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Federal Court of Australia
District Registry: New South Wales
Division: General No. NSD 1020/2024

In the Matter of Prospero Markets Pty Ltd (in liquidation) ACN 145 048 577

CONTRADICTOR'S WRITTEN SUBMISSIONS

1. These are the submissions of Mark Wilson, the contradictor appointed by this Court on 17 October 2024, responding to the written submissions of the liquidators of Prospero Markets Pty Ltd (in liq) (**Company**) dated 19 February 2025 (**Liquidators' Submissions**).

A. Contradictor's role and position on the issues

2. The nature and scope of the contradictor's appointment is set out in the appointing order, being:

> to assist the Court to perform its judicial function in deciding whether the proposed advice/directions sought in the Amended Originating Process should be given, having regard to the interests of the creditors of the Company, and as between those creditors, in relation to the following issues:
>
> (a) The proposed payment of the costs of the distribution, in whole or in part, from the Client Money (and not the general funds of the Company) and the treatment of any potential shortfall claims resulting from any such payment (prayers 1 and 15 of the Amended Originating Process);
>
> (b) The proposed 'pooling' of the Client Money accounts (prayers 9 and 12 of the Amended Originating Process);
>
> (c) The Proposed Distribution Process, including specifically, the proposed approach to the claims of the MT4 Offshore Database clients (prayers 10, 19 and 20 of the Amended Originating Process).

3. Adopting the articulation of the issues set out in the Liquidators' Submissions at [8], the contradictor's positions can be summarised as follows:

(a) <u>Legal issues</u>

(i) the Company's general funds (and not the Client Money) are the proper source of payment of the liquidators' remuneration and costs of the distribution of the Client Money;

(ii) contrary to the liquidators' proposal, the Court ought not make order 15 (that the plaintiffs are justified in treating clients whose Client Money has not been repaid in full as unsecured creditors of the Company) because that issue should instead be determined by the liquidators when they come to adjudicate on proofs of debt, which determination will be open to challenge in the ordinary way;

(b) Pragmatic issues regarding distribution

(i) consistently with the liquidators' proposal, the four AUD and USD bank accounts ought be pooled, the USD funds should be converted to AUD and the USD-denominated client entitlements should be converted to AUD as proposed by the liquidators;

(ii) contrary to the liquidators' proposal, all persons who traded via the MT4 Offshore Database and for whom the liquidators have email addresses (not just those who have contacted the liquidators on their own initiative) should be given the notification proposed in order 10(a) as the first step in the Proposed Distribution Process;

(iii) contrary to the liquidators' proposal, absent further evidence, the Court ought not direct the liquidators that they are justified in treating clients with balances under $100 as having no right to participate in the distribution of the Client Money;

(iv) consistently with the liquidators' proposal, clients' entitlements to 'bonus' promotions should be dealt with in the manner proposed by the liquidators;

(v) contrary to the liquidators' proposal, the liquidators should retain unclaimed client money until the end of the liquidation and only then pay it to ASIC.

4. There is one additional issue, being the treatment of interest earned on the Client Money, which is addressed at the end of these submissions.

5. Consistently with the scope of his appointment, the contradictor does not seek to be heard with respect to the quantum of the remuneration and costs sought by the Plaintiffs,

nor their character as remuneration and costs incurred in administering the Client Money.

B. It is appropriate for the Court to give directions

6. The contradictor agrees with the Liquidators' Submissions (at [13]) that there is a proper basis for the Court to give directions to the liquidators in respect of the issues raised, under either or both of s 90-15 of the Insolvency Practice Schedule (Schedule 2 to the *Corporations Act 2001* (Cth)) and s 63 of the *Trustee Act 1925* (NSW), there being matters of law on which the liquidators require guidance.

