FEDERAL COURT OF AUSTRALIA

Frigger v Trenfield (No 3) [2023] FCAFC 49

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| Appeal from: | *Frigger v Trenfield (No 10)* [2021] FCA 1500 |
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| File number: |  |
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| Judgment of: | **ALLSOP CJ, ANDERSON AND FEUTRILL JJ** |
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| Date of judgment: | 24 March 2023 |
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| Catchwords: | **APPEAL AND NEW TRIAL** –appeal – appeal by way of rehearing – errors of fact – advantage of primary judge – principles of appellate review.  **BANKRUPTCY AND INSOLVENCY** – appeal from the decision of the primary judge in *Frigger v Trenfield (No 10)* [2021] FCA 1500 (**primary** **judgment**) – where the appellants made numerous challenges to the findings of the primary judge with respect to certain disputed assets – whether these disputed assets were contributed to the appellants’ self-managed superannuation fund, named the Frigger Superannuation Fund (**FSF**) such that they were trust property – whether the primary judge erred in finding that certain assets vested in the trustee in bankruptcy pursuant to s 58 of the *Bankruptcy Act 1966* (Cth) (***Bankruptcy******Act***) and were therefore divisible amongst the appellants’ creditors – whether the primary judge erred in finding that the appellants’ Bankwest Account No. 1 (**BW1**) was not a trust asset of the FSF – whether the primary judge erred in finding that the Bank of Queensland Account No. 1 (**BOQ1**) and Bank of Queensland Account No. 2 (**BOQ2**) vested in the first respondent in circumstances where the first respondent failed to identify which funds were deposited into BOQ1 and BOQ2 were funds that belonged to the appellants personally – whether primary judge erred in finding that the shares held by Commonwealth Securities Limited (**CommSec**) Share Trading Account Portfolio (**Main Portfolio**) in its custodial service vested in the first respondent – whether the primary judge erred by finding that the first respondent’s conduct in consenting to a payout of security of costs in the Supreme Court of Western Australia did not breach s 82 of the *Bankruptcy Act* – whether the primary judge erred by refusing to determine the appellants’ claims for losses caused by freezing the BOQ1 account and the Main Portfolio account which required the court to finally determine all controversies between the parties – where no error is detected in the primary judge’s reasoning.  **PRACTICE AND PROCEDURE** – whether the primary judge failed to provide the appellants with procedural fairness – where the appellants claim that they were denied the right to know and to be given an opportunity to respond to the case presented against them – ground of appeal rejected in its entirety.  **SUPERANNUATION** – relationship between superannuation and trust law – compliance with legislative and regulatory requirements – adequacy of documentation – finding of lack of merit in appeal grounds.  **TRUSTS AND TRUSTEES** – whether the primary judge erred in finding that assets vested in the trustee in bankruptcy, in circumstances where the validity of the sequestration orders was being challenged in matter WAD 66 of 2021 – where the appellants claimed that the bankruptcy notices were invalid and that sequestration orders were a nullity – whether the primary judge erred in finding that the appellants had not established that BW1, BOQ1, BOQ2, the CommSec share portfolio and the two residential properties were assets of the FSF – whether the primary judge erred in refusing to grant relief in relation to the trustee’s consent to payments out of court – whether the primary judge erred by failing to remove the first respondent as trustee in bankruptcy – whether the primary judge erred in refusing to determine the claims for losses caused by freezing of BOQ1 and the CommSec share portfolio – where no error is found in the primary judge’s reasoning – held: appeal dismissed. |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 19(1)(k), 30, 30(1)(b), 34A, 58, 58(1)(a), 58(3), 58(5), 77A, 82, 120, 121, 125, 129, 116(2)(a), 116(2)(d)(iii)(A), sch 2 s 90-15(3)(a)  *Corporations Act 2001* (Cth) ss 173(1), 173(3A)  *Corporations Regulations 2001* (Cth) reg 2C.1.03(c)  *Evidence Act 1995* (Cth) ss 46, 59, 60–64, 66A–75, 69, 69(3), 81–84, 87, 135, 136, 138, 140  *Federal Court of Australia Act 1976* (Cth) ss 21, 22, 24(1E), 27, 37M  *Federal Court Rules 2011* (Cth) rr 1.34, 30.28, 36.57  *Income Tax Assessment Act 1997* (Cth) ss 294-30, 295-85, 295-380, 295-385, 295-385(3), 295-385(3)(a), 295-385(4)(a), divs 291, 292, 294  *Income Tax Assessment Regulations 1997*(Cth) reg 295-385.01(a)(i)  *Insolvency Practice Rules (Bankruptcy) 2016* (Cth) r 42-30(c)  *Rules of the Supreme Court 1971* (WA) ord 25 rr 1, 7  *Superannuation (Excess Non-concessional Contributions Tax) Act 2007* (Cth)  *Superannuation (Excess Transfer Balance Tax) Imposition Act 2016* (Cth) s 294-30  *Superannuation Industry (Superannuation) Regulations 1994* (Cth) regs 1.06, 6.01(2), 7.04(4), sch 7  *Superannuation Industry (Supervision) Act 1993* (Cth) ss 3, 10, 17A, 19, 35AE, 35B, 35C, 65, 66(1), 103, 103(1), 104, 104A, 105, 253, 289, 289(2)  *Superannuation Industry (Supervision) Consequential Amendments Act 1993* (Cth) |
|  |  |
| Cases cited: | *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570  *Aldi Foods**Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 301  *Allen v Roughley* (1955) 94 CLR 98  *Allesch v Maunz* (2000) 203 CLR 172  *Associated Alloys Pty Limited v ACN 001 452 106 Pty Limited (in liquidation)* (2000) 202 CLR 588  *Astbury v Astbury* [1898] 2 Ch 111  *Atwill v Commissioner of Stamp Duties (NSW)* (1970) 72 SR (NSW) 415  *Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation* (2018) 264 FCR 587  *Australian Securities and Investments Commission v Big Star Energy Ltd (No 3)* (2020) 389 ALR 17  *Bahr v Nicolay [No 2]* (1988) 164 CLR 604  *Benjamin v GB Franchising Australia Pty Ltd* [2011] ACTCA 26  *Blanch v British American Tobacco Australia Services Ltd* (2005) 62 NSWLR 653  *Bosanac v Commissioner of Taxation* [2022] HCA 34  *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424  *Byrnes v Kendle* (2011) 243 CLR 253  *Cashman v Kinnear* [1973] 2 NSWLR 495  *Caswell v Powell Duffryn Associated Collieries*[1940] AC 152  *CDJ v VAJ* (1998) 197 CLR 172  *CKT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[2022] FCAFC  *Coal and Allied Operations**Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194  *Cock v Smith* (1909) 9 CLR 773  *Computer Accounting and Tax Pty Ltd v Professional Services of Australia Pty Ltd* [2008] WASC 133  *Coshott v Prentice* (2014) 221 FCR 450  *Coulton v Holcombe*(1986) 162 CLR 1  *Cowan v Scargill* [1895] Ch 270  *Dovuro Pty Ltd v Wilkins*(2003) 215 CLR 317  *Duncan (as trustee for the bankrupt Estate of Garret) v National Australia Bank Ltd* (2006) 95 SASR 208  *Duralla Pty Ltd v Plant* (1984) 2 FCR 342  *Dwight v Federal Commissioner of Taxation* (1992) 37 FCR 178  *Eslea Holdings Ltd v Butts*(1986) 6 NSWLR 175  *Evans v European Bank Ltd* (2004) 61 NSWLR 75  *Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd* (1979) 1 BPR 9251  *Finch v Telstra* (2010) 242 CLR 254  *Foskett v McKeown* [2001] 1 AC 102  *Fox v Percy* (2003) 214 CLR 118  *Frigger v Trenfield* [2019] FCA 1746  *Frigger v Trenfield (No 2)* [2019] FCA 2009  *Frigger v Trenfield (No 3)* [2020] FCA 150  *Frigger v Trenfield (No 4)* [2020] FCA 797  *Frigger v Trenfield (No 5)* [2020] FCA 827  *Frigger v Trenfield (No 6)* [2020] FCA 934  *Frigger v Trenfield (No 7)* [2020] FCA 1740  *Frigger v Trenfield (No 9)* [2021] FCA 652  *Frigger v Trenfield (No 10)* [2021] FCA 1500  *Frigger v Trenfield (No 11)* [2022] FCA 326  *Frigger v Trenfield (No 12)* [2022] FCA 900  *Frigger v Trenfield (No 13)* [2022] FCA 906  *Frigger v Trenfield (Application for Stay Pending Appeal)* [2021] FCA 1605  *Goldus Pty Ltd (Subject to a Deed of Company Arrangement) v Cummins (No 4)* [2021] FCA 1095  *Hawkins v Powells Tillery Steam Coal Co Ltd* [1911] 1 KB 988  *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230  *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271  *Holloway v McFeeters*(1956) 94 CLR 470  *Hung v Warner, in the matter of Bellpac Pty Ltd (Receivers and Managers Appointed) (In Liquidation)* [2013] FCAFC 48  *In the Estate of William Just (deceased) (No 1)* (1973) 7 SASR  *In the matter of Tresdar Pty Ltd* [2019] NSWSC 179  *Jackson v Sterling Industries Ltd* (1986) 12 FCR 267  *Johnston v Brightstars Holding Company Pty Ltd* [2014] NSWCA 150  *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206 *Kauter v Hilton* (1953) 90 CLR 86  *Kennon v Spry* (2008) 238 CLR 366  *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62  *Lee v Lee* (2019) 266 CLR 129  *Lee v Sankey* (1872) LR 15 Eq 204  *Legal Practice Board v Computer Accounting and Tax Pty Ltd* [2007] WASC 184  *Legal Services Board v Gillespie-Jones*(2013) 249 CLR 493  *Lewis v Nobbs*(1878) 8 Ch D 591  *Liwszyc v Commissioner of Taxation* (2014) 218 FCR 334  *Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593  *Luke v South Kensington Hotel Co* (1879) LR 11 Ch D 121  *Markopoulos v Marco* [2020] WASC 79  *McLennan v Taylor* (1967) 85 WN (PT1) (NSW) 525  *Meeseena v Carr* (1870) LR 9 Eq 260  *Metwally v University of Wollongong* (1985) 60 ALR 68  *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104  *New South Wales v Kable* (2013) 252 CLR 118  *O’Brien v Komesaroff* (1982) 150 CLR 310  *Parbery v QNI Metals Pty Ltd* [2020] QSC 143  *Pelham v Pelham* *& Braybrook* [1955] SASR 53  *Pilmer v HIH Casualty & General Insurance Ltd (No 2)* (2004) 90 SASR 465  *Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd* [2010] WASC 38  *Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd (No 2)* [2010] WASC 113  *Professional Services of Australia Pty Ltd (administrator appointed) v Computer Accounting and Tax Pty Ltd (No 3)* [2010] WASC 93  *PT Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515  *Re Armstrong* (1960) VR 202  *Re Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491  *Re Billington* [1949] St R 102  *Re Courtenay House Capital Trading Group Pty Ltd (in liq)* [2018] NSWSC 404  *Re Kayford Ltd (in Liq)* [1975] 1 All ER 604  *Robinson Helicopter Inc v McDermott* (2016) 331 ALR 550  *Rosenbaum v Baidarman (No 2)* [2021] NSWSC 574  *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588  *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd (No 4)* [2014] WASC 405  *Toksoz v Westpac Banking Corporation* (2012) 289 ALR 577  *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107  *Trustee of the Property of Cummins (a bankrupt) v Cummins*(2006) 227 CLR 278  *Trustees of the Kean Memorial Trust Fund v Attorney-General (SA)* (2003) 86 SASR 449  *Twinsectra Ltd v Yardley* [2002] 2 AC 164  *Van Rassel v Kroon* (1953) 87 CLR 298  *Vitali v Stachnik* [2001] NSWSC 303  *Warren v Coombes*(1979) 142 CLR 531  *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* (1998) 152 ALR 332  *Young v Murphy* [1996] 1 VR 279 |
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| Division: | General Division |
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| Registry: | Western Australia |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | General and Personal Insolvency |
|  |  |
| Number of paragraphs: | 637 |
|  |  |
| Date of last submissions: | 29 August 2022 (Appellants)  6 September 2022 (Respondent) |
|  |  |
| Date of hearing: | 10–12 May 2022, 22–24 August 2022 |
|  |  |
| Counsel for the Appellants: | The Appellants appeared in person |
|  |  |
| Counsel for the Respondent: | S D Majteles and T J Langdon |
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| Solicitor for the Respondent: | Carles Solicitors |

