FEDERAL COURT OF AUSTRALIA

Lawrence, in the matter of Ozifin Tech Pty Ltd (in liq) v AGM Markets Pty Ltd (in liq) [2022] FCA 1478

File number(s):	VID 313 of 2021 VID 235 of 2021 VID 211 of 2021
Judgment of:	**BEACH J**
Date of judgment:	9 December 2022
Catchwords:	**CORPORATIONS –** liquidation – application by liquidators for directions – disbursal of funds – funds in accounts – statutory trusts – s 981H of the C*orporations Act 2001* (Cth) – constructive trusts – breach of fiduciary duties – conflict of interest – institutional constructive trust – remedial constructive trust – priorities – investors' claims – directions to deal with trust funds – liquidators' claims for remuneration – payment of remuneration from client accounts – recourse to trust assets – payment of remuneration out of trust assets – payment out of statutory trust funds – payment out of constructive trust funds – inter-company claims – equitable jurisdiction to remunerate a trustee – general expenses of liquidation being borne by trust assets – orders and directions made
Legislation:	*Corporations Act 2001* (Cth) ss 471B, 544, 556, 981A, 981B, 981H, 983D, 983E, Schedule 2 ss 60-10, 60-12, 90-15, 90-20 *Trustee Act 1958* (Vic) s 63 *Corporations Regulations 2001* (Cth) reg 7.8.03
Cases cited:	*13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 4)* (2020) 148 ACSR 511 *Australian Securities and Investments Commission v Rowena Nominees Pty Ltd* (2003) 45 ACSR 424 *Black v S Freedman & Co* (1910) 12 CLR 105 *Brisconnections Management Company Ltd v Dalewon Pty Ltd (in liq)* (2010) 79 ACSR 530 *Canehire Pty Ltd v Themis Holdings Pty Ltd* [2016] 1 Qd R

	liq) (2018) 125 ACSR 149 *Re Courtenay House Capital Trading Group Pty Ltd* (*in liq)* (2019) 139 ACSR 469 *Re G B Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 *Re Greater West Insurance Brokers Pty Ltd* (2001) 39 ACSR 301 *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* (2016) 305 FLR 222 *Re MF Global Australia Ltd (in liq)* (2012) 267 FLR 27 *Re Owen* (2014) 225 FCR 541 *Re Sutherland; French Caledonia Travel Service Pty Ltd (in liq)* (2003) 59 NSWLR 361 *Shannon v JMA Accounting Pty Ltd* [2005] QSC 240 *Staatz v Berry (No 3)* (2019) 138 ACSR 231 *Templeton v Australian Securities and Investments Commission* (2015) 108 ACSR 545 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669
Division:	General Division
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Date of last submissions:	14 March 2022
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VID 313 of 2021	
Counsel for the Plaintiffs:	Mr J Evans KC
Solicitor for the Plaintiffs:	O'Loughlin Westhoff
Counsel for the Defendant:	Mr SJ Maiden KC
Solicitor for the Defendant:	Maddocks
Counsel for OT Markets Pty Ltd (in liquidation):	Mr MGR Gronow KC

Solicitor for OT Markets Pty Ltd (in liquidation):	Piper Alderman
Counsel for ASIC:	Mr JP Moore KC and Mr T Chalke
Solicitor for ASIC:	Norton Rose Fulbright

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Counsel for the Plaintiffs:	Mr SJ Maiden KC
Solicitor for the Plaintiffs:	Maddocks
Counsel for OT Markets Pty Ltd (in liquidation):	Mr MGR Gronow KC
Solicitor for OT Markets Pty Ltd (in liquidation):	Piper Alderman
Counsel for Ozifin Tech Pty Ltd (in liquidation):	Mr J Evans KC
Solicitor for Ozifin Tech Pty Ltd (in liquidation):	O'Loughlin Westhoff
Counsel for ASIC:	Mr JP Moore KC and Mr T Chalke
Solicitor for ASIC:	Norton Rose Fulbright

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Counsel for the Plaintiffs:	Mr MGR Gronow KC
Solicitor for the Plaintiffs:	Piper Alderman
Counsel for the First Defendant:	Mr SJ Maiden KC
Solicitor for the First Defendant:	Maddocks
Counsel for Ozifin Tech Pty Ltd (in liquidation):	Mr J Evans KC
Solicitor for Ozifin Tech Pty Ltd (in liquidation):	O'Loughlin Westhoff
Counsel for ASIC:	Mr JP Moore KC and Mr T Chalke
Solicitor for ASIC:	Norton Rose Fulbright

ORDERS

VID 313 of 2021

IN THE MATTER OF OZIFIN TECH PTY LTD (IN LIQUIDATION)

BETWEEN:	**RICHARD LAWRENCE, BRENT KIJURINA AND RICHARD ALBARRAN IN THEIR CAPACITY AS LIQUIDATORS OF OZIFIN TECH PTY LTD (IN LIQUIDATION)** First Plaintiffs
	OZIFIN TECH PTY LTD (IN LIQUIDATION) Second Plaintiff
AND:	**AGM MARKETS PTY LTD (IN LIQUIDATION)** Defendant

ORDER MADE BY:	**BEACH J**
DATE OF ORDER:	**9 DECEMBER 2022**

THE COURT ORDERS THAT:

1. Within 7 days of the date of these orders the parties file and serve proposed minutes of orders to give effect to these reasons.
2. Costs reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

VID 235 of 2021

IN THE MATTER OF AGM MARKETS PTY LTD (IN LIQUIDATION)

BETWEEN:	**JOHN ROSS LINDHOLM AND GEORGE GEORGES IN THEIR CAPACITY AS THE JOINT AND SEVERAL LIQUIDATORS OF AGM MARKETS PTY LTD (IN LIQUIDATION)** First Plaintiffs
	AGM MARKETS PTY LTD (IN LIQUIDATION) Second Plaintiff

ORDER MADE BY:	**BEACH J**
DATE OF ORDER:	**9 DECEMBER 2022**

THE COURT ORDERS THAT:

1. Within 7 days of the date of these orders the parties file and serve proposed minutes of orders to give effect to these reasons.
2. Costs reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

VID 211 of 2021

IN THE MATTER OF OT MARKETS PTY LTD (IN LIQUIDATION)

BETWEEN:	**MATHEW TERENCE GOLLANT IN HIS CAPACITY AS LIQUIDATOR OF OT MARKETS PTY LTD (IN LIQUIDATION)** First Plaintiff
	OT MARKETS PTY LTD (IN LIQUIDATION) Second Plaintiff
AND:	**AGM MARKETS PTY LTD (IN LIQUIDATION)** First Defendant
	AUTHENTICATE PTY LTD Second Defendant

ORDER MADE BY: **BEACH J**

DATE OF ORDER: **9 DECEMBER 2022**

THE COURT ORDERS THAT:

1. Within 7 days of the date of these orders the parties file and serve proposed minutes of orders to give effect to these reasons.
2. Costs reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BEACH J:

1 The present applications arise from related proceedings brought by the Australian Securities and Investments Commission against three corporations who were engaged in promoting derivative instruments to Australian investors. Various contraventions of the *Corporations Act 2001* (Cth) were established against those entities and each are now in liquidation.

2 The various sets of liquidators have now applied for directions and declarations concerning the allocation and distribution of the statutory trust funds and other trust funds that are said to be held under various constructive trusts for the investors.

3 ASIC has intervened in each of these applications and is principally concerned with the disposition of the non-statutory trust funds. It has taken an opposing view to the liquidators in terms of the characterisation of the constructive trust funds and whether the liquidators can take out their general liquidation costs and expenses in priority to the investors who are the beneficiaries of such non-statutory trusts. For that purpose, ASIC has asserted that each of the relevant trusts involves an institutional constructive trust rather than a remedial constructive trust, a distinction which is both inelegant and imprecise yet seems to be favoured by some. So characterised, ASIC says that the liquidators can only take out in priority to the investors from the constructive trust funds the costs and expenses involved in getting in and dealing with the trust property, but not general liquidation costs and expenses. ASIC has also opposed other aspects of the orders sought by the various liquidators.

4 For the reasons that follow, I have essentially agreed with the various liquidators' positions. The plasticity of the principles of equity permit me to impress remedial constructive trusts without more. Doctrinal rigidity is to be eschewed.

5 Let me turn then to the detail of the various applications and some of the more non-contentious matters before I come to ASIC's points.

6 The liquidators of AGM Markets Pty Ltd (in liquidation) (AGM) have applied for orders inter-alia:

(a) declaring that the funds held in the AGM accounts are funds subject to a statutory trust pursuant to s 981H of the Act and reg 7.8.03 of the *Corporations Regulations 2001*

(Cth) and directing that they distribute such funds in accordance with a stipulated method;

(b) fixing their remuneration as joint and several liquidators of AGM from 11 October 2019 to 30 April 2021 in the sum of $379,460.50 plus GST and approving their future remuneration; and

(c) declaring that they are entitled to be indemnified in relation to certain legal costs.

7 Now as I have observed elsewhere, the affairs of AGM were complex and intertwined with those of OT Markets Pty Ltd (in liquidation) (OT) and Ozifin Tech Pty Ltd (in liquidation) (Ozifin), particularly through the operation of the OT and Ozifin corporate authorised representative (CAR) agreements.

8 The liquidator of OT has also applied for analogous directions. AGM and Authenticate Pty Ltd have also been joined to his application because their interests may be affected by the directions, save that whilst the liquidator seeks orders for the transfer of funds from AGM, he does not seek any relief directly against Authenticate Pty Ltd.

9 Further, the liquidators of Ozifin have applied for, inter alia:

(a) a declaration that funds in two identified bank accounts in the name of AGM (the AGM (Ozifin) CM accounts) are funds subject to a statutory trust pursuant to s 981H and reg 7.8.03 in favour of clients of Ozifin, and a direction that AGM, by its liquidators, pay to the Ozifin liquidators the statutory trust funds to be distributed by the Ozifin liquidators in accordance with the orders sought;

(b) a declaration that pursuant to s 90-15 of the Insolvency Practice Schedule (IPS), Schedule 2 to the Act and/or s 63 of the *Trustee Act 1958* (Vic), the Ozifin liquidators are entitled to be paid out of the statutory trust funds, prior to their being distributed in accordance with the orders sought in the Ozifin liquidators' originating process, their reasonable remuneration, costs and expenses insofar as the same was incurred in investigating, gathering in, dealing with and distributing the statutory trust funds;

(c) a direction that the Ozifin liquidators are justified in distributing the statutory trust funds received from the AGM liquidators after payment of their statutory trust remuneration and expenses to those clients of Ozifin entitled to receive a payment under reg 7.8.03 in accordance with their entitlements calculated on a claims basis, and *pari passu* in the

event that there are insufficient remaining statutory trust funds to satisfy the entitlements of all statutory trust claimants; and

(d) a declaration that the funds in another bank account (the liquidation account), being an account held in the name of the Ozifin liquidators, are funds held for and on behalf of Ozifin, and a declaration that pursuant to s 90-15 of the IPS, the Ozifin liquidators are justified in applying the surplus funds in accordance with Subdivision D of Division 6 of Part 5.6 of the Act.

10 Now I should say at this point that it is common ground as between the Ozifin liquidators and the AGM liquidators that the funds in the AGM (Ozifin) CM accounts are held by AGM on trust for the clients of Ozifin and therefore should be returned to those clients, subject to appropriate deductions for remuneration and costs.

11 It is also common ground as between these sets of liquidators that the most efficient way to distribute statutory trust funds is for AGM to transfer these funds to the Ozifin liquidators, for on-distribution to Ozifin clients. It is then said that the distribution of the statutory trust funds so transferred should be subject to the payment of the Ozifin liquidators' reasonably incurred remuneration, costs and expenses incurred in relation to the statutory trust funds.

12 Further, it is the Ozifin liquidators' position that the funds in the liquidation account, which I will identify later, are surplus funds, which has the consequence that the funds in the liquidation account are not funds subject to the statutory trust provided for by s 981H and reg 7.8.03.

13 Now before dealing with some of the legal questions, let me set out a little more of the background.

14 From 2 October 2012 to 5 November 2018, AGM was the holder of an Australian Financial Services Licence (AFSL) which permitted AGM to provide general financial product advice in deposit products, derivatives, contracts for differences (CFDs) and foreign exchange (FX) products, deal in deposit products, non-cash payment products, derivatives and FX products and make a market in derivatives and FX products to wholesale and retail clients.