C. Legal issues

Source of funds for remuneration and expenses (Order 1)

7. As the plaintiffs' submissions note, the applicable legal principles in relation to the use of trust funds to pay the expense of a winding up were cited by Gleeson J in *Kelly, Re Halifax Investment Services Pty Ltd (In Liq)* [2019] FCA 2111 at [6], quoting the following summary of the principles by Brereton J (as his Honour then was) in *Re AAA Financial Intelligence (in liq) ACN 093 616 445* [2014] NSWSC 1004 at [13] (citations omitted):

> (1) Where the company is trustee of a trading trust and has no other activities, the liquidators are entitled to be paid their costs and expenses, whether for administering the trust assets or for 'general liquidation work', out of the trust assets.
>
> (2) Where the company does not act solely as trustee, costs and expenses referable to work done in relation to trust assets which may nonetheless be considered as having been done for the purpose of winding up the company ought ordinarily be borne primarily by the (non-trust) property of the company, to the extent that the assets permit.
>
> (3) At least where the non-trust assets do not permit that course, and perhaps even when they do, a liquidator is entitled to be indemnified out of trust assets for his costs and expenses, but only to the extent that they are referable to administering the trust assets. This is pursuant to the court's equitable jurisdiction to allow a trustee remuneration costs and expenses out of trust assets, which extends to a person such as a liquidator who is, for practical purposes, controlling a trustee.
>
> (4) In principle, where the liquidator does work which would entitle him both to remuneration as liquidator by the company, and recovery from the trust assets, there are two funds liable and there should be contribution between them. However, where there are no assets of the company available, it is unnecessary to consider the question of contribution. If a liquidator has done work which is attributable equally to the winding up of the company and the administration of trust assets, and there are no assets of the company at all to meet his expenses in doing so, the expenses are payable solely from the trust assets.

8. The Company was not the trustee of a trading trust, nor did it have no other activities. Accordingly, the principle stated at (1) in the quotation above does not apply. Rather,

the principle stated at (2) above applies: costs and expenses referable to work done in relation to trust assets which may nonetheless be considered as having been done for the purpose of winding up the company ought ordinarily be borne primarily by the (non-trust) property of the company, to the extent that the assets permit.

9. The liquidators rely on the third proposition quoted above and particularly on the words "and perhaps even when they do", ie that perhaps where the non-trust assets are sufficient to meet the liquidators remuneration and expenses, the liquidator may still be able to have recourse to the trust assets. The case cited by Brereton J for that proposition, and the only case that appears to have considered this possibility, is *Re* ***French Caledonia*** *Travel Service Pty Ltd (in liq)* (2003) 59 NSWLR 361; [2003] NSWSC 1008 at [211], [213]. There were no assets of the company available to meet the liquidator's general expenses in *French Caledonia* (at [212]), so the suggestion by Campbell J that a liquidator may be entitled to be indemnified out of trust assets for his remuneration and expenses even where there are sufficient general assets was *obiter dicta* and expressed as an open question, not as a conclusion.

10. The discretion described generally in proposition (3) above comes from *Berkeley Applegate (Investment Consultations) Ltd; Harris v Conway* [1989] Ch 32 at 50-51 and is commonly described as the *Berkeley Applegate* principle. In the contradictor's submission, it ought not be exercised in the present case for at least two reasons. *First*, there are sufficient non-trust assets to meet the liquidators' costs and expenses so there is no need to resort to the trust assets to ensure payment of the liquidators' remuneration and expenses. *Secondly*, the Company was entitled to take agreed fees and charges from the Client Money and to credit or debit only the *net* profit or loss to the client's account (Wholesale Client Agreement, JSK-1 at 176-178; Terms and Conditions for retail clients, JSK-1 at 1265-1267, cl 14.1). It presumably did so in operating its business and in closing out all client positions in November 2023 (Exhibit JSK-1 at 1136). Having paid those fees to the Company and the Company having sufficient general funds to administer the Client Money through to its return to the clients, the clients should not be expected to pay again for the administration of their funds. This is consistent with the argument noted by Campbell J in *French Caledonia* at [212] that requiring a liquidator to resort primarily to non-trust assets (at least so far as liquidator's remuneration is concerned, though possibly not concerning out-of-pocket expenses) is analogous to a trustee's inability to make a profit from his trust. Here, the permitted

profit has already been made and the trust fund should not be depleted further in respect of the liquidators' remuneration where that is not necessary to ensure that the liquidators are paid.

