [underlining added]

31. In the circumstances of Prospero, the work done by the liquidators in relation to Client Money (identifying trust funds, identifying beneficiaries, organising distribution etc) may properly be treated as having a double aspect: see *GB Nathan* at 688C-E. It is work necessary for the purposes of winding up the company's affairs but it is also work in the administration of the trust on which the Client Money is held.

32. The concept of contribution between the funds raised by Campbell J in *French Caledonia,* although possibly appropriate in some circumstances, does not appear to be well suited in the circumstances of Prospero. The trust relating to the Client Money was not just incidental to the Company's operation. It was necessary given the nature of the business and the strict regulations of the *Corporations Act.* The dealing with the Client Money was the primary object of the business.

33. Further, the clear main object of the relevant *Corporations Act* provisions which required separation of the Client Money (Subdivision A of Div 2 of Pt 7.8 of the *Corporations Act 2001* (Cth) and *Corporations Regulations 2001*) was the protection of the funds so that they could be returned to the clients in full at any point in time.

34. In those circumstances, the potential arguments raised by Campbell J at [212] of *French Caledonia* for sharing between the funds are not convincing. There appears to be a good reason, given the nature of Prospero's business and its primary objective of protecting the Client Money held by it according to the regulations, why the clients of Prospero should '*freeload on the general creditors'*. (The possibility of the costs and remuneration regarding administration of the Client Money being shared between the Client Money and the general funds has not been shown on the Updated EOS but could easily be presented if required).

*Order 15*

35. Order 15 seeks:

> *Order that, to the extent that the entitlements of the clients are not fully paid as a result of any deficit in the Client Money whether resulting from the payment of the remuneration, costs and expenses referred to in each of the orders [2] to [7] above (and any further remuneration, costs and expenses approved by the Court) or otherwise, the Plaintiffs are justified in treating the shortfall to those clients as unsecured creditors of the Company as to the balance of those entitlements.*

36. The direction sought in order 15 becomes relevant only if the Court directs in order 1 that any of the liquidators' costs and remuneration of the distribution of the Client Money should come from the Client Money, creating a shortfall.

37. In those circumstances the question arises what, if any, claim do the clients have against the Company for a shortfall resulting, directly, from the costs of distribution incurred by the liquidators (as opposed to a shortfall caused by insufficient balance of the Client Money as at the date of winding up of the Company).

38. Such a shortfall would be a result of the distribution process itself and not any shortfall in the segregated trust funds as at the time of the winding up. In other words, the costs of the distribution process would create a shortfall where there was none before. A question arises in those circumstances whether the clients are unsecured creditors of the Company for the balance of their entitlement and if so, what is the nature of their claim.

39. Order 15 seeks a direction that the liquidators would be justified in treating the clients as unsecured creditors of the Company for the balance of their entitlement. Scenario 1 in the Updated EOS reflects that approach (see '*Shortfall for client liabilities*' in '*Unsecured Creditors*').

40. In the circumstances, the cause of action that each of the clients would have against the Company, justifying them becoming unsecured creditors, would need to relate to the Company's conduct which led to the winding up by ASIC (on just and equitable grounds) and the resulting loss in the form of the reduction of the Client Money by the costs of distribution in a winding up scenario.

41. The Company, as trustee, owed a duty to exercise the same care and skill "*as an ordinary prudent man of business would exercise in conducting the business as if it were his own*"[1]. At least arguably it breached that duty by the conduct which led to the winding up by ASIC on just and equitable grounds (specifically a range of concerns regarding compliance with obligations to file audited financial accounts and reporting under the law and regulations governing holders of an AFSL): First Keenan Affidavit at [9].

42. The conduct of the Company which led to a winding up was in breach of its duty, in its role as trustee of the Client Money, to exercise the required care and skill. That breach led ultimately to the incurring of the distribution costs which caused the shortfall. The beneficiaries (the Company's clients entitled to the Client Money) could hold the Company, as trustee, liable to restore the trust funds and to make good any loss caused by the breach of trust.[2] The Company, in its capacity as trustee of the Client Money, would therefore be liable to make good the loss caused by the breach by paying to the estate the amount which has been lost (the amount of costs incurred).[3] That amount would then, as Client Money, be ultimately distributed to the clients, in proportion to the amount of each person's entitlement: *Corporations Regulations 2001* r 7.8.03(6)(d).