15 Now AGM did not trade in any capacity other than as an issuer of financial products and custodian of client funds. In fact, by virtue of the operation of the OT and Ozifin CAR agreements, AGM to a significant extent only operated as the custodian of client funds, as OT and Ozifin had the vast majority of dealings with clients and there was limited commonality of clients. Clients of OT and Ozifin amount to 91.3% by number and 94.9% by value of the funds

held in the AGM accounts. I have previously proceeded in related proceedings on the basis that even in light of AGM being the holder of the AFSL, each of AGM, OT and Ozifin could from time to time be taken to have issued CFDs and FX contracts.

16 Now each of AGM, OT and Ozifin provided a web-based trading platform to retail clients. Clients used the trading platforms to open and close margin FX contracts and CFD positions. AGM, OT and Ozifin used various means to attract clients, including web sites, and advertising on the internet and social media.

17 And as I have indicated, OT and Ozifin operated as authorised representatives of AGM pursuant to CAR agreements. The effect of this relationship was that OT and Ozifin were authorised to provide certain financial services on behalf of AGM, and did not need to hold an AFSL of their own. They carried on the business of offering various leveraged derivatives in the form of CFDs, margin FX contracts and binary options.

18 Let me now jump forward to say something about the prior litigation that has occurred. Now I have already mentioned the ASIC proceedings.

19 On 14 January 2020, the various sets of liquidators for the three entities commenced proceedings seeking directions in relation to the sharing of information between them, and a release from certain notice requirements imposed on the liquidators (the co-operation proceedings).

20 On 26 February 2020, I handed down judgment in the trial of the ASIC proceedings concerning the three entities (*Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 (the liability judgment)) and my judgment in the co-operation proceedings (*Gollant, in the matter of OT Markets Pty Ltd (in liq)* [2020] FCA 207 (the co-operation judgment)).

21 In the liability judgment, I found that AGM, OT and Ozifin had committed various breaches of the Act and the *Australian Securities and Investments Commission Act 2001* (Cth) including the unlicensed provision of personal advice within the meaning of s 766B(3) of the Act, and had engaged in misleading or deceptive conduct and unconscionable conduct in connection with the supply or possible supply of financial services.

22 On 12 October 2020, I heard submissions from the parties about the form of orders needed to give effect to the liability judgment. I made orders and delivered reasons on 16 October 2020

in *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 4)* (2020) 148 ACSR 511 (the penalty judgment).

The position of AGM

23 Let me now say something about AGM and matters relevant to its liquidators' present application. In this regard I note that the AGM liquidators have not to date drawn any remuneration or paid any costs.

24 I should begin by saying something further about the relevant AGM accounts.

25 The AGM accounts are "client money accounts" and subject to the restrictions set out in Part 7.8 Division 2 of the Act and the Regulations, including the imposition of a statutory trust over funds held by AGM in accordance with s 981H and reg 7.8.03 (the statutory trust claims). As at the appointment date, AGM held the equivalent of AUD3,213,494.69 in three currencies being AUD, USD and EUR in the AGM accounts.

26 The funds held in the AGM accounts are held by AGM on trust for clients pursuant to the statutory trust claims. Now the statutory trust claims are relevant to the funds held by AGM on behalf of clients of all the companies in liquidation, but their application is more complex in relation to the OT client account, which I will return to later.

27 Now ASIC asserts that there are additional bases for impressing a trust on the funds held in the AGM accounts (the other trust claims). I will return to ASIC's submissions later, but I should say that the liquidators of AGM accept that any funds remaining in the AGM accounts after the deduction of reasonable remuneration and costs are likely to be subject to further trust claims, but the other trust claims (as described by ASIC) so far as AGM's liquidators are concerned are only relevant to the OT client account.

28 Let me say something more about the statutory trust claims. Section 981A relevantly states that Part 7.8, Division 2 applies to money paid to a financial services licensee for the provision of financial services or a financial product. Pursuant to ss 981B and 981H, the licensee is to pay any such money it receives into an account that is held on trust for clients who paid those funds.

29 Prior to 5 November 2018, AGM as a financial services licensee was subject to the requirements of Part 7.8, Division 2. However, on 5 November 2018, ASIC served a Notice

of Cancellation of AGM's AFSL pursuant to s 915C. AGM's AFSL was cancelled effective from 31 December 2018.

30 By virtue of the fact that the AFSL was cancelled, reg 7.8.03 was enlivened. Regulation 7.8.03 (4) – (6) relevantly confirmed that the funds held in the AGM accounts were held on trust for clients entitled to those funds, with those funds to be distributed as follows:

> (4) For each person who is entitled to be paid money from an account of the financial services licensee maintained for section 981B of the Act, the account is taken to be subject to a trust in favour of the person.
>
> (5) If money in an account of the financial services licensee maintained for section 981B of the Act has been invested, for each person who is entitled to be paid money from the account, the investment is taken to be subject to a trust in favour of the person.
>
> (6) Money in the account of the financial services licensee maintained for section 981B of the Act is to be paid as follows:
>
> (a) the first payment is of money that has been paid into the account in error;
>
> (b) if money has been received on behalf of insureds in accordance with a contract of insurance, the second payment is payment to each insured person who is entitled to be paid money from the account, in the following order:
>
> (i) the amounts that the insured persons are entitled to receive from the moneys in the account in respect of claims that have been made;
>
> (ii) the amounts that the insured persons are entitled to receive from the moneys in the account in respect of other matters;
>
> (c) if:
>
> (i) paragraph (b) has been complied with; or
>
> (ii) paragraph (b) does not apply;
>
> the next payment is payment to each person who is entitled to be paid money from the account;
>
> (d) if the money in the account is not sufficient to be paid in accordance with paragraph (a), (b) or (c), the money in the account must be paid in proportion to the amount of each person's entitlement;
>
> (e) if there is money remaining in the account after payments made in accordance with paragraphs (a), (b) and (c), the remaining money is taken to be money payable to the financial services licensee.

31 The references to "entitled" and "entitlement" in the payment waterfall contemplated by reg 7.8.03(6) encompassed all amounts listed in the books and records of the companies as

owing to each individual client, such that all funds held by AGM are to be paid to discharge these claims to the best extent possible.

32 Now Black J in *Re MF Global Australia Ltd (in liq)* (2012) 267 FLR 27 (at [106] to [108]) conveniently identified three bases for determining clients' entitlements under reg 7.8.03, being the contributions based approach, the claims based approach and the contractual based approach.

33 The contributions based approach is determined by the moneys actually held in the relevant trust account. This approach requires the books and records to contain sufficient information about the net contribution of each client as such a regime would fail without the relevant client information.

34 The claims based approach is determined by the sum that ought to have been held in the relevant trust account had the licensee performed its obligations.

35 The contractual based approach determines the gross liquidation value of clients' positions pursuant to the various client agreements. This approach has the advantage that it can be determined as at the time reg 7.8.03 first applied to the funds.

36 Now although there is some attraction in assessing claims on a contributions basis, in the current circumstances in my view assessing amounts owing to clients on a claims basis calculated as at the appointment date is the most cost effective approach. First, there is a significant overlap in clients' claims against each company in that only one consolidated balance is recorded in the books and records as owing to clients. Second, the companies appear to have undertaken a process of returning client funds prior to the liquidators' appointment. Clients' trading positions were also finalised prior to the cancellation of the AFSL and the appointment of the liquidators. In both processes, the companies appear not to have strictly returned funds to clients from the accounts that clients contributed funds to, complicating any tracing exercise. Third, discharging all book debts owing to clients from the AGM accounts will ensure that funds are returned as soon as possible and clients can then pursue any additional claims to the funds held by OT or Ozifin respectively.

37 Moreover, in circumstances where it is readily apparent that there are insufficient funds to pay claims of clients, reg 7.8.03(6)(d) requires a *pari passu* distribution.

38 Now the Court has an inherent jurisdiction to assist liquidators by determining any question arising in the winding up. In addition, a liquidator may apply to the Court for directions under

s 90-15 of the IPS. In addition, by s 63(1) of the *Trustee Act 1958* (Vic), a trustee may apply to the Court for a direction on a question relating to the management or administration of trust property. But whilst the Court has jurisdiction to give directions under the applicable trustee legislation, it is preferable to give any directions to a liquidator under the provisions of the Act where a question concerns the respective rights of beneficiaries. Clearly in the present context, I am empowered to make the directions sought and propose to do so under s 90-15 of the IPS.

39 Now the liquidators of AGM seek orders that they be directed to distribute the balance of the amounts held in the AGM accounts, following payment of their remuneration and costs, to the clients of AGM identified in the books and records of AGM, whose entitlements to those funds are to be assessed based on the books and records of AGM as at the appointment date, distributed to the clients of AGM *pari passu* pursuant to reg 7.8.03(6)(d), and distributed using clients' last known bank account details and contact information recorded in the books and records of AGM. I am disposed to make such orders and directions.

40 Now the liquidators have had limited success engaging with the clients of AGM and therefore do not anticipate that significant numbers of clients will cooperate with any further attempts to clarify their respective claims or confirm their bank account or contact details.

41 Further, there will be a shortfall in the amount of funds available to fully meet all client entitlements such that the liquidators are obliged to pay client entitlements *pari passu*. The liquidators wish to avoid further depleting the funds available for distribution. The liquidators have also previously been excused from sending a redress notice, and have been permitted to send notices, reports and communications to clients and creditors via electronic means.

42 In my view, in these circumstances, the amounts recorded as owing to AGM clients in AGM's books and records appear sufficiently accurate such that a detailed proof of debt process is likely to be unnecessary or unhelpful, and the cost of a proof of debt process would also significantly erode the amounts that may be returned to AGM clients.

43 Further, the liquidators propose to pay any unclaimed moneys remaining in the AGM accounts at the conclusion of the liquidation to ASIC pursuant to s 544. Such a course is in my view appropriate.

44 Further, the liquidators also seek directions that they transfer the funds in the OT client account and the Ozifin client accounts to the liquidators of OT and Ozifin respectively for them to distribute to the clients of those two companies. Now in the ordinary course, AGM, as the

former holder of the AFSL and current trustee of client funds, is the entity that would ultimately bear the responsibly for managing and distributing the client moneys it holds. But the liquidators seek directions to enable the distribution of client moneys to OT and Ozifin clients to be undertaken by the OT and Ozifin liquidators rather than AGM.

45 Now in my view, it is reasonable and more economically practical for the liquidators of OT and Ozifin to distribute the funds in the OT client account and Ozifin client accounts respectively and I will make the necessary directions to facilitate this.

46 First, the liquidators of AGM do not have the contact details for the clients of OT and Ozifin.

47 Second, the liquidators of OT and Ozifin are in a better position to contact clients of OT and Ozifin in a consistent manner that does not cause confusion to clients receiving circulars and updates from multiple liquidators.

48 Third, the books and records of AGM are deficient in material respects. I should also note that deficiencies in the books and records of all three companies were highlighted in the material filed in the co-operation proceedings and noted in my penalty judgment. Moreover, only after my orders of 17 February 2020 could all the liquidators share information between them across all entities.

49 Fourth, the liquidators of OT and Ozifin are willing to undertake the task of the distributions contemplated.

50 Let me turn to the question of the AGM liquidators' claim for remuneration and costs. The liquidators' position is that all of their reasonable remuneration and costs are payable from the funds held in the AGM accounts prior to any distribution being made to former clients. The liquidators submit that their remuneration and costs including estimated future remuneration and costs should be approved in full. I agree.

51 Section 60-5(1) of the IPS confirms that an external administrator of a company is entitled to receive remuneration for necessary work properly performed by the external administrator in relation to the external administration, in accordance with the remuneration determinations (if any) for the external administrator. Section 60-10(1)(c) empowers the Court to make remuneration determinations.

52 Section 60-12 of the IPS sets out the matters to which the Court must have regard in making a remuneration determination under s 60-10(1)(c). For present purposes it is not necessary to set these out.

53 Now the liquidators have undertaken various tasks in respect of the AGM accounts, including taking control of the accounts on and from the appointment date, reviewing the books and records of AGM, responding to various demands and conducting an analysis into client entitlements.

54 Now in circumstances where reg 7.8.03(6)(d) requires a *pari passu* distribution of the funds in the AGM accounts as a result of there being a shortfall of funds, the liquidators have sought to minimise costs in investigating clients' entitlements so as to ensure that the steps taken were proportionate in relation to the funds.

55 In my view it is appropriate that they be paid their remuneration and costs incurred to date and future remuneration and costs up to a cap estimated by the liquidators, for work undertaken in respect of the AGM accounts as a first priority from those funds.

56 Moreover, I note that on 28 January 2020, the unsecured creditors of AGM approved the liquidators' remuneration for the period 11 October 2019 to completion of the liquidation in the amount of $356,152.00. Now that approval is not of course determinative of itself, as the liquidators seek payment of their remuneration, costs and expenses from the assets of a trust. But the creditors' approval is relevant at least to my assessment of the reasonableness of the remuneration sought.