11. The liquidators do not point to any case in which, there being sufficient general assets to meet a liquidator's remuneration and expenses, a liquidator has nonetheless been permitted to draw on trust funds to meet remuneration or expenses. Nor have the researches of counsel for the contradictor identified such a case. Rather, in each of the identified cases there were no general assets, or insufficient general assets to meet the liquidators remuneration and expenses: eg *In re Berkeley Applegate (Investment Consultants) Ltd (in liq); Harris v Conway* [1989] 1 Ch 32 at 53D; *Re French Caledonia Travel Service Pty Ltd (in liq)* [2003] NSWSC 1008 at [212]; *In re MF Global Limited (in liq)* (No 2) [2012] NSWSC 1426 at [4]; *Re AAA Financial Intelligence (in liq) ACN 093 616 445 (in liq*) [2014] NSWSC 1004 at [14]; *In the Matter of Houben Marine Pty Ltd (in liq)* [2018] NSWSC 745 at [17]; *Kelly, Re Halifax Investment Services Pty Ltd (In Liq)* [2019] FCA 2111 at [29]-[30]; *Lawrence, in the matter of Ozifin Tech Pty Ltd (in liq) v AGM Markets Pty Ltd (in liq)* [2022] FCA 1478 at [203], [225.

12. In the case cited by Brereton J for the proposition quoted at (2) above, *Re G B Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 689D-E, there were sufficient general assets of the company to meet the liquidator's claim for remuneration and costs. Accordingly, McLelland J found that there was no occasion for an allowance of the liquidator's remuneration and expenses to be made from the trust assets. The same conclusion should be reached in the present case.

13. Finally, something should be said of the trustee's general law rights of indemnity and exoneration. Although most of the cases cited above apply the *Berkeley Applegate* principle, some cases have also referred to the trustee's right of indemnity or exoneration as a basis on which a liquidator might have a claim on the trust fund in respect of their remuneration or expenses (see for eg *Re Suco Gold Pry Ltd (in liq)* (1983) 33 SASR 99; *Kelly, Re Halifax Investment Services Pty Ltd (In Liq)* [2019] FCA 2111 at [11]). The trustee's right of indemnity or exoneration is not applicable in the present case because the right of indemnity has been found not to arise in respect of the statutory trust under s 981H of the *Corporations Act*: *Re MF Global Australia Ltd (in liq)* (2012) 267 FLR 27; [2012] NSWSC 994 at [149] (Black J), referred to with

apparent approval on this point in *Trentelman v Owners - Strata Plan No 76700* (2021) 106 NSWLR 227; [2021] NSWCA 242 at [194] (Bathurst CJ, Bell P and Leeming JA agreeing).

Potential shortfall (Order 15)

14. The contradictor accepts that, if the money in a client account is not sufficient to pay all clients in full who have an entitlement to the money in that account, then the money in the account must be paid *pari passu*, ie in proportion to the amount of each person's entitlement. That is so because payment *pari passu* is required by r 7.8.03(6)(d) of the Corporations Regulations 2001 (Cth). The requirement to pay *pari passu* does not depend on this court finding that to be the appropriate method of distribution, for example because this is a liquidator's application for directions in a case in which tracing beneficiaries' entitlements is not practical. Rather, it is simply a requirement of the applicable regulations. Accordingly, there is no need to consider general law trust cases in which a *pari passu* distribution has been found not to be appropriate (eg *Caron v Jahani (No 2*) (2020) 102 NSWLR 537; [2020] NSWCA 117).