ORDERS

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|  | | WAD 278 of 2021 |
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| BETWEEN: | ANGELA CECILIA THERESA FRIGGER  First Appellant  HARTMUT HUBERT JOSEF FRIGGER  Second Appellant | |
| AND: | KELLY-ANNE LAVINA TRENFIELD  Respondent | |

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| order made by: | ALLSOP CJ, ANDERSON AND FEUTRILL JJ |
| DATE OF ORDER: | 24 March 2023 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellants pay the respondent’s costs of the appeal, including any reserved costs, to be agreed, or failing agreement taxed.

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

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## Introduction

1 The appellants (Mrs Angela Cecilia Theresa Frigger and Mr Hartmut Hubert Josef Frigger) (hereafter, **appellants**or **Mrs and Mr Frigger**) appeal from the decision of the primary judge in *Frigger v Trenfield (No 10)* [2021] FCA 1500, delivered on 1 December 2021 (**Liability Judgment**) dismissing the appellants’ application for, amongst other things, declarations that certain bank accounts and residential properties were and are held in the Frigger Superannuation Fund (**FSF**) on trust for beneficiaries of the FSF and that pursuant to s 116(2)(d)(iii)(A) of the *Bankruptcy Act 1966* (Cth) (***Bankruptcy Act***) are not assets divisible amongst Mr and Mrs Frigger’s creditors as undischarged bankrupts.

2 The appellants, by their re-amended notice of appeal dated 15 June 2022, raise nine grounds of appeal. Those grounds may be briefly summarised as follows:

(1) Ground 1 – Status of Bankruptcy – The primary judge erred in deciding that certain assets vested in the respondent pursuant to s 58 of the *Bankruptcy Act*, in circumstances where the primary judge was on notice that, in proceeding WAD 66 of 2021, the appellants claimed the bankruptcy notices were invalid and that sequestration orders were a nullity.

(2) Ground 2 – Bankwest Account No. 1 – The primary judge erred in finding that the Bankwest Account No. 1 (**BW1**) was not a trust asset of the FSF.

(3) Ground 3 – Bank of Queensland Account No. 1 and Bank of Queensland Account No. 2 – The primary judge erred in deciding that the Bank of Queensland Account No. 1 (**BOQ1**) and Bank of Queensland Account No. 2 (**BOQ2**) vested in the respondent in circumstances where the respondent failed to identify which funds deposited into BOQ1 and BOQ2 were funds that belonged to the appellants personally.

(4) Ground 4 – Main Portfolio – The primary judge erred in finding that the shares held by Commonwealth Securities Limited (**CommSec**) Share Trading Account Portfolio No. 270815 (**Main Portfolio**) in its custodial service vested in the respondent.

(5) Ground 5 – Residential Properties – The primary judge erred by deciding that the respondent had an absolute caveatable interest in real properties (the addresses of which are unnecessary to specify for the purposes of this judgment) in Union Street, Bayswater and Cale Street, Como, Western Australia (**Residential Properties**) on the ground that *in specie* contributions of those properties by Mrs Frigger to the FSF on 1 July 2014 constituted contraventions of s 66 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (***SIS Act***).

(6) Ground 6 – Payout of security of costs – The primary judge erred by deciding that the respondent’s conduct in consenting to a payout of security of costs in the Supreme Court of Western Australia proceedings: CACV45/2016, CACV62/2014 and CACV56/2014 did not breach s 82 of the *Bankruptcy Act*.