57 Now the evidence discloses that a proportion of the liquidators' remuneration and costs are unable to be allocated to any specific AGM account, as they were incurred for the benefit of all clients of AGM, OT and Ozifin with an entitlement to the funds in the AGM accounts. Those amounts include both general trust time and general liquidation time.

58 Now previously I specifically considered that there were several factors that justified the appointment of separate liquidators to each entity. Accordingly, and in my view, the liquidators, as custodians of the AGM accounts and appointed to investigate entitlements to the funds in the AGM accounts, are entitled to recover their reasonable remuneration for work undertaken for the benefit of all clients and not just clients of AGM. And this remuneration should be apportioned between the AGM client accounts, OT client account and Ozifin client accounts. Their remuneration should be apportioned based on the respective value of the funds

held. In *Re Owen* (2014) 225 FCR 541 Greenwood J gave directions that an apportionment be made (at [73]):

> …in proportion to the value of funds held by each trust at the moment in time when the liquidators exercise a right of direct indemnity. This approach brings about the result that each trust shares the burden of the costs, expenses and remuneration of the liquidators in pursuing the interests of each trust in proportion to the available assets of each trust.

59 On the application of these principles, I accept the liquidators' proposal as to the apportionment as to 5.12% to the AGM client accounts, 64.09% to the OT client account, and 30.79% to the Ozifin client accounts.

60 Now it is necessary at this point to say something more specific about the OT client account.

61 In this regard the liquidators have taken control of the OT client account on and from the appointment date, reviewed the books and records of OT, dealt with additional direct correspondence from other clients of OT and conducted an analysis into client entitlements in accordance with the statutory trust claims and the other trust claims, including working cooperatively with the liquidator of OT. Now those investigations were necessarily more detailed and complicated because of the number of clients, value of claims and the funds held by AGM and the existence of the other trust claims.

62 The liquidator of OT accepts that the liquidators of AGM are entitled to be paid from the AGM accounts held for the benefit of OT clients, as a first priority, such remuneration and costs as the liquidators have reasonably and appropriately incurred in dealing with those funds. But the following should be noted.

63 First, there will need to be an apportionment of the liquidators' remuneration such that moneys held for the benefit of OT clients are not charged with the costs associated with dealing with Ozifin and AGM clients.

64 Second, a proportion of the AGM liquidators' time based remuneration and costs are unable to be allocated to any specific AGM account as they were incurred for the benefit of all clients of AGM, OT and Ozifin. This charged time is referred to by AGM as general trust time and general liquidation time. The AGM liquidators propose that general trust time and general liquidation time be apportioned across all AGM accounts based on the respective value of the funds held in the AGM accounts and be paid in priority before the statutory trust funds are disbursed to OT. In my view this is appropriate.

65 Let me now say something from the AGM liquidators' perspective concerning the Ozifin client accounts. The liquidators of AGM have taken control of the Ozifin client accounts on and from the appointment date, reviewed the books and records of Ozifin and conducted an analysis into client entitlements, including working cooperatively with the liquidator of Ozifin. In my view the evidence filed by the AGM liquidators more than adequately demonstrates that the deduction proposed by the AGM liquidators of remuneration and costs is appropriate concerning the Ozifin client accounts.

66 Let me now say something more relevant to the quantum sought. It is pertinent to make the following general observations in relation to the work undertaken by the liquidators of AGM.

67 First, the evidence before me sets out in detail the work for which the liquidators seek remuneration. Mr Lindholm has deposed that he has reviewed the narrations setting out the work undertaken and that he intends to write-off a relatively modest amount to ensure the amounts claimed are reasonable and necessary.

68 Second, the evidence supports a finding that the work which has been performed has been necessary and properly performed. In no sense has any of the work travelled beyond the object of the liquidators' appointment, namely, to wind down the affairs of AGM, separately investigate AGM's affairs and determine clients' claims. Of course, as I have indicated, this has also necessitated a consideration of OT's position, Ozifin's position and their affairs and clients.

69 Third, there is no need for me to undertake a line by line analysis of the liquidators' claim for remuneration. The evidence before me contains a detailed explanation of the work performed and annexes extracts from KPMG's billing system including narrations for the work performed.

70 Fourth, the remuneration sought has been calculated using time-based charging which is the most appropriate method of calculation in the present circumstances, and is reasonable and has been properly and necessarily incurred.

71 Fifth, and pertinent to the present context, it is generally accepted that the net position realised by a liquidator for creditors does not necessarily represent the value of their services. Instead, the value is determined by the services provided by the liquidator in view of the time reasonably expended in the circumstances of the particular liquidation. In addition, the quantum of any return to creditors is not the single determinative factor in the reasonableness of time-based

costing. Rather, weight is to be given to the quality of the work performed and the complexity of the liquidation.

72 Sixth, my observations made in the co-operation judgment confirm the complexity of the work required to be undertaken. Moreover, the tasks undertaken by the liquidators and their staff have been performed by staff with appropriate seniority and skill.

73 Seventh, the liquidators' work has related to establishing the entitlement of some 5,680 clients to the AUD3,213,494.69 held in the AGM accounts over a period from October 2019 to April 2021. The work done was proportionate to the difficulty and importance of the task in the context in which it needed to be performed. In that regard, I note that in *Templeton v Australian Securities and Investments Commission* (2015) 108 ACSR 545, Besanko, Middleton and Beach JJ said at (at [30] to [34]):

> ... Indeed, the question of proportionality is an anterior question to consider in order to determine whether time was reasonably spent. If the relevant work plan underpinning the actual time spent and the allocation of personnel at the requisite level of seniority was disproportionate to the nature, importance and complexity of the task and the benefit to be achieved from the task, then it might be said that the time spent on the task was not time *reasonably* spent.
>
> The question of proportionality is a well recognised factor in considering the question of reasonableness. As the analogue of s 425(8) and like provisions expressly state, in having "regard to whether the remuneration is reasonable", the court can take into account, inter alia, the quality and complexity of the work and the value and nature of any property dealt with as well as the question of time reasonably spent. Generally, an amalgam of the factors in s 425(8)(d)–(e) and (g)–(h) have as their unifying theme the concept of proportionality.
>
> The question of proportionality in terms of the work done as compared with the size of the property or activity the subject of the insolvency administration or the benefit or gain to be obtained from the work is an important consideration in determining overall reasonableness: see *Re AAA Financial Intelligence Ltd (in liq)* [2014] NSWSC 1004 at [18] and [19] per Brereton J, *Re AAA Financial Intelligence Ltd (in liq) (No 2)* [2014] NSWSC 1270 at [35], [36], [43] and [45] per Brereton J, *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] 1 BCLC 638 at 645 and 651–2 per Ferris J (also reported at [1998] BCC 324), *Re On Q Group Ltd (in liq)* (2014) 104 ACSR 470; [2014] NSWSC 1428 at [20] per Brereton J, *Bank of Nova Scotia v Diemer* [2014] ONCA 851 at [33], [45], [55] and [56] per Pepall JA, *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 at [108], [115] and [121] per Heath and Venning JJ, *Brook v Reed* [2012] 1 WLR 419 at [51], [86] and [87]; [2011] 3 All ER 743 per Richards J, referring to the relevant 2004 UK Practice Statement [2004] BCC 912, *Re Korda; Re Stockford Ltd* (2004) 140 FCR 424; 52 ACSR 279; [2004] FCA 1682 at [47] per Finkelstein J, although we do not endorse his Honour's obiter observations on the "lodestar" methodology as being the *required* approach as distinct from merely *one* practical way to proceed in a particular case.
>
> Generally, in looking at proportionality, the value of the services rendered must be considered. We would endorse the observations of McLure JA in *Conlan as liquidator*

of Rowena Nominees Pty Ltd (rec and mngr apptd) (in liq) v Adams (2008) 65 ACSR 521; [2008] WASCA 61 at [47] where her Honour observed:

> [47] As to the performance of a task reasonably embarked upon, the work done must be proportionate to the difficulty or importance of the task in the context in which it needs to be performed. This is what is encompassed in assessing the value of the services rendered. Using an example from the law, the time spent by an appropriately qualified and experienced practitioner in drafting a statement of claim should be proportionate to the amount in issue.

Finally, even if one was not to address proportionality as an express factor, nevertheless its absence may have forensic significance in determining reasonableness. Another way to look at proportionality can be to conclude from a lack of proportionality between the cost of the work done relative to the value of the services provided that there has been overcharging or excessive remuneration claimed: see *Thackray v Gunns Plantations Ltd* (2011) 85 ACSR 144; [2011] VSC 380 at [64] per Davies J.

(emphasis in original)

74 Eighth, the liquidators have not drawn any amounts for their remuneration and expenses to date. So, the liquidators have taken on significant risk and responsibility in administering the affairs of AGM where for all practical purposes they have been unfunded.

75 Let me say something more concerning legal costs and disbursements at this point. As noted in *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* (2016) 305 FLR 222 by Brereton J (at [28]), ordinarily a liquidator's claim for remuneration does not include approval of disbursements because they are a matter for the liquidator's commercial judgment.

76 Now in *Independent Contractor Services*, the liquidators sought orders that their legal costs and disbursements be paid from trust funds. Brereton J assessed whether the amounts claimed by the liquidators were reasonably incurred and reasonable in amount. The basis upon which his Honour determined the amount incurred to be reasonable was not disclosed, but seems to have been determined on a broad brush basis as opposed to a line by line analysis of the disbursements claimed. I will consider the reasonableness of the legal costs sought to be paid from the AGM accounts at a similarly high level.

77 Now a number of matters are of relevance when considering the reasonableness of the liquidators' claim for payment of their legal costs and expenses from the AGM accounts. First, to date the liquidators' legal costs and expenses have not been paid. Second, the amounts claimed are reasonable with reference to the complexity of the matters involved and length of time that the solicitors have been engaged. Third, the legal costs incurred on behalf of the liquidators have been necessary in facilitating the liquidators' involvement in the ASIC and co-operation proceedings, involving the preparation of affidavit material and multiple appearances

at court hearings, assisting the liquidators in determining client entitlements to the funds held in the AGM accounts, and otherwise assisting the liquidators in responding to client claims. Moreover, whilst the amount of legal costs incurred is significant, it is not out of proportion to the amount of funds held in the AGM accounts.

78 For these reasons, in my view it is appropriate that the liquidators' legal costs and disbursements as sought be paid from the funds in the AGM accounts and be apportioned in the manner proposed in respect of their remuneration.

79 Let me for completeness deal with one other matter concerning inter-company claims.

80 Now if all funds in the AGM accounts are to be returned to clients, the need for directions in relation to any inter-company claims does not arise. But to the extent that it is relevant, I should note that any claims against the AGM accounts in accordance with the OT and Ozifin CAR agreements would fall behind all client claims in order of priority as those claims are unsecured claims. Similarly, in accordance with the OT and Ozifin CAR agreements and AGM's position as the holder of the AFSL, all funds were required to be held by AGM so that it could meet its obligations as issuer, meaning that AGM may have claims against moneys held by the other companies. However, those claims would also fall behind all client claims in order of priority. But in circumstances where clients' claims will not be paid in full, it would serve no practical utility for the liquidators to take steps in relation to any such claims.

81 Now the liquidators for AGM and the liquidators for OT and Ozifin have all previously given undertakings to the Court that if they identified a claim against one of the other entities in liquidation that could not be agreed with the liquidator of that entity, they would apply for directions about how to resolve that claim before commencing any proceedings.

82 In light of the undertaking provided to the Court, the AGM liquidators wrote to the liquidators for Ozifin asking them to explain if AGM potentially had any claim to any of the funds in Ozifin's liquidation account under the terms of the Ozifin CAR agreement. The liquidators' solicitors received a response indicating that the liquidators of Ozifin did not consider AGM to have any claims over the relevant funds.

83 The liquidators for Ozifin say that the funds held in the liquidation account they maintain are not subject to a statutory trust for the benefit of former clients of Ozifin. The evidence before me appears to establish that the funds held in the liquidation account are effectively only those

amounts owed to Ozifin pursuant to the terms of Schedule 1 of the Ozifin CAR agreement and are not client moneys.

84 I agree with the AGM liquidators that as a result of the response from the liquidators for Ozifin and the existence of the other trust claims, any further inquiry by the liquidators would almost certainly be arid. Further, any claim that AGM could make on Ozifin's liquidation account would fall behind all client claims in order of priority. So, to the extent that claims on the funds held by the liquidators of Ozifin may arise, AGM making a claim on those funds serves no utility and would unnecessarily deplete the funds to be returned to Ozifin clients.