15. The contradictor also accepts that the clients are likely to have claims against the Company as unsecured creditors for any shortfall they suffer on the return of their client money entitlements, not only for possible breaches of duty by the Company (see Liquidators' Submissions at [41]-[42]) but also in debt for funds that are owed to them by the Company and have not been paid. However, the contradictor submits that, rather than the Court so directing the liquidator, it would be appropriate for that issue to be determined by the liquidators when they come to adjudicate on proofs of debt. It is normally inappropriate for a direction to be given that a liquidator would be justified in admitting, or rejecting a particular proof of debt, it being the duty of the liquidator to adjudicate on proofs of debt in respect of which creditors have rights of appeal: the relevant cases, beginning with *Re Magic Aust Pty Ltd (in liq)* (1992) 7 ACSR 742 at 745 (McLelland J), are usefully collected in *Morgan, in the matter of Traditional Values Management Ltd (In Liq)* [2024] FCA 74 at [30] and exceptions considered at [31]-[32]. The limited cases where the Court has given advice on a proof of debt have involved a liquidator being a position of conflict of interest, a question of law that requires determination in relation to a proof of debt, or in the case of *Re Forex Capital Trading Pty Ltd (In Liq)* (2022) 159 ACSR 669; [2022] FCA 600, very particular

circumstances which justified a truncated regime for proofs based on the liquidators' detailed adjudication of a sample of proofs.

D. Pragmatic distribution issues

Pooling and currency conversion (orders 9 and 12)

16. The liquidators seek an order that they are justified in pooling the Client Money contained in four bank accounts, differentiated by client status and currency of deposits (AUD/wholesale; USD/wholesale; AUD/retail and USD/retail): Plaintiffs' Submissions [46], [49]; First Keenan Affidavit [72].

17. The Court may permit the pooling of Client Money where it is 'not possible to work out precisely who is entitled to what moneys in particular segregated accounts': ***Re Krejci*** *(as joint and several liquidators of Union Standard International Group Pty Ltd (in liq)* (2021) 159 ACSR 590 (Jagot J). However, that is an exception to the default position, which is not justified in the absence of exceptional circumstances: *Australian Securities and Investments Commission v Caddick (No 2)* [2023] FCA 1196 at [57]. The Court's jurisdiction in this regard is pragmatic. Whilst exceptional circumstances are required, 'neither strict proof of mixing … nor absolute impossibility of tracing' is required (*Re Krejci* at [46]). Rather, it is a question of whether tracing is reasonably and economically practical: ***Re BBY*** *Ltd (recs and mgrs apptd) (in liq) (No 2)* (2018) 363 ALR 492, 515 [57], 525 [83] (Brereton J). The combination of mixing and impracticability of tracing will not necessarily warrant pooling, the scale of the mixing and the relative sizes of the funds and the deficiencies will be relevant in determining whether pooling is appropriate (*Re BBY* at [83]).

18. The liquidators' evidence is that the process of tracing all of the deposits in each of the CBA Client Money accounts has not been completed, and that the process would be time consuming and therefore expensive, and it would be complicated by the bulk transfers that were made into the accounts (First Keenan Affidavit at [70]-[71]). The liquidators seem to have some information available to them as to which clients are 'retail' and which are 'wholesale wealth' but they do not know whether that classification is reliable (First Keenan Affidavit at [72(b)]).

19. There is no direct evidence of mixing, but the fact that there are insufficient funds held in the USD-denominated accounts and a surplus in the AUD-denominated accounts (First Keenan Affidavit at [75(d)] is, the contradictor submits, sufficient evidence of

the likelihood that there has been mixing which, when combined with the impracticability of further tracing and the lack of harm to clients from pooling (discussed below), justifies pooling.

20. The table in the First Keenan Affidavit at [64] shows that the vast bulk of the Client Money, over $17.6 million, is in the AUD/retail account. A little over $2 million is in the AUD/wholesale account. The USD accounts have relatively little in them: around $200,000 in the USD/retail account and only $187 in the USD/wholesale account. The contradictor submits that the disparity in the size of the respective funds is a further factor in favour of pooling.