**Pragmatic distribution issues**

43. The remainder of the directions sought do not relate to a defined legal issue. Rather, they comprise pragmatic solutions for issues which arise as part of the distribution and are not directly regulated by the law.

44. In *Re BBY Ltd (Recs and Mgrs Apptd) (In Liq) (No 2)* [2018] NSWSC 346, Brereton J explained the following as to the nature of such pragmatic remedies in the context of this type of application (in that case specifically in relation to the proposed pooling of accounts) (at [40]-[41] and [61]):

> *[40] (…)in a liquidator's application for directions, courts often have to do "rough justice" by reason of the limitations of the available evidence, in the light of what is reasonably practical and economical, and judgments may be made on evidence much inferior to that which would be required to sustain a beneficiary's claim in adversarial proceedings. Campbell J (as he then was) explained that while a liquidator must*

[1] J D Heydon, M J Leeming, *Jacobs Law of Trusts in Australia*, 8th edition at [17-18].
[2] J D Heydon, M J Leeming, *Jacobs Law of Trusts in Australia*, 8th edition at [22-03].
[3] J D Heydon, M J Leeming, *Jacobs Law of Trusts in Australia*, 8th edition at [22-05].

*distribute the company's funds—or funds under its control as a trustee — in accordance with the legal entitlements of people to those funds, findings as to what those legal entitlements are depend upon the evidence and inferences properly drawn from it, and where a liquidator seeking to administer a fund knows no more than that the fund is held on trust and that there are a number of potential claimants whose merits he cannot on any rational basis distinguish between, a liquidator may be justified in distributing the fund amongst the claimants proportionately to their claims, and it may be appropriate to direct the liquidator accordingly*

*(…)*

*[41] Thus the liquidator — and the Court — has to do the best it can with the available evidence. One reason for that is that the fund has to be distributed, one way or another.*

*(…)*

*[61] The nature of the proceeding as a liquidator's application for directions and advice is fundamental, not least because it involves questions of pragmatism, informed but not ruled by principle. Quite different considerations may apply, for example, on a suit by a beneficiary seeking a tracing remedy against a recipient fund. In such a case, the tracing beneficiary would have to prove that its moneys could be followed into the recipient fund, whereas in the context of a liquidator's application for directions, as French Caledonia indicates, a liquidator (and then Court) has to do the best one can with evidence that is often imperfect, or worse."*

45. The solutions proposed in the orders and discussed below need to be read with that approach in mind.

<u>Pooling bank accounts and related currency conversion (orders 9 and 12)</u>

46. Client Money is in four bank accounts differentiated by the client status (wholesale/retail) and currency of deposits (AUD/USD) (referred to by Mr Keenan as the **CBA Client Accounts**): First Keenan Affidavit at [64], [67] - [69].

47. The liquidators have undertaken some investigations as to whether there is any possibility of any of the Client Money having been deposited into the Company general accounts. No obvious issues have been identified to date: First Keenan Affidavit at [69].

48. The liquidators have not to date completed the process of tracing the deposits made by clients into the CBA Client Accounts. Such process would be time consuming and

expensive, if possible at all (due to the manner in which the deposits took place by way of 'bulk transfers'): First Keenan Affidavit at [70]-[71].

49. The evidence discloses that the liquidators:

    a. Do not have convenient records dividing the clients into the four groups to which the four bank accounts, CBA Client Accounts, appear to relate: AUD/wholesale, USD/wholesale, AUD/retail, USD/retail: First Keenan Affidavit at [72];

    b. Are able to determine which clients held USD denominated database balances and those who held AUD denominated database balances. If the pooling was to happen only within the USD and AUD accounts, this would result in a potential shortfall in the USD funds and surplus in the AUD funds, the reason for which is unknown: First Keenan Affidavit at [75(d)]. It is possible, but not certain, that such identification is achievable after further investigations (at a further cost to the clients and creditors): First Keenan Affidavit at [70]-[74].