85 So, in my view, the AGM liquidators are justified in not pursuing any claims AGM may have had to the funds held in the liquidation account of Ozifin.

The position of OT

86 Let me now deal more directly with some aspects of OT's position.

87 The funds of clients of OT held in the relevant bank account in the name of AGM are, as I have already discussed, subject to a statutory trust pursuant to s 981H and reg 7.8.03 because they were paid to AGM as the AFSL holder by or on behalf of clients of OT or in AGM's capacity as a person acting on behalf of the clients. And as I have indicated, reg 7.8.03 applies because AGM has ceased to be a licensee and is being wound up: see regs 7.8.03(1) and (2)(b)(ii). In those circumstances, pursuant to reg 7.8.03(4) in respect of each person who is entitled to be paid money from the account of the financial services licensee (ie AGM) maintained for s 981B, namely, the OT clients, the account is taken to be the subject of a trust in favour of such persons. So, the money should be paid out in accordance with the priorities in reg 7.8.03(6).

88 Accordingly, I will order that the liquidators of AGM pay the money held in those statutory trust funds to the liquidator of OT, subject to the liquidators of AGM being permitted to pay themselves their reasonable remuneration, costs and expenses in relation to the funds. The liquidator of OT should also then be entitled to take from such statutory trust funds his reasonable remuneration, costs and expenses incurred in relation to the funds.

89 Now although there are some difficulties with the books and records of OT and AGM including in relation to the master/client data list, such a list would appear to be the best record available of the clients entitled to the moneys within the statutory trust funds. Accordingly, OT's liquidator can rely upon it and I will so direct.

90 So, the statutory trust funds should first be applied, once received by the liquidator of OT, to the liquidator's remuneration and expenses in respect of the statutory trust funds, and then in respect of all those clients having a positive account balance with OT as at the date of liquidation. If there are insufficient funds to pay all such claims in full they should be paid proportionately.

91 If after paying out all clients, there is a positive balance, it should be paid into an account maintained by the liquidator which currently includes the funds from the OT business transactions account.

92 Further, the liquidator should not be obliged to pay any statutory trust funds to clients with a positive balance of $25.00 or less, as the costs of paying those claims would exceed the likely benefit.

93 Now so far I have dealt with the statutory trust funds. Let me now deal with the non-statutory trust funds.

94 It is also appropriate to give to the liquidator of OT the declaration sought that the amounts from the OT business transaction account, the OT foreign account and any surplus of the funds, are held on constructive trust so that they can be paid out to investor clients who have obtained redress orders and consequent directions to apply the money first to costs and expenses, then for remuneration of the liquidator and the balance to those claimants admitted to proof, proportionally if insufficient funds are available to meet the claims in full.

95 Those funds ought to be held as constructive trust funds for the benefit of the investor clients of OT who are the beneficiaries of the redress orders made by me in the ASIC proceedings. I will discuss later the proper characterisation of the relevant constructive trust and the precise amount that the OT liquidator can deduct in priority for remuneration, costs and expenses.

96 Now in the absence of declarations and directions in the terms sought, the redress orders may be rendered fruitless in circumstances where OT is insolvent. The clients should not have to line up with other unsecured creditors given that the redress orders are for the repayment of moneys and to which they should be entitled in equity. Accordingly, the declaration and directions sought are an appropriate way of ensuring that justice is done to the OT clients and that my redress orders are properly given effect to.

97 Now I should note that those funds include moneys recovered by the liquidator and previously held by Authenticate Pty Ltd. The records of OT indicate that the funds received by

Authenticate Pty Ltd as a payments service provider of OT comprise a mixture of client moneys and have been applied in different ways. The liquidator has been unable to trace specific client deposits to any part of the funds recovered by him from Authenticate Pty Ltd. So in those circumstances these funds are a mixed fund and it is appropriate that they be held as constructive trust funds for distribution to investor clients who have obtained redress orders.

98 Further, there should also be a direction that the liquidator need not pay any constructive trust claimant a dividend of $25.00 or less given that the costs of doing so would be disproportionate to the benefit gained.

99 Let me now deal with some other matters.

100 First, it is appropriate that where customers hold two or more accounts and submit either one proof of debt or multiple proofs of debt, the liquidator can treat the accounts as one account in adjudicating the proofs of debt. Since the accounts will rank equally, it will not make any difference to the amounts actually received by the OT clients. And it will save expense by simplifying the proof of debt and adjudication process.

101 Second, the directions sought relating to proofs of claim under settlement agreements between clients of OT and OT entered into prior to liquidation are appropriate. Those clients have agreed to accept particular amounts in relation to their claims and in many cases have been paid those amounts. So where an amount in a settlement agreement has not been paid in full, the liquidator is justified in not accepting the settlement claim to the extent that it would provide the creditor with more than the claimant would receive on a *pari passu* distribution. Where it has not been paid in full and the amount paid is less than the *pari passu* distribution, the liquidator should admit the settlement claim to the extent required to enable that claimant to receive a dividend of an amount which together with what was already received would be equal to the *pari passu* distribution to other trust claimants. That will ensure that settlement claimants are not treated unfairly and are no worse off than they would be under a *pari passu* distribution than trust claimants who have not settled. Where the settlement claimant has already been paid more than he would receive on a *pari passu* distribution, the liquidator in my view is justified in not disturbing that arrangement.

102 Third, an order should also be made under s 544 of the Act that the liquidator may pay any unclaimed payments to the ASIC in respect of statutory trust claims or constructive trust claims where they remain unclaimed at the conclusion of the liquidation of OT.

103 Fourth, the liquidator should also be released from earlier undertakings given in the ASIC proceedings.

104 Fifth, it is also appropriate that the liquidator be allowed to take his proper costs of this application from the property of OT with priority in accordance with s 556 of the Act.

The position of Ozifin

105 Let me set out some aspects of Ozifin's position.

106 Now AGM maintained six accounts to hold client moneys belonging to Ozifin clients. But only two of those accounts (the AGM (Ozifin) CM accounts) held any funds as at the date of appointment. These accounts are what I will describe as the 3879 account and the 3887 account. At the date of appointment, the balance of the 3879 account was AUD890,316.00 and the balance of the 3887 account was USD66,975.51. The balance of the 3879 account as at 4 June 2021 was AUD890,306.00, reflecting a slight decrease due to a bank charge. The balance of the 3887 account remains at USD66,975.51.

107 The Ozifin liquidators seek the same relief as is sought by the AGM liquidators in their application insofar as it pertains to the nature of the funds held in the AGM (Ozifin) CM accounts. And as at the date of appointment, as I have already indicated, all of the funds held in the AGM (Ozifin) CM accounts were and continue to be funds held by AGM subject to the statutory trust imposed by s 981H and reg 7.8.03 in favour of Ozifin's clients, that is, all of these funds are statutory trust funds.

108 As I have already indicated, these statutory trust funds should be transferred to the Ozifin liquidators by the AGM liquidators to allow for their distribution to those Ozifin clients who have been identified as having an entitlement to a share of these funds.

109 As I have indicated, I will make the necessary orders enabling the funds held by AGM in the AGM (Ozifin) CM accounts to be transferred to the Ozifin liquidators for on-distribution to the statutory trust claimants. The Ozifin liquidators are in a better position to on-distribute the statutory trust funds to Ozifin clients in circumstances where the Ozifin liquidators have received over 800 proofs of debt from Ozifin clients, who represent most of the creditors by value, and therefore have the most up-to-date database of client contact information. Moreover, the Ozifin clients are familiar with the Ozifin liquidators and therefore the Ozifin liquidators are in a better position to communicate with Ozifin clients without causing confusion.

110 Now as I have already indicated, there are different ways of assessing a person's entitlement under reg 7.8.03(6). The Ozifin liquidators take the same position as the AGM liquidators that the preferable approach in the circumstances of the present case in calculating entitlements is to adopt the claims basis approach. I agree.

111 In the present circumstances an approach based on the claims basis is the most efficient and cost effective. First, the books and records of AGM and Ozifin are deficient so that tracing of client claims is not possible and/or economically viable. Second, a majority of clients of Ozifin invested $500.00 or less with Ozifin. Third, AGM and Ozifin appear to have undertaken a process of returning client funds prior to the date of appointment. Clients' trading positions were also finalised prior to the cancellation of the AFSL and the appointment of the liquidators. In both processes, AGM and Ozifin appear to have not strictly returned funds to clients from the accounts that clients contributed funds to, complicating any tracing exercise.

112 Further, based on the Ozifin liquidators' investigations into the identity and entitlements of statutory trust claimants to the statutory trust funds calculated on a claims basis, the amount which ought to have been held on behalf of clients of Ozifin as at the date of appointment, assuming that AGM complied with its obligations as holder of the AFSL, is the sum of AUD938,640.00.

113 Now as I have said, the balance of the 3879 account as at 4 June 2021 was AUD890,306.00 and the balance of the 3887 account remains at USD66,975.51. Accordingly, on the basis of the existing records available to the Ozifin liquidators and as a result of their investigations, including the reconciliation of client entitlements to the statutory trust funds, it appears that the AGM (Ozifin) CM accounts contained sufficient funds, prior to the deduction of the statutory trust remuneration and expenses, to pay out all of Ozifin's clients. But after deduction of the statutory trust remuneration and expenses there may not be sufficient money in the AGM (Ozifin) CM accounts to pay out each person entitled. If this occurs, the money in the account must be paid in proportion to the amount of each person's entitlement, as required by reg 7.8.03(6)(d).

114 Now the Ozifin liquidators seek a direction that they are justified in adopting the following approach in order to achieve the distribution of the statutory trust funds to the statutory trust claimants. In my view they are so justified.

115 First, the Ozifin liquidators should write to all statutory trust claimants within 14 days of the receipt of the statutory trust funds from the AGM liquidators. This communication will inform the statutory trust claimants of the quantum of the distribution they will receive, request the provision of bank account details and invite any statutory trust claimants who have not yet completed a proof of debt to do so.

116 Second, the Ozifin liquidators should allow statutory trust claimants 14 days from the date on which such a communication was sent to respond with their bank account details and any objections.

117 Third, the Ozifin liquidators should record all bank details received and deal with any objections within 14 days from the date of such a 14 days response deadline. The Ozifin liquidators should subsequently distribute to each statutory trust claimant their respective entitlements via EFT into that claimant's nominated bank account. If no response is received or no bank account is nominated from or by a statutory trust claimant, the Ozifin liquidators should distribute the statutory trust claimant's entitlement via cheque to their last known address. Further and more generally, due to there being material deficiencies in the books and records of Ozifin available to the Ozifin liquidators, the Ozifin liquidators seek a direction that they are justified in distributing the statutory trust funds to statutory trust claimants in accordance with their last known contact details recorded in the books and records of Ozifin. I will make this direction.

118 Now the Ozifin liquidators also seek directions that they are justified in not paying an amount to statutory trust claimants whose claims are less than $50.00, and that any statutory trust funds remaining after distribution be paid over into the liquidation account to be dealt with in accordance with the process described below. I am content with this.

119 Let me now say something about the liquidation account.

120 Now at the date of the liquidators' appointment, Ozifin held five bank accounts in its own name. The balances of the accounts at the date of appointment were: 0328 Account, AUD2,503,224.31; 4222 Account, AUD1,713,278.65; 4476 Account, EUR 158,017.80; 0040 Account, nil; and 2307 Account, nil. Now the current balances of the Ozifin bank accounts are nil because the Ozifin liquidators arranged for the funds in these accounts to be transferred into the liquidation account between November 2019 and March 2020. A total of AUD4,470,980.95 was transferred from the Ozifin bank accounts into the liquidation account

over this period. As at 31 March 2021, the balance of the liquidation account was AUD2,206,592.15, which is net of receipts and payments in the liquidation of Ozifin for the period between 11 October 2019 and 31 March 2021.

121 The Ozifin liquidators' investigations show that all of the funds in the liquidation account are held for and on behalf of Ozifin, that is, they are not statutory trust funds.

122 These investigations reveal that the way in which funds paid by Ozifin clients were dealt with by both Ozifin and AGM did not accord with what was contemplated in the CAR agreement, which mandated that all client moneys, being moneys to which Division 2 of Part 7.8 of the Act applied, were to be paid into an account in the name of AGM opened for the purposes of s 981B. Moreover, the Ozifin liquidators' investigations reveal that the AGM (Ozifin) CM accounts did not always exclusively hold statutory trust funds. The AGM (Ozifin) CM accounts historically held both statutory trust funds and surplus funds.