(7) Ground 7 – Respondent’s removal as Trustee in Bankruptcy – The primary judge erred in finding that the respondent’s conduct had not caused the appellants, whether personally or as Frigger Superannuation Fund members, losses occasioned by the lost opportunity to earn dividends and capital gains on share trading on the Main Portfolio and on the BOQ1 fund as a consequence of the Respondent freezing assets of more than $7.5 million.

(8) Ground 8 – Refusal to assess loss of opportunity to trade claim – The primary judge erred when he refused to determine the appellants’ claims for losses caused by freezing the BOQ1 account and the Main Portfolio account which required the court to completely and finally determine all controversies between the parties.

(9) Ground 9 – Failure to provide procedural fairness – The primary judge failed to provide the appellants with procedural fairness in case management orders made on 29 November 2019 and during the trial, by denying the appellants the right to know and to be given an opportunity to respond to the case presented against them.

3 The proceeding before the primary judge had a long and complex procedural history which is relevant to understanding the case which was put by the appellants on appeal. For this reason, we now set out the background of the appellants, the procedural history and relevant chronology which provides the framework for the determination of the grounds of appeal.

## Appellants’ background

4 The appellants are husband and wife. The appellants are intelligent people and have each held professional roles throughout their working life.

5 Mrs Frigger, is 71 years old and is now retired. Before her retirement she worked as an accountant. Mrs Frigger holds a Bachelor of Accounting from the Western Australian Institute of Technology (now Curtin University). After graduating, Mrs Frigger went on to qualify as a Certified Practising Accountant and a Registered Tax Agent. Mrs Frigger is also a Fellow of the National Tax and Accountants Association. Mrs Frigger managed all accounting records for the FSF and prepared the FSF’s financial statements throughout the years.

6 Mr Frigger is 69 years old. He too is retired. During his working years, Mr Frigger was gainfully employed as a process and commissioning engineer. Mr Frigger also acted as a consultant to companies in this capacity. At one point in time, Mr Frigger also managed the family accounting and investment business, and used his own experience in investments in property, shares, managed funds and bonds to help others start a self-managed investment portfolio (see details surrounding the background of the appellants in: *Computer Accounting and Tax Pty Ltd v Professional Services of Australia Pty Ltd* [2008] WASC 133 and *Legal Practice Board v Computer Accounting and Tax Pty Ltd* [2007] WASC 184).

7 It is clear that through investment, entrepreneurship or other means, Mrs and Mr Frigger had accumulated substantial assets by the time they were declared bankrupt.

8 Mrs and Mr Frigger have had, and had prior to the hearing before the primary judge, the opportunity to become familiar with court practice and procedure and important underlying notions such as the onus of proof resting on the party seeking to establish grounds for relief. Our observations of them in the various days of the appeal confirm this.

## Procedural history

### First instance

9 This appeal arises from an application brought by the first appellant, Mrs Frigger, against Mrs Trenfield seeking relief with respect to BOQ1 and BOQ2, the shares held in the Main Portfolio and the Residential Properties (collectively, the **disputed assets**), consent orders and costs assessments in the Court of Appeal of Western Australia, and the first respondent’s conduct of the administration of the bankrupt estate.

10 The first appellant filed an originating application on 12 March 2019 as against Mrs Trenfield. By orders dated 14 June 2019 and 31 July 2019, the second appellant, Mr Frigger, was joined as the second applicant and Paul Allen was joined as the second respondent. Mr Allen was subsequently removed as the second respondent by order dated 19 March 2020. For the reasons given in *Frigger v Trenfield (No 6)* [2020] FCA 934 (***Frigger (No 6)***), **H & A Frigger** Pty Ltd (or **HAF**) as the former trustee of FSF was joined as second respondent. Neither Mr Allen nor HAF is a party to these proceedings.

11 The learned primary judge helpfully summarised in the Liability Judgment at [7] the relief the appellants sought:

(a) declarations that BOQ1, BOQ2 and the Residential Properties are held in the FSF on trust for the beneficiaries of that fund, and so pursuant to s 116(2)(d)(iii)(A) of the *Bankruptcy Act* are not assets divisible among creditors;

(b) compensation for losses the applicants say they have incurred as a result of the first respondent having placed holds or freezes on BOQ1;

(c) an order requiring the first respondent to remove caveats she has placed on the Residential Properties and to pay any losses caused by the caveats;

(d) declarations that the various consent orders and costs assessments in the Court of Appeal are ‘incompetent’ pursuant to s 58(3)(b) of the *Bankruptcy Act*;

(e) compensation for losses resulting from the Court of Appeal costs orders and orders effectively requiring the first respondent to apply to that court to have the orders set aside;

(f) orders disentitling the first respondent to remuneration and costs in relation to the above matters;

(g) orders requiring the first respondent to write to CommSec and the ASX to remove a trading suspension on the Main Portfolio which appears to have been placed following a previous letter from the first respondent to CommSec, and requiring her to say that the securities in that account have not vested in her pursuant to s 58 of the *Bankruptcy Act*;

(h) compensation for losses said to have been caused by the suspension of trading in the Main Portfolio;

(i) an order removing the first respondent as the trustee in bankruptcy of the applicants’ estates; and

(j) costs.

12 The appellants sought the orders under s 30 of the *Bankruptcy Act* and also s 90-15(3) of Schedule 2 to the *Bankruptcy Act*. Some of the orders were also sought in the alternative under s 21 of the *Federal Court of Australia Act 1976* (Cth) (***FCA Act***).

#### The appellants’ submissions at first instance

13 By orders of the primary judge on each of 14 June 2019, 20 September 2019, 14 January 2020 and 1 July 2020, the appellants were granted leave to amend the originating application. The effect of these amendments was to join the second appellant as a party to those proceedings and to amend the relief sought by the appellants among other amendments discussed further below.

14 As noted by the primary judge, distilling the contentions on which the appellants sought the above relief was a complicated task. The appellants made wide-ranging contentions which came in the form of numerous affidavits and submissions. The difficulty in distilling the appellants’ contentions was further compounded by what the primary judge described as “the changing nature of the positions [the appellants] took in the case over time” (Liability Judgment at [10]). It is not necessary nor possible to canvass all the appellants’ submissions made at trial. However, for the purposes of this appeal, we will synthesise the submissions articulated by the appellants that the primary judge considered to be sufficiently cogent to warrant an express mention.

15 *First*,as to BOQ1 and BOQ2, the appellants submitted that the money in those accounts was originally earned by the FSF as rental income from two commercial properties (the addresses of which are unnecessary to specify for the purposes of this judgment): one at Edward Street, Perth and the second at Campbell Street, Hobart, which is leased to Officeworks. To establish that the BOQ1 and BOQ2 funds are FSF assets, the appellants’ relied upon several indicia. These included that the Hobart property was purchased in their names as trustees of the FSF, that there was a declaration of trust over the Edward Street property and that a registrar’s caveat was registered on the title. Invoices to the tenants of these properties were said to have been issued by the appellants as trustees of the FSF, with the tenants being directed to pay rent and outgoings to the BW1 account.

16 *Secondly*, as to the Main Portfolio, the appellants submitted that, although the trading account was opened at a time when Mr and Mrs Frigger were not trustees of the FSF, the surrounding circumstances indicated that the shares then held in the Main Portfolio were purchased in their capacity as trustees of the FSF.

17 *Thirdly*, as to the Residential Properties, the appellants submitted that those properties were FSF assets. Although each certificate of title of the properties lists Mrs Frigger as the registered owner, the appellants rely upon declarations of trust over the properties made on 1 July 2014 by Mrs Frigger (**2014 Declarations**)in support of their contention. More specifically, they contend that the properties were contributed to the FSF by Mrs Frigger as *in specie* transfer by way of these declarations. As a result, the appellants submitted that the first respondent does not have a caveatable interest in the Residential Properties.