50. In light of the above, Mr Keenan expresses an opinion that the most efficient manner of distributing the Client Money will involve pooling the funds in the four bank accounts into one interest bearing AUD account before distribution: First Keenan Affidavit at [75]. It is proposed that the amounts in the USD denominated account will be converted into AUD at the applicable bank rate at the time of the pooling.

51. Should that be allowed by the Court a conversion rate would need to be adopted to convert into AUD those of the MT4 AU Clients Database balances which are recorded in USD: First Keenan Affidavit at [76]. The liquidators propose to do so at the rate as at 10 April 2024 (the date of the winding up order and their appointment). Adoption of such date would be consistent with the approach adopted in *Corporations Act 2001*, s 554C(2) in relation to proofs of debt in foreign currency in the liquidation of a company.

52. In light of the above, in the proposed order 9, the liquidators seek a direction that they are justified in:

    *"(a) treating the money held in the CBA Client Accounts as the full the extent of the funds held by the Company for its clients pursuant to Part 7.8 of the Corporations Act 2001 (Cth) (Client Money); and*

*(b) pooling the Client Money for the purposes of the Proposed Distribution Process into a single, interest-bearing bank account held in the Company's name controlled by the Plaintiffs."*

53. To allow the pooling proposed in order 9 to occur and the distribution to proceed on the pooled basis, in the proposed order 12, the liquidators seek a direction that they are justified:

*"for the purposes of calculating each client's proportionate entitlement to the Client Money and for the purpose of pooling and distributing same, in converting any client entitlements in foreign currency to Australian dollars at the exchange rate of 0.6621 being the exchange rate as at 10 April 2024 (the date of the Plaintiffs' appointment)."*

54. The nature of the jurisdiction to order pooling in this context was explored by Jagot J in *Krejci, in the matter of Union Standard International Group Pty Limited (in liq)* [2021] FCA 1483 at [42] and following. Her Honour noted at [46]:

*"All a court can do in circumstances where it is not "possible to work out precisely who is entitled to what moneys in particular segregated accounts" is to "permit the moneys … to be pooled with a view to their proportionate distribution,"*

55. In *Re BBY Ltd (Recs and Mgrs Apptd) (In Liq) (No 2)* [2018] NSWSC 346, Brereton J described the nature of the power to order pooling in these circumstance as follows at [83]:

*"The pragmatic nature of the jurisdiction means that neither strict proof of mixing such as would entitle a beneficiary to an equitable proprietary remedy, nor absolute impossibility of tracing, is required; pooling may be directed where the identification and tracing of the interests of individual clients is not in the circumstances of the particular case reasonably and economically practical, on the basis that it is reasonable in the circumstances that the funds be regarded as irreversibly deficient and mixed."*

56. It is clear that if several bank accounts have been maintained, they will not be pooled simply on the basis of some notion of 'common misfortune' that the clients must share equally. Pooling is justified if there is some mixing between the accounts: Jagot J in *Krejci, in the matter of Union Standard International Group Pty Limited (in liq)* [2021] FCA 1483 at [48].

57. Given the evidence in this case, it is the liquidators' position that pooling is justified because mixing cannot be excluded (and appears somewhat likely given the surplus and shortage between the two currency groups) and because, pragmatically, the liquidators otherwise face a practical obstacle at distribution caused by the lack of fulsome records as to the wholesale/retail clients within each currency group. Furthermore, the liquidators consider any tracing exercise to be economically impractical (if it is possible at all).

Dealing with client balances under $100 (order 11)

58. In the proposed order 11, the liquidators seek a direction that they are justified in:

> "*treating persons listed in the MT4 AU Clients Database who have an 'Equity' or 'Balance' amount (as the case may be) recorded as AUD$100 or less, as having no right to participate in the distribution of the Client Money*."