123 Now Ozifin clients could fund their trading accounts by either direct deposit or indirect deposit. A direct deposit was a transfer of funds from an Ozifin client directly into one of the AGM (Ozifin) CM accounts. Funds transferred by direct deposit were statutory trust funds and dealt with accordingly. But indirect deposits could occur via a direct transfer into a bank account held by Ozifin or via a credit card payment. An indirect deposit would be accounted for by Ozifin and AGM by re-allocating some of the surplus funds in the 3879 account as client moneys in that account and subsequently re-allocating the actual funds directly transferred by the client to Ozifin or by credit card as surplus funds held in an Ozifin account or by such a provider on Ozifin's behalf. The effect of all of this was that client funds would be indirectly deposited into the AGM (Ozifin) CM accounts effectively through the use of accounting book entries.

124 Now any funds in the liquidation account could not be statutory trust funds because any statutory trust funds would have been accounted for as an increase to the statutory trust fund balance in the AGM (Ozifin) CM accounts.

125 In the circumstances, the Ozifin liquidators seek a declaration that the funds in the liquidation account are funds held for and behalf of Ozifin. And consequentially linked to such a declaration, the Ozifin liquidators seek a direction that they are justified in distributing the surplus funds in accordance with Subdivision D of Division 6 of Part 5.6 of the Act.

126 I will deal with the constructive trust claims aspect later concerning Ozifin.

127 Let me turn to the question of remuneration.

128 Now the Ozifin liquidators seek an order that they are entitled to be paid out of the statutory trust funds received from AGM their reasonable remuneration, costs and expenses insofar as such remuneration, costs, and expenses have been incurred in investigating, dealing with and distributing the statutory trust funds. I have no difficulty with this.

129 Now it should be noted that the Ozifin liquidators' investigations have been conducted in the face of various significant difficulties pertaining to material deficiencies in the books and records of Ozifin, as well as an inability to access Ozifin's customer relationship management (CRM) system, which was licensed by Ozifin from a company based in Cyprus. The lack of access to the CRM system in particular has meant that the tasks of identifying the statutory trust funds held for the benefit of Ozifin clients, and, more importantly, ascertaining the precise entitlements and identities of the statutory trust claimants, has been a time-consuming exercise.

130 The work done by the Ozifin liquidators in respect of the statutory trust funds held in the AGM (Ozifin) CM accounts includes gathering and reconciling the records of Ozifin, investigations into the nature of the funds held by and on behalf of Ozifin and Ozifin clients by AGM in the bank accounts maintained by both AGM and Ozifin, corresponding with the liquidators of AGM and OT regarding the distribution of funds held by each of AGM and OT, investigating and reconciling the accounting mechanisms employed by AGM and Ozifin to process indirect deposits of client moneys, and reconciling the balances of funds held pursuant to the s 981H statutory trust and calculating the entitlement of clients of Ozifin to the statutory trust funds under reg 7.8.03 using the claims basis approach.

131 The Ozifin liquidators' remuneration up to 30 April 2021 has been approved by the creditors of Ozifin. This means that the total amount of remuneration approved and paid as at 4 June 2021, in respect of the liquidation as a whole, is $2,636,729.75. The evidence suggests that approximately $62,000.00 of the total amount of work performed by the Ozifin liquidators might properly bear the description of being referable to administering the statutory trust funds.

132 Now there is a degree of flexibility as to the amount of the remuneration and expenses incurred by the Ozifin liquidators that ought be deducted from the statutory trust funds before they are distributed to Ozifin clients on a *pari passu* basis. Given that flexibility, I will fix a figure in that respect, which should take into account both work done to date which is referable to the administration of the statutory trust funds by the Ozifin liquidators and also the work required

to distribute those funds. Further, I will make the directions sought concerning legal costs and expenses.

133 Let me deal with the payment of dividend question. The Ozifin liquidators seek directions as to the process for adjudicating on, declaring, and paying dividends out of the surplus funds. In my view this is justified. First, within 14 days of the distribution of the statutory trust funds, the Ozifin liquidators should issue a notice of intention to declare a dividend with respect to ordinary unsecured claims. Second, the deadline for submission of proofs of debt should be 30 days from the date of the notice of intention. Third, the period for the adjudication of proofs of debt should be extended to 28 days from the date of the deadline for submissions of proofs of debt. Fourth, the last date for objections to rejected proofs of debt should be 21 days from the date of the adjudication of proofs of debt. Fifth, the dividend declaration date should be extended to 3 months from the date of the notice of intention to declare the dividend.

134 Furthermore, the Ozifin liquidators seek directions to the following effect. First, that they distribute each of the clients of Ozifin their dividend via EFT to the client's nominated bank account. Second, if clients do not nominate a bank account, that the Ozifin liquidators distribute the clients their dividend via cheque to the client's last known address recorded in the books and records of Ozifin. Third, where a customer of Ozifin holds two or more accounts with Ozifin and lodges a proof of debt regarding those accounts, that the Ozifin liquidators are justified in treating the accounts as one account in adjudicating on the customer's proof of debt. Fourth, they also seek a direction that the Ozifin liquidators are justified in writing to former clients of Ozifin who have not previously provided bank account details in order to request the provision of the same in order to facilitate payment of the dividend via EFT. I will give such directions.

135 Let me deal with four final matters.

136 First, in instances where a client of Ozifin is recorded as having a claim but that client has not submitted a formal proof of debt, the Ozifin liquidators seek a direction that the claim be admitted without formal proof based on Ozifin's books and records, subject to any exclusion of creditors whose dividend would be $50.00 or less. I will give such a direction.

137 Second, the Ozifin liquidators seek a direction that any surplus funds that are unable to be returned to clients of Ozifin be paid to ASIC as unclaimed moneys pursuant to s 544 if not

claimed within three months of the distribution of the funds in accordance with my orders. I will give that direction.

138 Third, in order to make the distributions sought, the Ozifin liquidators will need to be released from their undertaking given in the ASIC proceedings, which at present prevents the distribution of any of Ozifin's funds. I am prepared to do this.

139 Fourth, the Ozifin liquidators seek an order that their costs of this application be paid out of the property of Ozifin, specifically the surplus funds, in accordance with s 556. I will so order.

140 Let me now turn to the main areas of dispute.

ASIC's objections to the liquidators' proposals

141 Now an issue that arose at the hearing of the various liquidators' applications for directions and other orders was whether the relevant constructive trust in each case that was impressed on the non-statutory trust funds was institutional so as to arise when the relevant events occurred, or remedial so as not to arise until I made a declaration of trust or gave the necessary directions. And turning upon the resolution of that question was the extent to which the liquidators in each case could obtain or recoup themselves for general liquidation expenses from the non-statutory trust funds when the expenses did not directly relate to the getting in, maintenance or disposition of trust assets. So there are two questions.

142 First, should the liquidators of AGM, OT and Ozifin treat the funds held by those companies that are not subject to a statutory trust by the operation of Part 7.8 of the Act as held on an institutional constructive trust for the clients of those companies? Now in this regard, ASIC says that such a constructive trust may have arisen from three possibilities concerning AGM, although this can be extrapolated to the other entities. One possibility relied upon was a fiduciary relationship between AGM and clients arising from AGM's position as trustee for client moneys. Another possibility relied upon was AGM being knowingly concerned in another entity's breaches of duties to its clients and assisting that other entity in a dishonest and fraudulent design including receiving profits resulting from that other entity's breaches. A yet further possibility relied upon was that AGM received funds that were procured by fraud and so should be held on such a trust under the principles discussed in *Black v S Freedman & Co* (1910) 12 CLR 105. Other permutations arise.

143 Second, if such an institutional constructive trust exists, can the liquidators of the companies have resort to those non-statutory trust funds to satisfy their claims for general liquidation remuneration and expenses incurred in the winding up of those companies?

144 ASIC says that I ought to make declarations or give directions to the liquidators that funds not subject to a statutory trust should be treated as impressed with an institutional constructive trust in favour of the clients of each of the companies. The liquidators disagree and say that only a remedial constructive trust should be imposed.

145 Further, ASIC says that the liquidators ought to be able to recover from those trust funds their remuneration and expenses, but only to the extent that those costs are attributable to the administration of the trust assets and not otherwise. In other words, there should be no resort to those funds to meet general liquidation expenses if it is correct that an institutional constructive trust exists. Contrastingly, the liquidators say that there can be recourse irrespective of whether the relevant constructive trust is institutional or remedial.

146 Let me deal with the first question. Are we dealing with an institutional constructive trust or a remedial constructive trust?

The question of characterisation

147 ASIC says that each of the companies stood in a fiduciary relationship with the clients of those companies. ASIC points out that a person or entity who, in a professional capacity, provides investment advice to a client, in circumstances justifying an entitlement in the client to expect that the adviser is acting in the client's interest, stands in a fiduciary relationship with that client. Further, it says that because the system of conduct engaged in by each of the companies gave rise to conflicts of interest with their clients, each of the companies breached its fiduciary duty to its clients.

148 ASIC says that all revenue earned by the companies, and therefore all money sitting in company accounts not subject to a statutory trust, was derived from losses sustained by clients. It says that the companies as fiduciaries obtained that profit or benefit in circumstances where there was an actual or potential conflict of interest and duty. Consequently, it says that the profit is or ought be treated as held on constructive trust for the clients.

149 Now I have previously determined the liability of AGM, OT and Ozifin for their respective contraventions of the Act and the ASIC Act. ASIC says that the findings in my liability judgment support the conclusion that each of the companies owed fiduciary duties to their

clients. In the liability judgment, I determined that representatives of each of the companies provided personal financial advice to their clients within the meaning of s 766B(3) of the Act, which advice was provided in relation to complex derivative instruments. Further, those representatives were trained in and used tactics to gain investors' trust, and to engender a sense of security, and represented to investors that the representatives were experienced or had expertise in the products in relation to which they provided advice. Further, those representatives falsely represented to their clients that in providing that personal advice, the representatives had done all things that it was reasonable for them to have done to ensure that they were acting in the best interests of the clients and considered that the financial product advice in each instance was reasonably appropriate to the client. Now each of those matters was consistent with the existence of a fiduciary relationship.

150 Moreover, I determined that the conduct of the representatives of the companies was part of a consistent system of conduct applied by each company in its interactions with its clients. Further, on my findings, when providing personal financial advice to their clients, each of the companies stood in a clear position of undisclosed conflict with their clients. Let me elaborate.

151 First, each of the companies generated revenue when their clients lost. In the case of the clients of OT and Ozifin, that was because the terms of the CAR agreements between those companies and AGM, as the holder of the relevant AFSL, entitled the former to between 93% and 95% of the total client funds deposited and lost via trading, net of any profits realised by clients from their trading. And in the case of AGM, it was the counterparty to the positions opened by its clients.

152 Second, in the case of AGM and OT, the commissions and incentives paid to the respective representatives to encourage deposits placed them in a position of direct conflict with their clients.

153 It is said that each of those matters placed the companies in a direct position of conflict with their clients which was a breach of the companies' fiduciary duties. ASIC says that the result is that any profit or benefit gained by the companies was held by them as constructive trustee.

154 Now ASIC says that an institutional constructive trust arose at the moment of the receipt of the benefit by the fiduciary. And in this regard, ASIC says that the point at which each company received the relevant benefit was the point at which the client(s) made a loss via trading with the relevant company. It says that a benefit was only obtained by the relevant company when

it earned revenue, which was at the point where the trades the investors were induced to make resulted in a loss to the investors and a win for the relevant company. It says that this was the point at which the terms of the contract between the client and the relevant company gave rise to a contractual entitlement on the part of the company to those funds, and at which the company ceased to account for those funds as being held on a statutory trust for the clients.

155 Moreover, ASIC says that there is nothing in the evidence that suggests that any of the companies earned any revenue apart from the benefits obtained by them in breach of fiduciary duty. ASIC says that I ought therefore to be satisfied that the funds standing to the credit of OT and Ozifin, and the surplus funds held by AGM for OT, represented profit or a benefit gained by those companies in breach of the fiduciary duties owed by them to their clients, and which were therefore impressed with an institutional constructive trust.

156 ASIC says that at the time of the appointment of a liquidator to OT, it held approximately $3,653,892.14 in cash that was not subject to a statutory trust. In addition, AGM holds OT funds that AGM intends to transfer to the liquidator of OT that are surplus to the amount required to refund positive account balances, and therefore not subject to a statutory trust. It is said that these funds, which are or were held by OT and AGM, are impressed with an institutional constructive trust in favour of the relevant clients.

157 Further, at the time of the appointment of liquidators to Ozifin, it held approximately $4,470,980.95 in cash that was not subject to a statutory trust. ASIC says that these funds were similarly impressed with an institutional constructive trust.