18 *Fourthly*, as to the Court of Appeal orders, the primary judge noted that the basis for the appellants’ claims was difficult to establish from their written submissions (Liability Judgment at [43]). Nonetheless, the appellants’ oral opening distilled two complaints. The first complaint was that the costs liabilities were debts provable in the bankruptcy, and, rather than calling for proofs and adjudicating on them, the first respondent signed consent orders which led to the payment out of the amounts that had been paid in as security for costs. The second complaint was that Mrs Trenfield should not have consented to that payment as the cost liabilities were more than offset by the substantial counterclaims the appellants had against Mr Mervyn Kitay and Clavey Legal.

19 Although the appellants sought declarations that the Court of Appeal orders were “incompetent”, the appellants in oral submissions made clear that they were not seeking for this court to somehow reverse or override the order.

20 *Lastly*, as to the first respondent’s conduct of the administration of the bankrupt estates, the appellants made a number of allegations in support for the declaration they sought that Mrs Trenfield be removed as trustee in bankruptcy. These were listed in schedule 4 to their written submissions dated 29 June 2020 and summarised by the primary judge in the Liability Judgment at [46]–[48].

#### Classes of documents in support of the appellants’ claims

21 In support of their submissions, the appellants relied upon numerous classes of documents that they put before the primary judge. This included financial statements, annual returns, audit reports, Personal Property Security Register (**PPSR**)registrations, tax file number (**TFN**)notifications, holder identification statements, bank statements and reconciliations among other things.

22 However, as noted by the primary judge, the orders the appellants sought were “on the basis of evidence with many gaps; gaps that they seek to cross with leaps of broad assertion”: *Frigger v Trenfield* [2019] FCA 1746 at [67] (***Frigger (No 1)***).

23 Indeed, one major issue that arose at trial was whether the financial statements and annual returns relied upon were reliable. The real possibility that such documents were prepared after the sequestration orders, and so were unreliable, was a real issue.

24 As highlighted by the respondent, the appellants had not put before the primary judge documents evidencing their personal tax returns they asserted were relevant, financial statements, annual returns and audit reports prior to 2015, and CommSec statements prior to 2016, among other things. In other words, in the mass of material placed before the Court at first instance, and on appeal (including in additional tenders on the appeal) no coherent, reliable body or framework of documents was placed before the Court from which any reliable inferences could be drawn (in particular without Mrs Frigger’s evidence as to context) as to what assets and what activity were those of Mr and Mrs Frigger on their personal account and of the FSF. A starting point for such a coherent analysis could have been the kinds of documents referred to in the first sentence of this paragraph.

#### Discovery orders

25 With respect to *Frigger v Trenfield (No 2)* [2019] FCA 2009 (***Frigger (No 2)***), the respondents brought an interlocutory application seeking specific discovery of documents said to be relevant to the source of the funds in BOQ1 and BOQ2, and the capacity in which the Residential Properties and securities in the Main Portfolio are owned. By way of context, the appellants also brought an interlocutory application for summary judgment in respect of the declarations that BOQ1 and BOQ2 are FSF assets.

26 Mrs Trenfield’s submissions in support of her application for discovery were relevantly put in four sworn affidavits. Across the four affidavits, Mrs Trenfield made various statements of purpose as to why she was seeking discovery. In essence, Mrs Trenfield said that she did not know the true nature of the beneficial ownership of the disputed assets based on the available evidence in order to firmly respond to the appellants’ contentions, and that a full and proper investigation is required. Mrs Trenfield provided details of the investigations she had conducted in performing her duties as the trustee in bankruptcy.

27 Ultimately, the primary judge found that the respondents were not pursuing discovery for any purpose collateral to the just resolution of the issues in the proceedings, and thus did not amount to an abuse of process.

28 Similarly, in *Frigger v Trenfield (No 6)* [2020] FCA 934 (***Frigger (No 6)***), Mrs Trenfield also brought an interlocutory application for discovery of certain miscellaneous documents pertaining to (i) an alleged additional CommSec portfolio, (ii) notices from a share registry (Computershare), and (iii) certain bank statements. She submitted that these documents were relevant to the issues of the beneficial ownership of the shares in the Main Portfolio, the appellants’ claim for losses regarding the freezing of the Main Portfolio, whether Mrs Trenfield made any claim to hold a power of attorney on some 40 shareholdings held in the Main Portfolio, and the source of trust funds traceable into other accounts.

29 Relevantly, the discovery orders made with respect to the St George and Citibank bank statements directly relate to the discovery orders made in *Frigger (No 2)*. With respect to the St George statement, the primary judge clarified that it was discoverable under the previous orders (*Frigger (No 6)* at [64]). Similarly, the primary judge explained in his reasons why the appellants’ assertion that further pages of a relevant Citibank statement were not included in the previous discovery order was incorrect (*Frigger (No 6)* at [65]). The specific discovery orders were made for the purpose of addressing “any doubt”, noting that the Citibank account “falls within that order”.

30 Consequentially, two sets of discovery orders were made each on 29 November 2019 (*Frigger (No 2)*) and 25 June 2020 (*Frigger (No 6)*).

31 The 29 November 2019 orders required the appellants to provide the following classes of documents:

(1) all documents, including but not limited to bank statements, deposit slips, invoices, cheques, cheque butts, withdrawal forms, transfer instructions and receipts evidencing the source of the funds held in [BOQ1 and BOQ2] …

(2) all documents, including but not limited to all bank statements, application forms, agreements, accounts and correspondence evidencing the person or entities which have or had a legal or beneficial interest in [BOQ1 and BOQ2];

(3) all documents … evidencing the purchase, sale, transfer or conveyance of, and the identity of the legal and beneficial owner of [various properties, including the Residential Properties].

32 The 25 June 2020 orders further required the appellants to provide the following additional classes of documents:

(a) All documents that evidence the holding, purchase, sale, transfer, subscription or other conveyance of, and the identity of the legal and beneficial owner of, the securities identified in the Commonwealth Securities Ltd portfolio that is referred to in the affidavit of Angela Frigger sworn 16 September 2019 at annexure AF6, page 14 …

(b) All bank statements for the St George bank account identified in the affidavit of Kelly-Anne Trenfield sworn 1 June 2020 at annexure KAT-9, pages 42 to 43, whether in the name of Jessica Frigger or any other person (excluding pages 1 and 2 of the statement of account for the period 26 February 2017 to 7 July 2017).

(c) All bank statements for the Citibank account identified in the affidavit of Kelly-Anne Trenfield sworn 1 June 2020 at annexure KAT-8, page 44, in the name of “Angela Frigger & Hartmut Frigger ATF Frigger Super Fund” (excluding page 3 of 3 for the statement for 1 November 2018 to 30 November 2018).

33 The primary judge refused to make orders with respect to a second category of documents relating to the Computershare notices.

#### Judgments

34 Over the course of the matter, the primary judge delivered 13 judgments. It is convenient to address these in short compass, in turn, below.

#### Interlocutory judgments

35 *Frigger (No 1)*, concerned the appellants’ interlocutory application seeking to compel Mrs Trenfield to retract a letter that she sent to CommSec on 28 August 2019. The appellants also sought orders requiring Mrs Trenfield to send a letter to ASX Settlement Pty Ltd with the effect of changing the holder status of the Clearing House Electronic Sub-register System holder identification number associated with the CommSec portfolio so that shares can be traded on the Australian Securities Exchange, and that Mrs Trenfield make good any loss to the fund. Each of these proposed orders was refused.

36 The primary judge made a number of observations with respect to the evidence relied upon in support of the appellants’ interlocutory application which are worth noting. Importantly, to succeed at trial, the primary judge identified that Mr and Mrs Frigger needed to:

(1) point to an objectively manifested intention on their part (or the part of any other relevant entity) that the shares were to be held on trust for another person, which may be inferred from all the circumstances (*Frigger (No 1)* at [44]); and

(2) to establish that, at the commencement of their bankruptcy on 20 July 2018, the shares in the portfolio either did not belong to or were not vested in them, or if they were, they were held on trust for another person (*Frigger (No 1)* at [17]).