21. If there is to be no shortfall in Client Money (as appears likely if the contradictor's position is accepted that the liquidators' remuneration and expenses should not be paid out of the Client Money), then it would not be detrimental to any client for the accounts to be pooled. In fact, pooling would eliminate the risk of some clients suffering a shortfall while surplus funds in another account go to the Company under r 7.8.03(6)(e) of the Corporations Regulations. That regulation applies if a financial services licensee is the subject of a winding up (r 7.8.03(2)(b)(ii)). It sets out the order of payments from Client Money, the last of which is payment of any surplus to the financial services licensee.

22. Accordingly, the contradictor submits that, in all the circumstances, pooling is justified and appropriate as proposed by the liquidators.

23. The liquidators' proposed conversion of USD bank balances into AUD is, in the contradictor's submission, both necessary to facilitate the proposed pooling and consistent with case law. The observations of Black J in *Re MF Global Australia Ltd (in liq)* (2012) 267 FLR 27; [2012] NSWSC 994 at [97] are applicable to the present case:

> I am satisfied that a direction should be made that confirms the entitlement of the Liquidators to convert the funds, including the funds held in the Singapore-accounts into Australian dollars. In *Sonray* [*Georges v Seaborn International (Trustee)* (2012) 288 ALR 240] at [95], Gordon J held that the liquidators in that case had power to convert the balances in client segregated accounts in foreign currency into Australian dollars, by analogy with the situation that exists for insolvent companies provided for by s 554C of the *Corporations Act*. I take the same view. The matters to which I have referred above, and most significantly the lack of underlying logic to which currencies are in which CSAs, support the conversion of foreign currency balances to Australian dollars. This direction would extend to the Singapore-based accounts given that I have found that there is sufficient justification for them to be pooled with the relevant Australian-based accounts.

24. As to the proposed conversion of USD-denominated debts at the exchange rate applicable on the day the winding up order was made, given that the Client Money of USD-denominated clients appears to have been mixed with AUD client money at an unknown point in time, the contradictor accepts that it is appropriate that the USD-denominated debts be converted to AUD and that doing so by analogy with s 554C(2) of the *Corporations Act* is a principled basis on which to determine the appropriate date.

The timing of the distribution process (order 10(c) and 10(d)(ii))

25. The liquidators wish to distribute the Client Money as soon as possible and the clients wish to receive it. However, the 14-day period in which a client is required to dispute an Admitted Entitlement Notice sent to them by the liquidators is too short, as is the 14-day period in which a client is required to apply to the Court for orders if the Dispute Notice is rejected by the liquidators. Both periods should be 28 days. That will more appropriately balance the desire for swift distributions with the rights of clients to dispute the liquidators' determinations.

The MT4 Offshore Database issue (orders 10(a)(i)(B), 19 and 20)

26. The liquidators do not propose to notify MT4 Offshore Database Clients (other than those who have already contacted the liquidators of their own initiative) of the distribution process. To the extent that the liquidators have email addresses for the MT4 Offshore Database Clients, the contradictor submits that it would be appropriate to notify the MT4 Offshore Database Clients of the distribution process. The evidence from the liquidators is that the cost of sending an email notification to multiple recipients is $3,000 + GST per "email blast" (Second Keenan Affidavit at [12](b)).

27. Although the liquidators' investigations thus far have not identified any deposits by MT4 Offshore Database Clients into the Company accounts, those investigations have been limited to a review of a selection of the correspondence received by the liquidators from MT4 Offshore Database Clients, in circumstances where the MT4 Offshore Database Clients have not been receiving notifications regarding the liquidation (First Keenan Affidavit at [105]-[106]). There may be as many as 33,000 MT4 Offshore Database Clients, although the number is likely to be lower given the presence of 'test' and 'demonstration' accounts on the relevant database (First Keenan Affidavit at [107]). The contradictor accepts that the emails in evidence between the liquidators and

the Company's management seem to indicate that the MT4 Offshore Database Clients were not clients of the Company (Exhibit JSK-1 at pp 958, 960, 976, 977, 1093).