59. The liquidators propose to treat clients who have an entitlement of $100 or less as having no entitlement to Client Money. This is a purely pragmatic solution, contrary to the actual legal position.
60. It is put forward because the administrative cost of dealing with such claims immediately exceed the amount of the entitlement, reducing the amount available to clients generally: First Keenan Affidavit at [101].
61. Such solution has previously been accepted by the courts in similar situations: *Re BBY Ltd (Recs and Mgrs Apptd) (In Liq) (No 2)* [2018] NSWSC 346 at [393]-[397].

Dealing with lack of fulsome records in relation to bonus promotions (order 13)

62. In the proposed order 13, the liquidators seek a direction that they are justified in:

> *"assessing the clients claim in relation to withdrawals of credit bonuses recorded in the MT4 AU Client Database by reference to the conditions set out in the 'Credit Bonus Promotion Rules Wholesale Client Only' updated as at 1 October 2023."*

63. The background to this issue is addressed at [109] to [117] of the First Keenan Affidavit. The total amount in issue is $277,480: First Keenan Affidavit at [113].
64. In short, the liquidators do not have perfect records allowing them to assess the, additional, entitlement of some of the clients to contractually agreed bonuses and cannot be sure that the terms and conditions document they have is the one applicable to all of the affected clients.

65. In the circumstance, the liquidators propose a pragmatic approach allowing them to apply the terms they have to all affected clients.

Dealing with unclaimed money (orders 14)

66. The liquidators do not have a Company record of the bank account details for all clients in the MT4 Databases: First Keenan Affidavit at [79].
67. They are therefore practically not able, at this time, to return the money to those clients.
68. To address this, in the proposed order 14, the liquidators seek a direction that they are justified in:

    *(a) requesting in the Admitted Entitlement Notice that all clients in the MT4 AU Clients Database who, to date, have failed to provide valid bank account details for distribution, provide such bank account details within 14 days of the date of the Admitted Entitlement Notice;*

    *(b) if no such bank details are provided within the time provided in order [(a)] above, paying the distribution of the Client Money for the relevant person to:*

        *(i) The Australian Securities and Investments Commission in accordance with s 544 of the Corporations Act 2001 (Cth) ('Unclaimed money to be paid to ASIC'); or*

        *(ii) alternatively, into this Court.*

69. Payment into Court would preserve the clients' right to some extent, should they later seek to recover. The payment to ASIC pursuant to s 544 of the *Corporations Act 2001* (Cth) ('Unclaimed money to be paid to ASIC') would extinguish such rights.
70. In circumstances where a long and careful process is being followed at the time of distribution finality afforded by the payment into ASIC appears appropriate but the liquidators would abide by the Court's decision in this respect.

Distribution process and MT4 Offshore Database issue (orders 10, 19 and 20)

71. Order 10 regulates the mechanics of the distribution process, including the manner of determining the balance amount for each client and the potential dispute resolution process.
72. Orders 19 and 20 relate to the usual statutory distribution notice requirements under *Trustee Act 1925* (NSW), s 63(8) and (10).

73. The s 63 issue in orders 19 and 20 can be disposed of briefly:

a. Equivalent orders were made, for example, by Markovic J in *Kelly (Liquidator), in the matter of Halifax Investment Services Pty Ltd (in liquidation) v Loo* [2021] FCA 53;

b. s 63(8)-(11) of the *Trustee Act 1925* (NSW), provides:

> *(8) Where the question is who are the beneficiaries or what are their rights as between themselves, the trustee before conveying or distributing any property in accordance with the opinion advice or direction shall, unless the Court otherwise directs, give notice to any person whose rights as beneficiary may be prejudiced by the conveyance or distribution.*
>
> *(9) The notice shall state shortly the opinion advice or direction, and the intention of the trustee to convey or distribute in accordance therewith.*
>
> *(10) Any person who claims that the person's rights as beneficiary will be prejudiced by the conveyance or distribution may within such time as may be prescribed by rules of court, or as may be fixed by the Court, apply to the Court for such order or directions as the circumstances may require, and during such time and while the application is pending, the trustee shall abstain from making the conveyance or distribution.*
>
> *(11) Subject to subsection (10), and subject to any appeal, any person on whom notice of any application under this section is served, or to whom notice is given in accordance with subsection (8), shall be bound by any opinion advice direction or order given or made under this section as if the opinion advice direction or order had been given or made in proceedings to which the person was a party.*

c. In light of the notice and dispute resolution process proposed in order 10 (discussed below), the liquidators seek a direction that s 63(8) is dispensed with and the period in s 63(10) is set to 14 days after the Court makes orders.

74. As noted above, order 10 proposes mechanics of the distribution process. Other than the purely mechanical aspects (which the liquidators do not expect to be controversial, and which can be adjusted if the Court or a contradictor identifies any difficulties), it is based on two main premises:

a. *First*, that the clients in the 'MT4 AU Clients Database' will receive the amount recorded as their balance of the Client Money in the MT4 AU Clients Database;

b. *Second*, that the persons in the 'MT4 Offshore Database' will not receive any of the Client Money (and, other than in relation to those who expressly engaged with the liquidators, will not receive any notices from the liquidators in relation to the distribution process).

75. The background to the existence of the two separate databases referred to and the investigations undertaken by the liquidators are set out in the First Keenan Affidavit at [27] to [31], [50] to [54].

76. **As to the entitlements of the persons in the MT4 AU Clients Database:**

a. Ultimately the proposal in order 10 is that the persons in the MT4 AU Clients Database will receive the amount of Client Money determined by reference to the balance recorded in their account on the MT4 AU Clients Database. That is, their entitlement will be defined as at the date of, and taking into account the consequences of, the closure of their positions by the Company in late 2023, prior to the appointment of the liquidators;

b. At [77] to [79] of the First Keenan Affidavit, Mr Keenan describes the investigation in relation to the identity and details of the clients listed in the MT4 AU Clients Database. At [80] to [93] he describes the process of seeking and receiving proof of clients' entitlements to date. At [94] to [100], Mr Keenan describes the process adopted to ascertain and review the clients' claims to the Client Money;

c. Through the investigation and proof of entitlement process referred to above Mr Keenan satisfied himself that the records of entitlements in the MT4 AU Clients Database appear to be accurate: Third Keenan Affidavit at [16]. As set out at [91(d)] of the First Keenan Affidavit, [23] to [26] of Second Keenan Affidavit and [22] to [27] of the Third Keenan Affidavit, only limited discrepancies have been identified between the proofs of entitlement lodged by the clients and the balances recorded for the relevant clients in the MT4 AU Clients Database and those discrepancies can be explained;

d. As the Third Keenan Affidavit makes clear (at [22] to [27]), some clients have lodged a proof of debt alleging that their entitlement to Client Money should exceed the balance of their account because that balance is as a result of forced closure of their positions by the Company. Those clients appear to assert that their balance reflects losses which they would have avoided if the trading continued. The liquidators recorded those claims in the Updated EOS as 'Potential Claims for

Damages from Clients' under 'Unsecured Creditors'. The proposed distribution approach in relation to which the Court's advice is sought assumes that any such claims would be treated as claims by unsecured creditors sharing in the Company's general assts and not as circumstances affecting the extent of clients' entitlement to the Client Money.

77. **As to the entitlements of the persons in the MT4 Offshore Database:**

a. Ultimately the proposal in order 10 is that the persons listed in the MT4 Offshore Database will not receive any of the Client Money;

b. At [55] to [60] of the First Keenan Affidavit, Mr Keenan sets out the investigation in relation to the persons listed in the MT4 Offshore Database. He concludes, at [57], that the Company did not hold Client Money for such persons;

c. At [102] to [108] of the First Keenan Affidavit, Mr Keenan considers correspondence from specific persons in the MT4 Offshore Database who actively contacted the liquidators (two of whom, largest by value, have successfully applied to be joined to these proceedings: First Keenan Affidavit at [105(a)]) and explains his conclusions as to why the material provided by those persons does not establish that they have transferred any funds to the Company (and therefore do not have any entitlement to the Client Money);

d. At [121(d)] of the First Keenan Affidavit, Mr Keenan records his conclusion that on presently available information he does not believe that the persons who traded via the MT4 Offshore Database have any entitlement to the Client Money but notes that he cannot conclusively exclude such a possibility. He makes clear that satisfying himself that there was no such possibility would be costly and time consuming (if possible at all). This is the reason for the approach proposed in order 10.