37 This was particularly pertinent in circumstances where one would expect that more specific evidence of the requisite intention would be easy to adduce (*Frigger (No 1)* at [45]).

38 As will be discussed in due course (see [247]–[257] below) the importance of objectively manifested intention is the need to prove acts undertaken that are sufficient to permit the conclusion that assets were or became part of a trust fund (the FSF). The acts to be proven, are acts or facts in the world that are done or exist that carry with them the inference that the appellants’ intention which was effected by the acts was to have the assets form part of the FSF.

39 In analysing the evidence, the primary judge noted that there were “uncertainties” (*Frigger (No 1)* at [43]), including that the evidence was at a “high level of generality” (*Frigger (No 1)* at [44]) and “at best equivocal” (*Frigger (No 1)* at [45]) or was “little more than a broad assertion” (*Frigger (No 1)* at [44]). Similar comments in relation to the evidence were repeated in later published reasons, which will be discussed below. No direct evidence was adduced of any share registry having noted the beneficial ownership of shares in their records (*Frigger (No 1)* at [45]). A further example was the FSF balance sheet, which was prepared by Mrs Frigger at an undisclosed time for an undisclosed purpose (*Frigger (No 1)* at [46]). Neither was any evidence adduced revealing exactly when nor how the appellants’ children, Jessica and Michael Frigger, were appointed as trustees. Similarly, there was no evidence adduced to support the contention that the nature of the security interest that was registered over the Main Portfolio in the name of an entity called “Frigger Super Fund” was in ‘the beneficial ownership’ of the FSF, nor why the registrations were lodged (*Frigger (No 1)* at [49]). The appellants also failed to explain the fact that none of the shares appeared to have been acquired in the name of HAF. The primary judge noted that Mrs Frigger’s evidence may be supported by holder identification statements or other share registry records; however, these were not produced (*Frigger (No 1)* at [50]). Finally, there was no evidence explaining why the shares that were held at the time when the appellants were replaced as trustees had not been transferred into the name of the new trustee, despite that being a requirement of the FSF Trust Deed cl 167 (*Frigger (No 1)* at [51]). Although there was a serious question to be tried, it was this kind of evidentiary uncertainty that ultimately persuaded the primary judge to refuse the orders sought by the appellants: *Frigger (No 1)* at [52].

40 The second judgment, *Frigger (No 2)*, has been relevantly summarised above save with respect to the appellants’ interlocutory application for summary judgment, which was ultimately refused. At this stage it is also worth noting comments made by the primary judge with respect to the evidence adduced in support of the interlocutory applications for summary judgment and discovery. As his Honour had said in *Frigger (No 1)*, to succeed at trial, the appellants would need to establish that, at the commencement of their bankruptcy, the BOQ1 and BOQ2 accounts either did not belong to or were not vested in them, or if they were, they were held on trust for another person (*Frigger (No 2)* at [15]). The appellants alleged that this was established on the evidence as a result of transactions by which the trustee of the trust exchanged other trust assets for BOQ1 and BOQ2. However, as pointed out by the primary judge, the appellants would need evidence establishing that at the point when the funds first became subject to the trust, there was an objectively manifested intention to that effect (*Frigger (No 2)* at [17]). Critically, his Honour noted that Mr and Mrs Frigger’s application for summary judgment hinged upon the extent to which the evidence they adduced could establish that BOQ1 and BOQ2 were FSF assets at the time of commencement of the bankruptcy (*Frigger (No 2)* at [22]). His Honour drew particular attention to the fact that BOQ1 was in Mr Frigger’s name and BOQ2 was in Mrs Frigger’s name (*Frigger (No 2)* at [15]).

41 Regarding the FSF itself, the primary judge noted that the evidence adduced was, again, “at a high level of generality”, stating that “documentation of [certain] contributions or any specific evidence to establish that [these contributions] were transferred to the Friggers in their capacity as trustee of the FSF are absent from the affidavits” (*Frigger (No 2)* at [26]). The primary judge also made the following observations:

(1) The deed of amendment of the FSF as to when the appellants ceased to be trustees made no mention of 21 July 2018, being the date Mrs Frigger claimed this change of trustee occurred, and was dated 1 July 2018, the date to which Mrs Frigger claimed the removal was backdated (*Frigger (No 2)* at [25]).

(2) The notification of change of trustee to the Australian Business Register filed on 21 July 2018 removing the appellants as individual trustees and replacing them with HAF stated that these changes were to take effect from 1 July 2018 did not necessarily support a finding that the appellants were trustees of the fund at the time that BOQ1 was opened (*Frigger (No 2)* at [25]).

(3) Although being potentially probative (albeit without the benefit of cross-examination and the context of a full hearing), his Honour could make no finding about when (or whether) the change of trustees occurred based on a minute of meeting of the FSF trustees dated 21 July 2018, recording resolutions that the four individual trustees be removed and replaced with HAF, as relied upon by the appellants (*Frigger (No 2)* at [25]).

42 Regarding BOQ1, there was also no evidence as to when the account was given the FSF designation (*Frigger (No 2)* at [32]). The most that was provided was a number of internet banking printouts that merely possessed the label ‘Frigger Super Fund’ beneath a heading ‘Account Name’, but did not disclose who gave it this denotation, or when or how this came about: *Frigger (No 2)* at [32]. As there was no further evidence in support, the primary judge placed no weight on this evidence: *Frigger (No 2)* at [32]. Although the appellants adduced an email dated 13 July 2018 from Mr Frigger providing Bank of Queensland with a TFN for the account, which appeared to be the same for FSF, the primary judge did not find this, by itself to be compelling: *Frigger (No 2)* at [33].

43 Regarding BOQ2, a bank statement for this account was in evidence indicating that BOQ1 was opened with a deposit of $50 withdrawn from BOQ2 on 2 July 2018. It made no reference to the FSF. There was also no documentation verifying a claim by Mrs Frigger in her affidavit sworn 25 July 2019 that Bank of Queensland advised her that it was not possible to transfer the funds from BOQ3 to (seemingly) BOQ1 (*Frigger (No 2)* at [37]).

44 Regarding BOQ3, two bank statements for this account were produced but also made no reference to the FSF. Similarly to BOQ1, the internet banking printouts produced also denoted the account name as “Frigger Super Fund”, but no further evidence was produced in support (*Frigger (No 2)* at [39]). A balance sheet of the FSF “As of June 2018” included a line item that appeared to correspond with the total balance of BOQ3 as at 30 June 2018. However, the document was headed “H & A Frigger atf Frigger Super Fund”, which the primary judge noted appeared to suggest that the balance sheet was generated some time after 1 July 2018, and no evidence was produced as to when it was prepared or by whom (*Frigger (No 2)* at [41]). The primary judge therefore found that this document had limited use and that it did not establish that the respondents did not have a reasonable prospect of defending against the allegation that the funds in BOQ1 were held on trust on the terms of the FSF: *Frigger (No 2)* at [41].

45 Bank statements were also produced in evidence by Mr and Mrs Frigger which seemed to indicate that the source of the funds in BOQ2 came from two HSBC accounts. However, none of those bank statements mentioned the FSF and the only documentary evidence in support of the appellants’ submission that these accounts were held in their respective names as “trustee of the Frigger Super Fund” was a single document. This document was an invoice that was issued on 1 October 2017 for rent from the Hobart property, headed “Angela and Hartmut Frigger atf Frigger Super Fund”, directing payment to one of the HSBC accounts: *Frigger (No 2)* at [44]. Although relevant, the primary judge found that it alone was hardly conclusive: *Frigger (No 2)* at [44].