28. Although it appears unlikely on the current evidence that the MT4 Offshore Database Clients would be entitled to participate in the distribution of the Client Money, those persons should not be deprived of the right to participate in the distribution of $19.5 million of Client Money if they can establish a right to do so, merely by the liquidators not notifying them that a distribution process is taking place.

Dealings with client balances under $100 (order 11)

29. The liquidators have not given evidence as to how many of the 2,373 clients in the MT4 AU Clients Database have balances under $100. Without that evidence, the Court ought be reluctant to give the liquidators the direction sought.

30. In *Georges v Seaborn* (2012) 299 ALR 240 (***Sonray***), there was no opposition to a direction to exclude 1328 clients with a net balance less than $50 from the distribution of client money but there was evidence that the total balance for those Sonray clients was $8980.89 and the average balance was $6.76 (at [129]-[130]). There was also evidence of the number of professional hours that would be expended completing the tracing exercise for those clients. On the basis of that evidence, Gordon J held that (at [135]):

> The liquidators have undertaken the exercise to determine the entitlement of those with an overall net balance of less than $50 and determined that the value or amount of that entitlement is zero or negative because of the costs involved, and the inherent uncertainties that exist, in the tracing exercise. In the circumstances of the present case, I consider that the approach adopted by the liquidators is not only consistent with reg 7.8.03(6) but the only approach that can be adopted. Put another way, if the task was undertaken on a case by case analysis, the cost would be greater than the highest possible entitlement of any one Sonray client. The liquidators should have the direction that they seek.

31. The evidence in this case falls far short of the evidence in *Sonray*. The evidence from the liquidators is that, "[t]he Liquidators cost of the process of administering (reviewing and/or distributing) the claims in relation to each of those accounts would exceed $100 per account." (First Keenan Affidavit at [101]). No evidence is given of how that figure is calculated, but the evidence is that an intermediate accountant is charged out at $300 + GST per hour (First Keenan Affidavit at [167]), and the Court would readily infer that it would take someone of that or greater level of experience at least 20 minutes to adjudicate each claim based on the Adjudication Flow Chart (Exhibit JSK-1 at 339). If

the liquidators establish by further evidence that the total of all balances under $100 is minimal, then the direction proposed by the Liquidators may be appropriate.

Dealing with unclaimed money (order 14)

32. The contradictor submits that unclaimed client money should be retained by the liquidators until the conclusion of the liquidation and only then paid to ASIC under s 544 of the *Corporations Act*. That is consistent with the approach taken in *Lawrence, in the matter of Ozifin Tech Pty Ltd (in liq) v AGM Markets Pty Ltd (in liq)* [2022] FCA 1478 at [43], [102], [137].

33. Paying the unclaimed money to ASIC before the end of the liquidation would transfer to ASIC the liquidators' obligation to deal with money and would impose on clients a requirement to deal directly with ASIC rather than with the duly appointed liquidators.

34. There is no clear evidence as to how much the unclaimed client money is likely to be. There is evidence that the 784 client proofs lodged so far total $19.45 million (Third Keenan Affidavit at [17]) and that the Client Money totals around $19.76 million. However, the $19.45 million in proofs includes $1.685 million that the liquidators propose to reject as client money claims (Third Keenan Affidavit at [17] and [22]). The remaining 1,589 clients who have not lodged proofs as yet may therefore have claims adding up to the remaining $1.995 million. If there were no more proofs lodged in the timeframes provided for in the distribution process, that would result in $1.995 million of unclaimed funds. Such a substantial sum should be retained by the liquidators subject to their administration and earning interest through to the conclusion of the liquidation.