158 Now Mason J said in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 107 that if a fiduciary becomes liable to account for a profit or benefit that was obtained in circumstances where there was a conflict of interest, then:

> [a]ny profit or benefit obtained by a fiduciary [in the circumstances where there was a conflict] is held by him as a constructive trustee.

159 ASIC says that this language resonates with the concept of an institutional constructive trust, although to me this seems more open-ended.

160 Moreover, ASIC prayed in aid Lord Browne-Wilkinson's observation that "[u]nder an institutional constructive trust, the trust arises by operation of law from the date of the circumstances which give rise to it: the function of the court is merely to declare that such a

trust has arisen in the past" (*Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714).

161 Now in some settings, courts have treated the availability of a constructive trust as remedial. In the case of the misappropriation of corporate property or opportunity or the receipt of a bribe, courts have in that setting approached the impression of a constructive trust on the proceeds of those breaches as a discretionary remedy. But ASIC says that that is not determinative of the question here. ASIC says that no case has held that the profit or benefits obtained by a fiduciary from the person to whom fiduciary duties are owed can only ever be the subject of a remedial constructive trust. So, cases such as *Canehire Pty Ltd v Themis Holdings Pty Ltd* [2016] 1 Qd R 296 have held that property acquired in breach of fiduciary duty is impressed with a trust that comes into existence immediately it is acquired.

162 Further, ASIC points out that funds that are stolen are impressed with a constructive trust (*Black v Freedman* at 110 per O'Connor J), and such *Black v Freedman* trusts are institutional such as to arise at the moment the relevant theft occurs.

163 Moreover, ASIC says that the circumstances giving rise to an institutional constructive trust extend beyond cases of theft to include cases involving the receipt of funds on the basis of fraud; see *Re Courtenay House Capital Trading Group Pty Ltd (in liq)* (2018) 125 ACSR 149 at [30] per Brereton J and also *Re Courtenay House Capital Trading Group Pty Ltd* (*in liq)* (2019) 139 ACSR 469 at [34] to [38] per Black J. But in any event, ASIC says that the breaches of fiduciary duty that arose in the context before me are such as to give rise to an institutional constructive trust, regardless of whether the circumstances can be described as involving the commission of a fraud. It is said that the relevant companies were in relation to every client in a position of direct conflict of interest. And all moneys other than the statutory trust funds held by the companies represented benefits obtained by them from the clients whilst the companies were in a position of conflict. ASIC says that this is enough to establish that those benefits are held on constructive trust from the moment the benefits were received.

164 But ASIC says that if it is necessary to go further and to conclude that the relevant companies were engaged in a fraud, that conclusion should be drawn from my findings in the liability judgment. The companies were through their agents found to have deliberately misrepresented the true position to their clients, in particular by falsely representing that the account managers were acting in the best interests of the clients. It is said that the purpose of the unconscionable scheme was the antithesis. The aim was to increase the prospect that deceived clients would

lose their money in financial transactions, in relation to which the companies stood on the opposite and winning side. That fact was unknown to the clients. It is said that the moneys to which the companies purported to be entitled was obtained as the consequence of that illegal scheme.

165 For those reasons, ASIC says that the scheme carried out by each of the companies was fraudulent, and the non-statutory funds held by them were acquired as a result of that fraud. It is said that those funds were impressed with a constructive trust at the point at which the funds ceased being the subject of a statutory trust.

166 Moreover, according to ASIC, the conclusion that an institutional constructive trust arose immediately on the happening of the relevant events does not require that the defendants "assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff" (*Paragon Finance Plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 at 408 and 409 per Millett LJ). It is said that the better view is that remarks to that effect refer to the availability of personal remedies. It is said that that was the view taken in *McNab v Graham* (2017) 53 VR 311 at [96], which concerned the application of s 21(1)(b) of the *Limitation of Actions Act 1958* (Vic) to a constructive trust that arose on the basis of proprietary estoppel.

167 In any event, ASIC says that even if it is necessary to show that the companies assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and has not been impeached by the relevant claimant, such a transaction occurred here.

168 It is said that every client, who lost money as a result of the companies' fraud, initially paid money to those companies. Immediately upon receipt of that money, and before any trading had taken place to the benefit of the companies and the detriment of the clients, the companies held client moneys in bank accounts on statutory trust. And despite the fact that those moneys ought to have been held by AGM as the AFSL holder, some transfers at least were made directly to the other companies or their payment providers. It is said that the constructive trust arose immediately upon the appropriation of those funds by the companies as their own after the clients' losing trades.

169 For that reason, ASIC says that the companies' possession of the property was coloured by the trust and confidence by means of which they obtained it, and their subsequent appropriation of the property to their own use, which was in breach of trust.

170 Further, ASIC says that once it is concluded that the constructive trust was institutional, having taken effect at the moment the relevant events occurred, there are only limited circumstances justifying the making of a contrary order by way of a deferral. The limited circumstances were explained in *Parsons v McBain* (2001) 109 FCR 120 at [13] to [16]. It is said that the principles there stated in the context of a common intention constructive trust apply equally to the institutional constructive trust in the present case. It is said that there are no circumstances in the present case of the kind discussed in *Parsons* that could or should defer the proprietary rights of the defrauded clients to the liquidators' claims for general liquidation costs and remuneration.

171 Now generally speaking I reject ASIC's characterisation.

172 In my view the constructive trust over the non-statutory trust funds held by the respective liquidators is better regarded or should be regarded as remedial, that is, giving rise to an enforceable equitable obligation but only operating from a time as determined by me, rather than institutional, that is, arising from the date of the circumstances giving rise to it.

173 I am dealing with the second type of case described by Millett LJ in *Paragon Finance* at 409:

> The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief ': *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073 at 1097, [1968] 1 WLR 1555 at 1582 per Ungoed-Thomas J.

174 Moreover, in terms of the non-statutory trust funds I am not here dealing with a case where the entities have assumed the duties of a trustee by a lawful transaction which preceded any breach of trust. I am here dealing with a case where the so called trust obligation arose as a very consequence of the unlawful conduct that has been impugned concerning the non-statutory trust funds.

175 I am not in doubt that I am not dealing with a trust which is proprietary in nature, but rather one associated with the imposition of a personal liability to account as if the wrong-doer was a trustee (*Giumelli v Giumelli* (1999) 196 CLR 101 at [4] per the plurality). I am not here dealing with the notion of the "trust institution" which seems inelegantly to explain the derivation of

the problematic label "institutional constructive trust". In the context before me I am only concerned with equitable wrongdoing involving a breach of fiduciary duty. I am not concerned with other contexts.

176 Now of course, what have been described as institutional constructive trusts are commonly imposed in recognised categories of cases such as trusts arising from mutual wills, trusts arising where equity perfects an incomplete gift, secret trusts, trusts arising from sales of real property and personal property, as well as transactions involving future property. Institutional constructive trusts can also arise in circumstances involving the failure of an express trust or in the case of stolen property or moneys obtained by fraud.

177 On the other hand, constructive trusts imposed as a response by a court to a claim for equitable intervention are better regarded as remedial. Common examples include responses to findings of a breach of fiduciary duty, unconscionable conduct, undue influence or estoppel. Moreover, where transactions and dealings are unwound by a court because they are found to be a result of a breach of a fiduciary duty, it is always in the discretion of the court as to whether or not a constructive trust is declared or some other lesser equitable relief is given.

178 But I accept that the dichotomy drawn between the two types of trusts is not free from doubt.

179 In *Muschinski v Dodds* (1985) 160 CLR 583, Deane J suggested that there was no true dichotomy between the notion of an institutional constructive trust and a remedial constructive trust. And a proprietary remedy should never be regarded as mandatory. Further, as has been said, it should be possible to exercise a discretion against declaring proprietary relief if the circumstances suggest that it would be unwise to do so.

180 Further, the observations of Ormiston JA in *Nolan v Nolan* [2004] VSCA 109 are both pertinent and persuasive. He said (at [60]):

> …A person becomes an institutional constructive trustee because there is evidence from which it may be inferred either that that person intended to hold property on behalf of others or that he or she should have had such an intention. If, however, the person intends to act adversely to other persons having a right in the property, then it could not be said that that person then acts as trustee, whatever other remedies might be had against that person, which might comprehend the declaration of a remedial constructive trust at the appropriate time…

181 In the present case there is no evidence that any of the companies intended to hold property, other than that held on statutory trust, on behalf of others. Each company was the counterparty

to client trades, and therefore made income when the clients lost. Conversely, the counterparties lost when clients won.

182 In my view if any constructive trust was to be declared in the present case, such a constructive trust would be remedial because such a constructive trust could only ever be said to be a response to an allegation of wrongdoing in the sense of a breach of fiduciary duty on the part of the relevant company, by entering into a trade where it had a conflict between its own interests and those of the client. Moreover, each company was not intending to, and absent established dishonest intention towards each client, should not be seen as having intended in each trade to hold the revenue it won on behalf of the individual client.

183 Further, as to the suggestion of any dishonest intention on the part of a particular company in respect of each trade undertaken by it, I do not accept ASIC's submissions regarding findings of fraud in order to justify the imposition of an institutional constructive trust. It was no part of ASIC's case against a particular company in the ASIC proceedings that it, its employees or agents were each engaging in specific and repeated fraudulent conduct in respect of individual trades.

184 Let me make another point. It is uncontroversial that funds continued to be paid into and withdrawn from client accounts for some time after the losses and misconduct that is said to have given rise to the constructive trusts. As a result, if each constructive trust is institutional and is regarded as having existed from the commencement of the misconduct, the funds owing to each client will have become mixed and be untraceable, which is inconsistent with the imposition of a trust. It would be more appropriate to regard the constructive trusts here as remedial, being imposed upon the funds in the hands of the liquidators to protect clients who should be entitled to the funds in equity.

185 Further, even if one was to accept that an institutional constructive trust existed for a breach of fiduciary duty, there is still an element of discretion in the recognition of any such scenario. The idea that the imposition of an institutional constructive trust is strictly only rules based is heretical. Even where one is dealing with an institutional constructive trust, there is still a discretion whether to grant a declaration or award some other remedy.

186 Moreover, even if I could declare and therefore recognise the existence of an institutional constructive trust, in the exercise of my discretion I would not do so if its consequence would mean that innocent third parties, that is, the sets of liquidators in the present matters, would be

denied the ability to recoup their general liquidation costs and expenses (assuming ASIC's institutional characterisation to be correct) from the relevant non-statutory trust funds.

187 In the exercise of my discretion, the more appropriate course is to declare a remedial constructive trust which, speaking now, would not deny the sets of liquidators their ability to recoup such costs and expenses from the non-statutory trust funds.

188 In summary, in my view the imposition of a remedial constructive trust is an appropriate response to a situation where the companies and their liquidators hold funds in addition to those caught by the statutory trust fund provisions, which due to misconduct by those managing the companies should be preserved for the benefit of clients who contributed the funds and are entitled to them.

189 Now in any event, AGM's liquidators seek payment out of funds that are held on statutory trust, rather than any funds held on a constructive trust. But the OT liquidator accepts the proposition that all profits in OT accounts are held on constructive trust for clients of OT. Further, the liquidators of Ozifin do not oppose a declaration or direction that the funds of Ozifin that are not subject to a statutory trust ought to be treated as being impressed with a constructive trust for the benefit of all clients of Ozifin.

190 In all of the circumstances then, I will make the necessary directions and orders to reflect my conclusion that the non-statutory trust funds are *now* to be impressed with a remedial constructive trust in each of the liquidations.

The question of deduction

191 Let me turn to the second point raised by ASIC which concerns the extent to which the various liquidators can look to the funds held on constructive trust by the companies to satisfy their claims for remuneration and costs concerning general liquidation matters.

192 Now in one sense, ASIC's concern evaporates if I decide, as I have, that the relevant non-statutory funds are the subject of a remedial constructive trust rather than an institutional constructive trust. If the former, then in my view it should only be imposed and speak now at the earliest. So if that is the case, then any remedial constructive trust takes subject to the liquidators' entitlement to remuneration and costs concerning general liquidation matters. And if there is any doubt as to this, I can declare this to be so.

193 But let me assume that the non-statutory funds are held on an institutional constructive trust. ASIC says that in that eventuality the liquidators are not entitled to have recourse to the assets the subject of such a trust in relation to remuneration and costs concerning general liquidation matters. But I would disagree with such a proposition in any event. Let me begin with some general principles.