46 Regarding BW1, which was asserted to be (at least in part) the “start of the trail” of transfer of funds, that account also made no reference to the FSF. The one invoice in evidence which directed payment to this account which was issued by HAF as trustee for the FSF is dated 5 February 2019. The primary judge found that this invoice provided little support to Mr and Mrs Frigger’s case as it post-dated the sequestration order: *Frigger (No 2)* at [46]. The only other two pieces of evidence in support of the BW1 account being an asset of the FSF was a statement to that effect in Mrs Frigger’s first affidavit and a second statement in another affidavit of Mrs Frigger. The first statement was found by the primary judge to be a statement made “at a high level of generality”: *Frigger (No 2)* at [47]. The second statement was to the effect that the appellants had provided evidence and explanations to the Official Trustee, after which it determined the account was superannuation funds. However, the primary judge did not find there to be any documentary evidence provided as to what Mrs Frigger alleged to be the Official Trustee’s conclusion: *Frigger (No 2)* at [48]. The primary judge also found that an audit report which was annexed to Mrs Frigger’s first affidavit of 6 March 2019 did not contain any financial statements nor did it establish any other information pertaining to what the assets of the trust were at the time that affidavit was made, let alone at the time of the bankruptcy in 2018: *Frigger (No 2)* at [49].

47 The primary judge found that the evidence detailed above was sufficient to establish a prima facie case that the ultimate source of funds in BOQ1 and BOQ2 was the BW1 account. The primary judge also concluded that this finding was not the same as a finding that there was a prima facie case that the respondents had no reasonable prospect of defending the claim that the funds are held on trust on the terms of the FSF Trust Deed, to allow the summary judgment application: *Frigger (No 2)* at [62].

48 Specifically, his Honour provided two main reasons for this. *First*, as highlighted above, the evidence consisted of little more than “assertions”, without any documentary evidence or persuasive testimony in support of their application: *Frigger (No 2)* at [63]. *Second*, despite some evidence which was given little to no weight, there was an “almost complete absence of any objective manifestation of an intention that BOQ1 is held on the terms of the FSF”: *Frigger (No 2)* at [64]. More pointedly, the primary judge noted how the relevant “BOQ” accounts as well as BW1, were opened in Mrs Frigger’s name only, and this pointed “objectively in the opposite direction” of manifesting an intention that these accounts be part of the FSF: *Frigger (No 2)* at [65]. The cumulative effect of this was that the evidence failed to establish a pattern of the trustees of the FSF moving funds from one account *in their names (as trustees)* to another *in their names (as trustees)*: *Frigger (No 2)* at [66]. The documentary evidence fell short of proving that the funds were subject to the terms of the FSF Trust Deed.

49 Although the appellants did not seek summary judgment concerning the declarations about the ownership of the Residential Properties, the evidence was relevant to the respondents’ application for discovery. The primary judge made the following observations about the relevant evidence:

(1) The declarations of trust over the relevant properties noted that the powers of the trustee over the land are contained in the FSF Trust Deed, despite Mrs Frigger being named as the trustee (*Frigger (No 2)* at [72]).

(2) The lease for the Como property notes that the owner is Mrs Frigger as trustee for the FSF, but is both undated and unsigned; therefore, little weight could be placed on it (*Frigger (No 2)* at [73]).

(3) There is no documentary evidence of the alleged ‘*in specie* contributions’ of the Residential Properties (*Frigger (No 2)* at [75]).

(4) The evidence was not clear as to whether the land at the property (the address of which is unnecessary to specify for the purposes of this judgment) at South Western Highway, Armadale was sold at 11 February 2016 or any other time (*Frigger (No 2)* at [76]).

(5) The invoices for rent and other charges for the Residential Properties and the Hobart property issued in the name of HAF as trustee for the FSF were dated from February and March 2019, well after the bankruptcy (*Frigger (No 2)* at [78]).

50 Regarding the Residential Properties, the primary judge observed that such evidence was probative, though the documents that post-dated the sequestration orders must be treated with caution (*Frigger (No 2)* at [78]–[79]).

51 The primary judge found that there were “real doubts” about the source of the funds in the BW1 account, and there was a lack of any documentary evidence of any objective manifestation of intention that the funds in any of the bank accounts were held on trust on the terms of the FSF (*Frigger (No 2)* at [81]).

52 The third judgment, *Frigger v Trenfield (No 3)* [2020] FCA 150, involved the appellants’ application for leave to amend the originating application to add a claim for non-economic damages for defamatory imputations. This arose in relation to a letter published by Mrs Trenfield to the Australian Financial Complaints Authority on 27 September 2019. The application was relevantly dismissed.

53 The fourth judgment, *Frigger v Trenfield (No 4)* [2020] FCA 797, mainly concerned the date at which the calculation of the alleged losses with respect to the Main Portfolio ought to be fixed. The primary judge ordered that the trial be confined to the issues in the then third amended originating application which did not claim losses (other than certain minor losses).

54 The fifth judgment, *Frigger v Trenfield (No 5)* [2020] FCA 827 (***Frigger (No 5)***), involved the appellants’ interlocutory application seeking orders that Mrs Trenfield is guilty of three counts of contempt of court, and an order for punishment for the alleged contempt. The appellants alleged that Mrs Trenfield had breached an implied undertaking to the Court not to use certain documents obtained in the course of those proceedings other than for the purposes of those proceedings. The appellants also sought summary judgment with respect to final relief for Mrs Trenfield’s removal as trustee in bankruptcy, and a separate order that the administration of the bankrupt estates be returned to the Official Trustee. The interlocutory application was ultimately dismissed. His Honour held that Mrs Frigger was not compelled to file an affidavit annexing the two documents that were the subject of the charges either by reason of a rule of court or a specific order of the court or otherwise: *Frigger (No 5)* at [10], [14]–[18]. After examining the divergent lines of authority concerning whether production must be compulsory for the implied undertaking to arise, the primary judge ultimately found that it was not necessary to decide this issue as Mrs Frigger’s affidavit of 6 March 2019 was sworn and filed voluntarily: *Frigger (No 5)* at [59]–[60]. Ultimately, the primary judge found that no relevant element of compulsion was present, no implied undertaking attached and Mrs Trenfield was not guilty of the three charges of contempt of court: *Frigger (No 5)* at [64]–[65].

55 In the sixth judgment, *Frigger (No 6)*, the primary judge considered a number of interlocutory applications which were brought by each of the parties.

56 The appellants filed an application for leave to amend their originating application in terms of a minute of fourth amended application.

57 The first respondent filed applications for the joinder of certain parties as additional respondents, leave to file a cross-claim out of time and for discovery. The appellants’ application was partly refused.

58 Three changes were proposed:

(a) to make clear that the appellants were suing in their capacity as trustees of the FSF;

(b) to amend certain declarations sought so that assets that are the subject of the declarations are no longer described as being held by the appellants as “bare” trustees; and

(c) to seek additional orders requiring the first respondent to remove a “stop” said to have been placed on a bank account which appears to be associated with a share portfolio that is in issue in the proceeding, and to seek “pre-judgment statutory interest” on the money in that account: *Frigger (No 6)* at [4].

59 The first change was permitted without objection from the first respondent: *Frigger (No 6)* at [5]. The second change was also permitted, as the primary judge did not consider that the removal of the word ‘bare’ would affect the substance of the issue raised by the declaration sought: *Frigger (No 6)* at [7]. The third change was ultimately refused, as the primary judge found that a powerful factor militating against granting leave was that the first respondent offered to undertake that if the shares in the Main Portfolio are found to be FSF assets, she would write to the bank asking that the freeze be removed, in return for the application for leave to amend be withdrawn: *Frigger (No 6)* at [14]. This represented the best possible outcome for resolving a relatively minor issue without involving the court: *Frigger (No 6)* at [14]–[15]. As the appellants rejected the offer “for no good reason”, leave was refused: *Frigger (No 6)* at [17].