**Orders 16, 17, 18 – miscellaneous**

78. The remaining orders, 16, 17, 18 are largely mechanical provisions governing the mode and timing of providing notices and further participation by interested parties.

79. The liquidators do not anticipate these proposals to be controversial but will make oral submissions if necessary.

**Orders 2 to 8 - Approval of the quantum of remuneration and costs**

80. Orders 2 to 8 seek approval of the expenses and remuneration incurred to date in relation to the matters relating to the distribution of the Client Money and such expenses and remuneration expected going forward.

*Legal principles regarding quantum approval*

81. Principles relating to determination of quantum in these circumstances were helpfully summarised by Gleeson J in *Re Halifax Investment Services Pty Ltd (In Liq) (No 6)* [2019] FCA 2111 at [12] to [15]. In effect, s 60-5 to 60-12 of the *Insolvency Practice Schedule (Corporations)* (**IPS**) being Schedule 2 to the *Corporations Act 2001* (Cth)), applied to Court approval of liquidator's remuneration in general winding up, are applied by analogy. The question is what is fair and reasonable remuneration for necessary work properly performed by the liquidators. The onus is on the liquidators to put forward sufficient evidence to establish this.

82. Section 60–12 of the IPS lists matters to which the Court must have regard in making a remuneration determination under IPS, s 60–10(1)(c) (and, by analogy, in these circumstances).

83. The Court should take into account any approval (or otherwise) by the creditors: see for example *Re Halifax Investment Services Pty Ltd (In Liq) (No 6)* [2019] FCA 2111 at [53] to.

*Evidence*

84. At [162] to [173] of the First Keenan Affidavit and [54] to [59] of the Third Keenan Affidavit, Mr Keenan sets out the expenses and remuneration incurred to date and future estimates for which the approval is sought.

85. The nature and scope of the work undertaken to date by the liquidators in relation to the matters relating to the distribution of the Client Money is clear from the matters referred to in the submissions above as to the investigations undertaken and difficulties faced, and the relevant sections of the First Keenan Affidavit. Further details of that work, and specific tasks undertaken and expenses incurred, were summarised by Mr Keenan at [125] to [161] of the First Keenan Affidavit and [57] of the Third Keenan Affidavit.

86. On 10 July 2024, the liquidators published a statutory report to creditors. Annexure H to that report was the 'Remuneration Approval Report': exhibit JSK-1 to the First Keenan Affidavit at 1185 to 1208.

87. The total remuneration which the liquidators were seeking approval for (for past and future work) was $1,040,610 (excl. GST). That amount did not differentiate between remuneration for general winding up work and for Client Money distribution work.

88. The remuneration referred to in orders 2 (past remuneration) and 3 (future work) is a subset of that amount attributable, on the liquidators' assessment, to the work relating to distribution of Client Money.

89. At the creditors meeting on 31 July 2024, the creditors passed resolutions approving the liquidators' remuneration as summarised in the resolutions ($740,610 (excl. GST) for remuneration up to 30 June 2024 and $300,000 going forward): Minutes of meeting of 21 July 2024 at 14-15 in exhibit APC-1 to the affidavit of Adam Cutri dated 3 September 2024 and filed on that day in relation to a case management hearing. This approval will give the Court some comfort as to the orders sought, although, ultimately the Court will need to be independently satisfied that the remuneration and expenses are reasonable and necessary.

Helena Mann

**Seven Wentworth Selborne**

**19 February 2025**