35. The contradictor does not share the view expressed in the Liquidators' Submissions at [69] that payment to ASIC pursuant to s 544 would extinguish the clients' rights. Payments to ASIC under s 544 are to be dealt with by ASIC under Part 9.7, in which s 1341 ('Entitlement to unclaimed property') provides:

> (1) If
>
> (a) unclaimed property is or was held by ASIC; and
> (b) the unclaimed property is an amount of money; and
> (c) a person claims to be entitled to that amount; and
> (d) ASIC is satisfied that the person is entitled to that amount;
>
> ASIC must:
>
> (e) pay the person an amount equal to that amount; and
> (f) do so out of money appropriated by the Parliament for the purposes of this section

36. As Button J noted in *Australian Securities and Investments Commission v Letten (No 29)* [2023] FCA 315 at [38]:

> As will be apparent, were the unclaimed moneys paid over to ASIC, to be held by it as unclaimed property pursuant to Pt 9.7, that will not alter the entitlement of the Relevant Investors to claim moneys due to them as distributions from the Common Fund.

37. In preparing these submissions, the contradictor also considered whether, contrary to the liquidators' application, unclaimed client money could or should instead be used to make a further distribution to clients who have participated in the distribution process, if they have otherwise suffered a shortfall. Although the Court can give such directions to a liquidator (*Australian Securities and Investments Commission v* ***Tasman*** *Investment Management Ltd* (2006) 202 FLR 343; [2006] NSWSC 943 at [32]), there is no such application in the present case and such orders can only be made on notice to the proper parties, giving them an opportunity to be heard (*In the matter of Hawden Property Group Pty Ltd (in liq)* (2018) 125 ACSR 355 [2018] NSWSC 481 at [6]-[8]; *One T Development Pty Ltd v Peter Krejci in his capacity as liquidator of ENA Development Pty Ltd* [2023] NSWCA 120 at [35]). For those reasons, the contradictor considers that such an approach would not be permissible on this application.

Interest earned on client money

38. Mr Keenan gives evidence that the Client Money accrues interest at approximately $60,000 per month (Keenan 3 at [7(b)]) and that in the Updated Estimated Statement of Outcomes (Exhibit JSK-3, p 2), the accrued interest of $658,424 is recorded as becoming a general asset of the Company, if the costs in relation to the Client Money are paid from the general assets.

39. The contradictor understands this to be an application of r 7.8.02(7) of the *Corporations Regulations* as analysed by Black J in *RE MF Global Australia Ltd (in liq)* (2012) 267 FLR 27; [2012] NSWSC 994 at [168]-[179] to the effect that in a liquidation:

    (a) if there is a deficiency in client money, interest will go first to meeting the deficiency; and

    (b) if, or once, there is no deficiency in client money, interest will go to the financial services licensee if the requirement in r 7.8.02(7) has been met, being that the financial services licensee has disclosed to the client that the financial services licensee is keeping the interest (if any) earned on the account.

40. The Wholesale Client Agreement in evidence (JSK-1 at 183) and the Terms and Conditions for retail clients in evidence (JSK-1 at 1273, cl 17.2.2(a)) both state that Prospero is "solely entitled to any interest or earnings derived from your moneys". Although the liquidators do not know whether these agreements applied to all of Prospero's clients as at the time of winding up, the Court can infer from these documents that Prospero likely disclosed to all clients that it was keeping the interest. As to the standard to which the Court need be satisfied of that fact, as with judicial advice given to a trustee, a liquidator seeking directions is not required to "prove" the facts to a certain standard of proof as would be the case in adversarial litigation: *Australian Securities and Investments Commission v Piggott Wood & Baker (a firm)* [2019] FCA 672 at [25] (Kerr J); *In the matter of Banksia Securities Ltd (recs and mgrs apptd) (in liq)* [2022] NSWSC 1106 at [36] (Black J); *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42 at [78]-[81] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

41. The contradictor therefore accepts that the requirement of r 7.8.02(7) has been met and that, *once interest has been applied to satisfy any deficiency in the client funds*, the balance of any interest will be a general asset of the company available to meet the claims of creditors.

E. Contradictors' costs

42. It appears to be common ground that the contradictors' costs ought be paid from the same source from which the liquidators' costs are to be paid and with equal priority, as shown in the Updated Estimated Statement of Outcomes (Exhibit JSK-3, p 2). The contradictor intends to seek orders to that effect.

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12 March 2025