194 The principles giving rise to a liquidator's entitlement to remuneration and costs from funds held on trust by a company in liquidation were summarised by Brereton J in *In the matter of AAA Financial Intelligence Ltd (in liq)* [2014] NSWSC 1004 at [13]:

> (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…
>
> (citations omitted)

195 An alternate basis the liquidators could seek to rely on to establish their entitlement to be paid their remuneration would invoke the principles outlined in the decisions of *In re Universal Distributing Company Ltd (in liq)* (1933) 48 CLR 171 at 174 per Dixon J.

196 Now liquidators have been able to deduct their general liquidation costs from trust moneys in cases such as the following.

197 In *Australian Securities and Investments Commission v Rowena Nominees Pty Ltd* (2003) 45 ACSR 424, all liquidation costs could be charged against the trust assets. Now the relevant

company did not act solely as a trustee, and the trust creditors had as Pullin J described (at [94]) "personal claims against [the company] … as well as claims as beneficiaries to the trust property. That being so, the general administration associated with winding up [the company] will concern creditors, and this includes trust creditors". I note that in the present context former clients will have unsecured claims against AGM, OT and Ozifin to the extent that amounts received in accordance with the statutory trust claims and other trust claims do not satisfy their claims.

198 Further, in *Re Sutherland; French Caledonia Travel Services Pty Ltd (in liq)* (2003) 59 NSWLR 361 Campbell J said (at [212]):

> …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.

199 In the case of *In the matter of North Food Catering Pty Ltd* [2014] NSWSC 77, Brereton J found that the liquidators were entitled to be paid their remuneration, whether for administering the trust assets or for general liquidation work, out of the trust assets, since the company had no assets other than trust assets.

200 In the case of *In the matter of Primespace Property Investment Ltd (in liq)* [2016] NSWSC 1821, Black J allowed general liquidation remuneration and costs to be paid from trust funds where he was satisfied (at [18]) that:

> …the work done by [the liquidators] in both the administration and the liquidation cannot be funded from the assets presently available to [the company] in its own right and that their remuneration for that work is properly paid out of trust assets.

201 In reaching that conclusion Black J applied the decisions in *North Food* and *French Caledonia*. But the court would have equally had the discretionary power to make an order approving the liquidators' remuneration on the basis of *In re Berkeley Applegate (Investment Consultants) Ltd (in liq)*; *Harris v Conway* [1989] 1 Ch 32.

202 Let me at this point say something about *Kelly, in the matter of Halifax Investment Services Pty Ltd (in liq) (No 6)* [2019] FCA 2111. Now by virtue of the operation of the OT and Ozifin CAR agreements, in substance, AGM's principal activities related to managing client funds. The liquidators accept that to a certain degree, AGM may be viewed as not acting solely as trustee but also carried on business in its own right, namely, as an issuer of financial products, provider of financial services and counterparty to client trades. However, in *Halifax No 6* there

was a focus on whether the company acted as a trustee to a significant extent in considering whether general liquidation costs could be paid from trust funds. Further, the following description of Gleeson J (at [32]) applies to AGM:

> … the activities of Halifax AU were all concerned with the administration of client moneys and the management of client moneys, that is trades placed by investors and interest accrued on funds held on trust for investors of Halifax AU and Halifax NZ….

203 As occurred in *Halifax No 6*, in the present context there are no separately identifiable company assets from which the remuneration of the liquidators might be paid. So the liquidators are justified in having recourse to trust funds for general liquidation costs.

204 Now there are authorities which have taken a more restrictive view in considering whether general liquidation remuneration and costs are appropriately applied to trust funds if the company in liquidation acted in a capacity other than as trustee.

205 In *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377, Finkelstein J at 385 stated:

> The position is a little more involved as regards work done and expenses incurred in what may be described as general liquidation matters. If that work is unrelated to the beneficiaries and their claims it is difficult to see how the cost could be charged against their assets. In the case of a company that has carried on the business of trustee it might be that much of the work involved in the liquidation is chargeable against trust assets if it can be shown that the liquidation is necessary for the proper administration of the trust. But it is unlikely that this will be so where the company did not act solely as trustee or at least did not act in that capacity to a significant extent. In that event, the liquidator will be required to estimate those of his costs that are attributable to the administration of trust property and only those costs will be charged against the trust assets.

206 In *Staatz v Berry* (2019) 138 ACSR 231 the relevant corporate entity acted in the capacity of a trustee of a unit trust (later found to be ineffective and illegal) and subsequently acted in the capacity of a bare constructive trustee of property. Derrington J said (at [210]):

> Here, no global order can be made allowing the liquidator to recover all of the costs of the administration and of the winding up from the assets of the trust. An apportionment will necessarily be required to be undertaken to separate the costs of the administration and winding up relating to the trust from other costs. As the Company's activities extended beyond its conduct as a trustee it is inappropriate that the trust assets bear the burden of the whole of the costs of winding up…

207 However, his Honour went on to allow that (at [211]) "the administration of the trust was a part of the winding up of the Company such that a portion of the cost of the general liquidation matters should also be met out of the trust assets as identified by Finkelstein J [in *13 Coromandel*]".

208 In *Park v Whyte (No 4)* [2019] 2 Qd R 412 the relevant corporate entity acted in dual capacities as the responsible entity of four managed investment schemes (giving rise to trustee obligations under s 601FC of the Act) and trustee of a private trust. Jackson J said (at [34]):

> My reasoning in the First Remuneration Decision does not support any general right of a liquidator to reimbursement from trust property for remuneration for work necessary for the winding up of the company trustee, where that work is not carried out in relation to the trust or relevant trusts, if more than one. I accepted the formulation in *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No. 2)*, that where a company is the trustee of a trading trust and has no other activities, the liquidators are entitled to be paid their costs and expenses for general liquidation work out of the trust assets. But I also referred to *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)*, where it was made clear that where a trustee does not act solely as trustee, the liquidator will be required to estimate those of the costs that are attributable to the administration of trust property and only those costs will be charged against the trust assets…

209 His Honour went on to state (at [36]) that the liquidator in that case was not entitled to recover remuneration for non-trust remuneration on the *Berkeley Applegate* principle.

210 But neither *Staatz* or *Park* are authority for any principle that liquidators cannot recover general liquidation costs from trust funds in an appropriate case. Both are an application of the broad discretionary power to the circumstances of the relevant case. The question is really one of discretion with each case turning on its own facts.

211 Now ASIC says that the correct principles in relation to the drawing of a liquidator's remuneration and costs from funds held by the company on trust are those set out in *13 Coromandel*. Finkelstein J there distinguished between general liquidation activities, on the one hand, and activities comprising identifying or attempting to identify trust assets, recovering or attempting to recover trust assets, realising or attempting to realise trust assets, protecting or attempting to protect trust assets and distributing trust assets to the persons beneficially entitled to them, on the other hand. The liquidator is entitled to be indemnified out of trust assets for the costs and expenses of the latter. But as to the former, his Honour set out the position as he saw it in a passage (at 385) that I have already set out.

212 Moreover, ASIC boldly says that to the extent that cases such as *Re G B Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 685 to 690 per McLelland J and *Re Greater West Insurance Brokers Pty Ltd* (2001) 39 ACSR 301 at [14] to [23] per Young J, are contrary to these principles, they ought not be followed.

213 Further, as to *Rowena Nominees*, ASIC says that if the proposition advanced in that case suggests that a liquidator is able to recover from trust assets the expense of doing work that could not be fairly categorised as administering the trust assets, it is wrong.

214 Further, ASIC says that the mere fact that beneficiaries of the trust have, in addition to their rights to proper administration of the trust property, personal claims against the trustee is no reason to depart from the principle stated in *13 Coromandel*, *French Caledonia* and *Park*.

215 Further, ASIC points out that it cannot be said that any of the companies solely carried on the business of trustee. Each company carried on business in their own right for the personal benefit of their shareholders and controllers. The companies promoted and advanced an illegal and immoral scheme that was intended to and did generate significant private profit at the expense of Australian investors. ASIC says that the fact that all of the remaining profits left in the hands of the companies when the scheme was brought to an end ought be treated as held on trust for those investors cannot be used in reverse to contend that the companies acted only as trustees.

216 ASIC says that the end result is that the entitlement of the liquidators of each of the companies to have recourse to assets that ought be treated as held on constructive trust is governed by the principles in *13 Coromandel*. Those principles permit a wide range of costs and expenses to be deducted from the trust assets. Costs may be deducted for any step necessary or reasonably appropriate for the purposes of identifying, recovering, realising, protecting or distributing trust assets to the persons beneficially entitled to them. But ASIC says that as a matter of principle, costs and expenses incurred for activities that do not constitute any of those activities cannot be deducted from the assets of persons beneficially entitled to them.

217 ASIC also relied on *Re application of Sutherland* (2004) 50 ACSR 297 at [11] to [13], *Shannon v JMA Accounting Pty Ltd* [2005] QSC 240 at [22], *Georges, in the matter of Sonray Capital Markets Pty Ltd (in liq)* [2010] FCA 1371 at [6], *AAA Financial* at [13], *Freelance Global Ltd v Bensted* [2016] VSC 181 at [67] and [68], and *In the matter of BBY Limited (rec & mgs apptd) (in liq) (No 3)* [2018] NSWSC 1718 at [95].

218 In summary, ASIC says that the funds having been impressed with an institutional constructive trust from the date of the relevant events, the Court's discretion to allow the liquidators to recover remuneration, costs and expenses applies only to work that has been done in the interests of beneficiaries.

219 I am not convinced as to ASIC's position even assuming for the sake of argument ASIC's institutional constructive trust characterisation.

220 Generally, whether general liquidation costs can be recovered from trust assets is a matter for the Court to determine, and relevant factors include the extent to which the relevant company acted in its capacity as trustee of a trust and whether there are separately identifiable company assets from which the remuneration of the liquidators might be paid.

221 Now ASIC says that it cannot be said that any of the companies solely carried on the business of trustee. It says that on the contrary, each company carried on business in its own right for the personal benefit of its shareholders and controllers. But that assertion does not engage with *Halifax No 6*, which focuses on whether the company acted as a trustee to a very significant extent, in considering whether general liquidation costs could be paid from trust funds. *Halifax No 6* is analogous to the liquidators' claims in the context before me.

222 Further, in my view ASIC reads too much into *13 Coromandel* and the passage that I have set out (at 385) in relation to the circumstances before me.

223 First, the work done by the liquidators concerning general liquidation matters is not completely unrelated to the beneficiaries and their claims for reasons that I will explain later.

224 Second, Finkelstein J used the phraseology "it is difficult to see how", rather than being definitive.

225 Third, in the scenario before me, there are no other non-trust assets to which the liquidators could have recourse if all the assets are either statutory trust funds or, on ASIC's hypothesis, institutional constructive trust funds. I am far removed from a situation where there are other non-trust assets to which the liquidators could have recourse to obtain or recoup their general liquidation remuneration and expenses, if ASIC is correct on its institutional constructive trust point.

226 Moreover, I am not convinced that the other authorities cited by ASIC take it that far.

227 First, *Shannon* at [22] cites *Re GB Nathan* where McLelland J stated (at 689) that where there was inadequate non-trust property available for work performed in winding up the affairs of the company it would normally be appropriate to make allowance out of trust assets.

228 Second, in the passage relied on by ASIC from *Brisconnections Management Company Ltd v Dalewon Pty Ltd (in liq)* (2010) 79 ACSR 530 at [11] to [13], McMurdo J was rationalising the

use of the power by describing a nexus between liquidation work and the benefit of the beneficiaries. That is not inconsistent with the existence of the power upon which the liquidators rely in the present case and the asserted relevant nexus.

229 Third, *Sonray Capital* at [6] is no more than an example of the payment of remuneration for trust-related work out of trust assets. Moreover, *Re application of Sutherland* at [11] to [13] hardly tells against the liquidators' position in the present case, given the breadth of what was described as the inherent equitable jurisdiction.

230 Fourth, in *AAA Financial*, the statement by Brereton J at [13(3)] confining payment out of trust assets "only to the extent that [amounts] are referable to administering the trust assets" must be seen in context. Further, that statement relied on *13 Coromandel* at 385 and *French Caledonia* at [211] to [213], which I do not read as rigidly as ASIC would have it. Of course, if these are to be read so rigidly, then I would treat them as outliers.

231 Fifth, *Freelance Global Ltd* at [67] and [68] is merely a non-exhaustive description of factors that usually support the exercise of the discretion to allow remuneration to be paid from trust assets.

232 Sixth, the passage from *BBY Limited (No 3)* at [95] must be read in its context. In the circumstances of that case it was considered not to be appropriate to treat all the costs of the liquidation as being costs of administering the trusts and payable out of trust assets. But it does not exclude the possibility that there are cases where that is appropriate.