60 The first respondent’s joinder application was refused save with respect to granting leave to amend the originating application to identify that the appellants were suing in their capacities as trustees as well as their capacities as regulated debtors, and joining HAF as a party. The first respondent sought to join Mr and Mrs Frigger to the proceeding as respondents in their capacity as trustees of the FSF as well as HAF and the appellants’ adult children: *Frigger (No 6)* at [18]. As the primary judge granted leave to amend the originating application to make clear that the appellants were suing in their capacity as trustees as well as in their capacity as regulated debtors, the first part of the joinder application was refused: *Frigger (No 6)* at [31]. The joinder application with respect to HAF was granted as the company was an immediate former trustee of the FSF at relevant times and the appellants were its directors and shareholders: *Frigger (No 6)* at [38]. With respect to the appellants’ adult children, the primary judge did not consider it appropriate to grant leave. This was because the orders sought by the appellants were held not to affect them in any prejudicial way: *Frigger (No 6)* at [39]. Moreover, if an order in favour of the appellants was made, it would not be detrimental to the appellants’ adult children, rather they would benefit from it: *Frigger (No 6)* at [40]. Lastly, among other reasons, the primary judge found that the possibilities that the appellants’ adult children are still trustees, or will be able to commence their own proceedings to re-agitate the issues before that proceeding, were not more than theoretical: *Frigger (No 6)* at [46].

61 The remainder of the first respondent’s interlocutory applications dealt with in *Frigger (No 6)* met with mixed success. With respect to the application for leave to cross-claim, although the primary judge found that there was a close connection between the subject matters of the proceeding and of the proposed cross-claim (*Frigger (No 6)* at [50]), his Honour also found that prejudice was likely to arise *Frigger (No 6)* at [51]. With respect to the application for particular discovery, orders were subsequently made, as discussed at [25]–[33] above. Regarding the first category of documents sought, the primary judge found that evidence produced by Mrs Frigger gave rise to a possibility that another CommSec portfolio was used by the trustee of the FSF to trade shares held in that capacity. The primary judge considered that such evidence could therefore shed light on whether the shares in the Main Portfolio had also been held in that capacity *Frigger (No 6)* at [58]. Regarding the second category of documents, the primary judge ultimately held that notices from Computershare were wholly uninformative and would not likely have any relevance to the proceeding *Frigger (No 6)* at [62]. Finally, regarding the third category of documents, the primary judge noted that:

(1) the name under which the St George account was registered may have been relevant in the proceeding, given that it was claimed to be the source of trust funds traceable into other accounts. Specifically, although the St George account had already been the subject of the discovery orders of 29 November 2019, that occurred on the assumption that it was in Mrs Frigger’s name, whereas evidence had been produced showing that it was in Jessica Frigger’s name: *Frigger (No 6)* at [63]–[64]; and

(2) the appellants incorrectly resisted discovery of the other pages of a Citibank statement from November 2018. Although the Citibank account was not listed specifically in the discovery orders of 29 November 2019, the relevant order had not been limited to the specified accounts, it actually extended to “accounts held in the name of any or all of the applicants and the trustees (including the former trustees)”: *Frigger (No 6)* at [65]. The appellants merely made a “bald assertion” that the Citibank accounts were not relevant in resisting discovery: *Frigger (No 6)* at [65].

62 The seventh judgment, *Frigger v Trenfield (No 7)* [2020] FCA 1740 (***Frigger (No 7)***), involved the appellants’ application to re-open the trial hearing. It was filed after the trial had ended and judgment was reserved. It also included a list of orders sought by the appellants, in the event that leave to re-open be granted. The purpose of the re-opening application was to give the appellants the opportunity to object to parts of, and exhibits to, certain affidavits that had already been received into evidence, as well as to seek to adduce further evidence in support of those objections and additional affidavits sworn by Mr and Mrs Frigger respectively. Specifically, the appellants submitted that:

(1) a large part of the affidavit evidence of the first respondent that had been admitted should be excluded as it had been obtained improperly or unlawfully: *Frigger (No 7)* at [2]; and

(2) the first respondent should be ordered to write to various share registries and retract the letters that she sent to them on 24 April 2020 and 29 September 2020, on the alleged basis that they included falsehoods: *Frigger (No 7)* at [3].

63 The appellants submitted that this arose in the context where they misapprehended the above claimed facts and law, and only became aware of this when served with the first respondent’s affidavit of 16 September 2020. As such, they were unable to object to the first respondent’s evidence during the trial or prior to its commencement. It is further worth noting that, in response to the appellants’ allegation that the letter of 3 September 2020 sent by the first respondent to Just SMSF Audits was false, the primary judge informed the appellants of the provisions of s 138 of the *Evidence Act 1995* (Cth) (***Evidence Act***).

64 The application was ultimately dismissed on the basis that the appellants failed to demonstrate any good reason to re-open the trial given that the parties had already closed their cases, both Mrs Frigger and Mrs Trenfield were cross-examined on the basis of the evidence that had been admitted up to that point, and judgment had been reserved: *Frigger (No 7)* at [26]. With respect to the claimed inability to object to the first respondent’s evidence, the primary judge noted that the letters the appellants referred to were all in evidence in applications well before the trial started, and that the 3 September 2020 letter had also been obtained during the course of the trial: *Frigger (No 7)* at [27]. Further, it was noted that the appellants had always been “alive to their ability to allege impropriety against Mrs Trenfield on [the basis that Mrs Trenfield’s letter of 28 August 2019 to CommSec was an ‘abuse of process’]”: *Frigger (No 7)* at [29]. While they might not have known the precise terms of s 138 of the *Evidence Act*, they had sufficient knowledge to claim that the evidence should be excluded because it was obtained by Mrs Trenfield abusing her power as was actually claimed by Mrs Frigger in her affidavit filed on 18 September 2020: *Frigger (No 7)* at [30].

65 Even though the primary judge acknowledged that the four established classes of reasons for re-opening a matter are not closed, the circumstances were such that they did not justify such an outcome: there was a “lack of a satisfactory explanation for why the objection was not raised during the trial”: *Frigger (No 7)* at [32]. Neither did the appellants present clear evidence of serious illegality or impropriety by another party to justify re-opening the matter: *Frigger (No 7)* at [34], [41]. The appellants also failed to explain why they did not raise an objection to the evidence they sought to exclude on the basis that it was adduced solely to impugn Mrs Frigger’s credibility: *Frigger (No 7)* at [45]. Furthermore, were the objections upheld, a large volume of documentary evidence and a significant quantity of oral evidence would have to have been excluded. This would have posed significant implications and illustrated “why objections of that kind need to be made and determined during the trial rather than after it”: *Frigger (No 7)* at [47].

66 The appellants also sought leave to re-open for the purpose of producing further evidence, namely, Mr Frigger’s (at that time) new affidavit of 27 October 2020. The primary judge acknowledged that the affidavit, which attached an email dated 28 September 2020 from one of the share registries, answered questions concerning a potentially significant issue in the proceeding: *Frigger (No 7)* at [50]. Even so, the attached email was merely a “general statement … unlikely to assist the court” concerning the dates on which an unspecified TFN was entered on the respective share registry’s system across different holdings: *Frigger (No 7)* at [50]. Mr Frigger’s affidavit concerned matters that were clearly in issue at the trial, which could have been adduced then. Similarly, the primary judge therefore held that there was no good reason to allow the appellants to adduce that evidence after the trial had finished: *Frigger (No 7)* at [51]. The same reason was given for rejecting leave to re-open for the purpose of putting into evidence an affidavit which Mrs Frigger swore on 17 September 2020: *Frigger (No 7)* at [52].

67 It is worthwhile addressing, at this point, two other applications for leave to re-open that had been submitted during the course of the trial on both 7 and 9 September 2020 and 21 September 2020 respectively. Each related to the issue of the reliability of certain financial statements and annual returns, as noted above.

68 As to the first application on 7 and 9 September 2020, the primary judge gave the appellants leave to re-open their case to tender certain documents. The application was not opposed and the documents were admitted into evidence. The appellants made several submissions in support of their re-opening application, including:

(1) to establish that FSF continued to be a regulated and complying fund after 30 June 2018 (Transcript 2020-09-07 T.723; but see T.729);

(2) that “the BOQ account specifically only came into existence after the end of the financial year 30 June 2018 … [a]nd so, it doesn’t appear in any financial statement which is in evidence in the court” (Transcript 2020-09-07 T.723);

(3) “to prove that the Bank of Queensland bank account was held in the [FSF]” (Transcript 2020-09-07 T.724);

(4) to negate the first respondent’s allegation the appellants advised various share registries of the FSF’s TFN only in September 2019 (Transcript 2020-09-07 T.724); and that

(5) there was not effectively a 50 per cent withholding tax on the dividends (Transcript 2020-09-07 T.725).