233 Let me now widen the scope and consider a perspective that ASIC sought to diminish if not dismiss.

234 The Court has an expansive equitable jurisdiction to allow a liquidator's remuneration to be paid out of assets of a trust; see *In the matter of M & J Super Fund Pty Limited (in liq)* [2021] NSWSC 279 at [13] to [17] per Williams J.

235 As stated by Brereton J in *North Food* (at [9]):

> (1) The court has an inherent equitable jurisdiction to allow a trustee remuneration, costs and expenses out of trust assets, and this extends to a person such as a liquidator who is, for practical purposes, controlling a trustee.
>
> (2) The court may decline to exercise that jurisdiction 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 affairs. Thus, generally where a company has assets which are not held on trust, the liquidators' costs should usually fall on its non-trust assets.

(3) Where the company has both trust assets and assets held beneficially by the company, the costs can be apportioned such that the remuneration attributable to the statutory liquidation work would fall on the assets beneficially owned by the company, whereas that which related to administering the trust property might fall on the trust assets.

(citations omitted)

236 Now ASIC says that I should not allow general liquidation remuneration to be paid from any trust funds, unless that remuneration relates solely to work done in the interests of beneficiaries. But the Court has an independent equitable power to allow non-trust remuneration to be paid out of trust assets in appropriate cases, which none of the authorities cited by ASIC would deny. And it is not the case that the ability of the liquidators to have recourse to trust assets for the payment of their costs, expenses and remuneration is governed solely by the principles discussed in *13 Coromandel*.

237 Now in the present case the work conducted by the liquidators is divisible into categories of work relating to the ASIC proceedings, work relating to this proceeding, work relating to locating and reconstructing the books and records, work relating to the conduct of investigations directed to the identification of assets held and not held on statutory trust, work relating to the investigation and pursuit of recovery action against third parties who held, or potentially held, funds belonging to the relevant company, work relating to reporting to creditors and creditors' meetings, work relating to the adjudication of creditors' claims including the very substantial number of client creditors who are likely to be beneficiaries of any constructive trust, and other general liquidation work.

238 Clearly, much of the work done by the liquidators falls squarely within the principle recognised in *Universal Distributing*, save perhaps for work relating to reporting to creditors and creditors' meetings and other general liquidation work.

239 Moreover, in *Berkeley Applegate*, orders were made for the liquidators' costs and remuneration to be paid out of trust property given that the work performed by the liquidator was of substantial benefit to the trust property and to the investors. Absent the liquidator performing the work, this work would have needed to be completed by the investors or by a court appointed receiver, whose fees would have ultimately been borne by the trust property in any event.

240 Indeed, the principles in *Berkeley Applegate* go beyond those recognised in *Universal Distributing*. But there is a degree of overlap between the categories of work justifiable by the

Berkeley Applegate principle and the *Universal Distributing* salvage principle, at least in the present case. The categories of work identified above each fall within the *Berkeley Applegate* principle, save perhaps for work relating to reporting to creditors and creditors' meetings and other general liquidation work.

241 But importantly, if delivering a benefit to the trust beneficiaries is to be used as the test by which entitlement to use trust funds to pay liquidator's remuneration, costs and expenses is ascertained in the case of the liquidation of a corporate trustee, then it is difficult to see why remuneration, costs and expenses attributable to general liquidation work do not meet that test in the present case. A general liquidation of each relevant company was the quickest and most cost efficient way to crystallise returns to beneficiaries, whether statutory trust beneficiaries or other trust beneficiaries of whatever description.

242 Moreover, in the present case the persons who will take the benefit of the general liquidation work will be the beneficiaries of the constructive trust sought by ASIC. They will take the benefit of a concerted long-term effort on the part of the liquidators to locate, recover and manage trust assets as well as to identify the claims and claimants on those assets. Work performed by the liquidators in the adjudication of creditor claims is, as a matter of practical reality, work done in ascertaining the respective entitlements that the beneficiaries of the constructive trust will have. Work done by the liquidators in reporting to creditors is, as a matter of practical reality, work done in reporting to these beneficiaries. All of this work has advantaged the trust estate. Accordingly, the liquidators' remuneration and costs and expenses incurred in relation to all of the categories of work identified ought to be payable out of assets held on trust.

243 More generally, the general liquidation work was undertaken prior to any determination of client entitlements, and necessarily involved a consideration of issues relating to the statutory trust claims and other trust claims. Consequently, although not directly related to the beneficiaries' interest, it can be seen as broadly related to the trusts.

244 Further, there is both a public interest in insolvent companies being properly administered, which must extend to insolvent trustee companies, and a plain benefit to the beneficiaries / clients in having the affairs of the relevant entities properly investigated and administered by the liquidators.

245 Now ASIC suggests that the three liquidations were unnecessary to deal with and administer the trust assets and that the appointment of receivers could have sufficed. But in my view ASIC's position is problematic.

246 First, its present position goes against the stance that ASIC has previously taken in this litigation concerning the form and necessity of the external administrations.

247 Second, the so-called trust beneficiaries benefited significantly from the appointment of the liquidators to get in the relevant funds. They also benefited from the broader work involved concerning the proper administration of the companies. There was a non-pecuniary benefit to the so called trust beneficiaries of having this general liquidation work done, particularly given the nature of the scheme(s) and money flows involved. Indeed, any receiver may have had to do most of the broader work as well.

248 More generally, the liquidations were necessary for the benefit of these trusts, howsoever described. And as part of these liquidations, it was necessary to incur general liquidation expenses. So, these necessary expenses were a consequence of the broader benefit of liquidations to the beneficiaries.

249 Let me turn to two final matters.

250 First, as I have indicated, where a company has no assets other than trust assets, as would be the case if an institutional constructive trust were to be declared over all funds belonging to the company other than statutory trust funds, then a liquidator is nevertheless entitled to be paid their remuneration whether for administering the trust assets or for general liquidation work out of the trust assets; see *North Food* and *AAA Financial*.

251 In *North Food*, Brereton J said (at [17]):

> [t]hose cases appear to me to establish clearly enough that in the present case the liquidators are entitled to be paid their remuneration, whether for administering the trust assets or for general liquidation work, out of the trust assets, since the company has no assets other than trust assets.

252 See also *In re MF Global Limited (in liq) (No 2)* [2012] NSWSC 1426 at [55] per Black J; *In the matter of JML Property Services Pty Ltd (in liq)* [2018] NSWSC 1069 at [10] per Black J; *In the matter of Houben Marine Pty Ltd (in liq)* [2018] NSWSC 745 at [14] to [17] per Gleeson JA; *In the matter of Aberdeen All Farm Pty Ltd (in liq)* [2020] NSWSC 770 at [19] and [20] per Black J; *In the matter of Glenvine Pty Ltd (in liq)* [2020] NSWSC 866 at [52] to [57], [120] and [121] per Black J.

253 Accordingly, where, as here, there are no non-trust assets from which remuneration, costs, and expenses for general liquidation work can be paid, then the trust assets may be used in order to pay these amounts, even if the constructive trusts were to be characterised as institutional.

254 Second, there is confusion in ASIC's position concerning a lack of authorisation which was pointed out by Mr Stewart Maiden KC for AGM's liquidators.

255 In my view, there would be no unauthorised use of trust moneys if the various liquidators were to deduct general liquidation expenses and costs from the so called trust moneys whatever the characterisation of the constructive trusts.

256 Now no doubt where a liquidator is seeking to invoke a trustee's right of indemnity, there are certain limitations on what can be sought to be recouped or re-imbursed from the trust assets. But here, the various liquidators are not relying upon any rights of indemnity to recoup general liquidation costs and expenses. Rather they are relying upon the Court's powers and orders, if made, to so authorise. If the liquidators are so authorised by me, then there cannot be any unauthorised use of trust property.

257 For all of these reasons, even if ASIC was correct on its institutional constructive trust argument, the liquidators should be permitted to obtain or recoup their general liquidation remuneration, expenses and costs from the trust assets.

258 Let me then turn specifically to the position of AGM.

259 First, the liquidators seek payment of their remuneration and costs from funds that are subject to the statutory trust claims, not the other trust claims. So much is clear from the distribution proposal and the directions sought by the liquidators.

260 Second, the liquidators seek to recover from the statutory trust funds in the OT client account remuneration and costs apportioned to that fund. Further, to the extent that general liquidation costs are sought to be applied to the OT client account, the liquidator of OT does not oppose the proposed allocation.

261 Third, the liquidators have approached me for directions and filed detailed material outlining their remuneration and expenses and the proposed basis for payment of those amounts. As I have already indicated, the liquidators have not drawn any remuneration or paid any legal costs since their appointment.

262 Fourth, ASIC has identified no specific criticisms of the amounts claimed by the liquidators, notwithstanding the liquidators' detailed affidavits outlining their claims. In my view, the material filed by the liquidators is more than sufficient for me to make an assessment of the reasonableness of the amounts now claimed. The amounts claimed by the AGM liquidators are fair and reasonable.

263 In all of the circumstances I will approve the remuneration and costs sought by the liquidators of AGM.

264 Let me turn to the position of Ozifin. The liquidators of Ozifin wish to have me approve over $4.1 million of remuneration and expenses from out of $6.9 million of clients' property.

265 I note that the creditors of Ozifin have approved $2,636,729.75 in remuneration as at 4 June 2021 in respect of the liquidation as a whole, most of which has already been drawn from the $4,470,980.95 of funds held by the Ozifin liquidators that ASIC contends ought be treated as impressed with a constructive trust.

266 ASIC says that the appropriate quantum of costs and remuneration should be a matter that is referred to a Registrar.

267 ASIC also says that in some respects, the remuneration and costs incurred by the liquidators relate to contentions that Ozifin advanced that were adverse to the interests of the beneficiaries of the constructive trust. But I do not consider this to be a complete characterisation.

268 The role taken by the liquidators in the ASIC proceedings against Ozifin was undertaken in circumstances where they were appointed as liquidators of Ozifin on 29 September 2019, where the trial of those proceedings was listed to start on 1 October 2019. The liquidators appeared before me by counsel on that date, did not oppose the application for leave to proceed against Ozifin as a company in liquidation, did not call evidence, and directed limited submissions as to the extent to which the Court might properly make findings in respect of the conduct of Ozifin which might have an effect as between various classes of creditors of Ozifin as to whether or not those creditors might ultimately be found to be trust creditors. Their submissions were principally addressed to the question of whether the Court should make findings of wrongful conduct in respect of investor clients of Ozifin generally including by reference to a system of conduct, or only in respect of those clients who were the subject of specific evidence adduced at the trial. This was not making submissions adverse to the interests of the beneficiaries. The liquidators were assisting the Court as a proper contradictor to

determine the appropriate extent of the findings that I should make regarding investor client rights against Ozifin, which in turn was relevant to the question of the performance of the liquidators' subsequent functions of identifying the extent to which a client of Ozifin was a creditor in the liquidation of Ozifin, and further the extent to which such clients might ultimately be found to be beneficiaries of a constructive trust, that trust being derived from findings as to the conduct of Ozifin towards them, and whether or not the liquidators would be required to undertake those processes themselves or seek directions from me as to such matters.

269 The liquidators, through their counsel, provided submissions in circumstances where ASIC was taking the counter position. Their submissions, even though not accepted, resulted in my determination of the identity of those clients of Ozifin who could properly now claim an interest as beneficiaries of the relevant constructive trust. There is nothing in ASIC's point.

270 In summary, I will approve the Ozifin liquidators' remuneration, costs and expenses incurred in relation to the categories of work identified. The material filed adequately justifies the quantum and there is no need for a separate reference. ASIC has not pointed to any matter raising a doubt in the evidence before me justifying the quantum. Moreover, any disparity in the amounts sought as between the three liquidations is readily explained in the material before me given the different work, investigations and complexity involved.

271 Let me say something about the position of OT.

272 Generally, the liquidator of OT should have his reasonable remuneration, fees and disbursements authorised to be paid from and allocated against the funds in his possession or to be transferred to him by the liquidators of AGM as set out in the evidence before me.

273 And I will not require the remuneration and expenses of the liquidator to be separately assessed. There is no basis for doing so. ASIC has not pointed to any matter concerning any deficiencies in the evidence concerning the quantum sought.

274 Finally, as to any allocation questions, there are two dimensions to consider. For a particular set of liquidators, namely, for each of AGM, Ozifin and OT, each set is best placed to determine their own particular allocation questions. But as between sets of liquidators, they are best placed to consider and agree upon the appropriate allocations inter se. Certainly, I am content with what is proposed. But if further directions are necessary, these can be given.

Conclusion

275 I will require each of the various liquidators to submit proposed orders to reflect my reasons.

I certify that the preceding two hundred and seventy-five (275) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Beach.

Associate:

Dated: 9 December 2022