69 The reason for granting leave was that his Honour was satisfied that the documents were arguably relevant for the purpose of establishing that BOQ1 and BOQ2 were FSF assets and that the TFN for the FSF had been notified to share registries before September 2019: Liability Judgment at [260].

70 As to the second application on 21 September 2020, the primary judge refused to grant leave. The appellants sought leave after counsel for the first respondent had delivered his oral closing submissions and on the same day on which the appellants made their closing submissions. The basis of the application were the following purposes:

(1) to admit into evidence an account transaction list for the FSF which Mrs Frigger had obtained from the Australian Taxation Office (**ATO**) Business Portal;

(2) to admit into evidence a copy of the 2017 annual return for the FSF which, Mrs Frigger said, she had posted to the ATO as a paper return; and

(3) to recall Mrs Frigger as a witness to respond to what she described as “numerous false allegations of substantial wrongdoing against the [appellants], which allegations effectively amounted to tax fraud”.

71 Mrs Frigger’s affidavit dated 17 September 2020 in support of this application listed some 40 “false allegations”. The primary judge noted that this list appeared to have been based on Mrs Frigger’s contemporaneous notes and presumed for the purposes of the application that it was accurate: Liability Judgmentat [263].

72 The affidavit provided more succinctly the “essential basis” of Mrs Frigger’s application to be recalled as a witness pursuant to s 46 of the *Evidence Act*:

6. At no time during cross-examination was it put to me that:

6.1 No financial statements had been prepared by me for FSF prior to sequestration date;

6.2 All financial statements were prepared after sequestration date;

6.3 All annual returns were audited and lodged after sequestration date;

6.4 My husband and I decided after sequestration date what assets we would allege are trust assets and what assets are not;

6.5 The valuations of Hobart and Perth in June 2017 were falsely understated.

73 It is worth noting that many of these grounds were substantially repeated in Ground 9(g) of the appellants’ amended notice of appeal.

74 As submitted and accepted by the primary judge, these documents appeared to be relevant to the question of when the financial statements and annual returns were prepared, an important issue in the proceeding: Liability Judgmentat [265].

75 Notwithstanding this, the application was nevertheless dismissed. The critical reason for this was that the appellants had been well and truly on notice, even spanning back before the trial, of the importance of such documents and that this would be in issue and that the appellants had ample opportunity to adduce evidence before they closed their case: Liability Judgmentat [266]. As summarised above, these issues and the importance of their and the FSF’s financial records were raised as early as the first interlocutory judgment in *Frigger (No 1)*. These issues and the lack of complete documentation were further raised and addressed comprehensively in the first respondent’s written opening submissions filed 12 July 2020, 15 days before the commencement of the trial, and noted that the evidence was either “generally unreliable”, “should be given no weight”, “they were prepared by Mrs Frigger with no explanation as to when they were prepared”, “they were likely prepared after the sequestration order”, and “were full of inconsistencies and accurate information such that they cannot be relied on as a source”: Liability Judgmentat [268]. Mrs Frigger was also extensively cross-examined on this issue during the trial: Liability Judgmentat [269]. Similar to the reasons given in *Frigger (No 7)*, the evidence the appellants sought to adduce at this stage could have been produced during the trial: Liability Judgmentat [271]. The primary judge relevantly said that “[the appellants] were seeking to plug a gap in their case which the first respondent highlighted in closing submissions”: Liability Judgmentat [274]. Furthermore, the primary judge held that there was no other good reason why the interests of justice required the case to be re-opened: Liability Judgmentat [271]. As such, leave to recall Mrs Frigger under s 46 of the *Evidence Act* was refused.

76 The eighth judgment, *Frigger v Trenfield (No 8)* [2021] FCA 569, concerned a subsidiary interlocutory application brought by Mrs Trenfield responding to the appellants’ stay application (which is summarised immediately below) to set aside a notice to produce that had been served by the appellants under r 30.28 of the *Federal Court Rules 2011* (Cth) (***Rules***). Orders were made pursuant to r 1.34 of the *Rules* dispensing with any requirement for the first respondent to comply with this notice to produce.

77 The ninth judgment, *Frigger v Trenfield (No 9)* [2021] FCA 652, involved the appellants’ application for a stay of the delivery of judgment in the proceeding, which at the time of the application had been reserved. The basis for the stay application was that the appellants had commenced a separate proceeding in the court for the annulment of their bankruptcies. The application was ultimately dismissed.

#### Liability judgment

78 The final judgment, (the Liability Judgment), comprehensively addressed the substantive issues in the proceeding below. It numbers some 751 paragraphs across 226 pages. For the sake of brevity, only those elements pertinent to the procedural history of the proceeding below and this appeal will be summarised.

79 The trial judge helpfully grouped the relevant issues as follows (which will also be dealt with in turn here):

(1) whether the disputed assets (i.e. the BOQ1 and BOQ2 accounts, the Main Portfolio, and the Residential Properties) are property divisible amongst the creditors of the bankrupt estates;

(2) issues concerning orders relating to costs that were made by the Court of Appeal of Western Australia; and

(3) whether the first respondent should be removed as trustee of the appellants’ bankrupt estates.

#### Costs judgments

80 The eleventh judgment, *Frigger v Trenfield (No 11)* [2022] FCA 326 (***Frigger (No 11)***), concerned orders sought by the first respondent relating to the costs of the proceeding, following the delivery of the Liability Judgment. From a high level, the appellants were ordered to pay the first respondent’s costs of the proceedings on a party-party basis.

81 Relatedly, the twelfth judgment, *Frigger v Trenfield (No 12)* [2022] FCA 900 (***Frigger (No 12)***), determined the quantum of costs that are to be payable as ordered in *Frigger (No 11)*.

82 Finally, the thirteenth judgment, *Frigger v Trenfield (No 13)* [2022] FCA 906, involved an interlocutory application that was brought by the appellants to suspend the judgments in *Frigger (No 11)* and *Frigger (No 12)*. The primary judge dismissed the application.

### The witnesses

83 For the sake of completeness, it is worth repeating the primary judge’s observations as to the reliability of the evidence provided by the two witnesses: Mrs Frigger and Mrs Trenfield. Mr Frigger did not give evidence.

84 With respect to Mrs Frigger, the primary judge concluded that she had knowingly altered documents which she put into evidence, in order to create a false impression that the documents supported the appellants’ case: Liability Judgement at [51]. His Honour relied upon the following evidentiary issues to reach this conclusion.

85 *First*, the St George Bank statement annexed to Mrs Frigger’s affidavit sworn 6 March 2019 included the notation “Frigger Super Fund” beneath the account name “Mrs A Frigger”. Yet, an identical bank statement bearing the same account number and identical transactions annexed to Mrs Frigger’s affidavit sworn 20 April 2020 included the notation “Jessica Ann Frigger” beneath the account name “Miss J Frigger”. An email exchange between Mrs Trenfield’s staff and Westpac Banking Corporation annexed to Mrs Trenfield’s affidavit sworn 22 May 2020 noted that the account was “not held under Hartmut Hubert Josef Frigger and Angela Cecilia Therese Frigger”: Liability Judgment at [58]. In cross-examination, Mrs Frigger explained that the account was not in her name and that she included the ‘Frigger Super Fund’ notation herself: Liability Judgment at [60]–[62]. The primary judge found Mrs Frigger’s explanations implausible and were provided “in an attempt to dispel the obvious inference … that Mrs Frigger altered the document … in an attempt to persuade the court that it was an asset of the FSF”: Liability Judgment at [65].

86 *Secondly*, similar to the St George Bank statement, the ‘Financial Year Summary’ from CommSec showing the value of the Main Portfolio as at 30 June 2018 annexed to Mrs Frigger’s affidavit sworn 6 March 2019, also included a similar notation to the FSF. Yet, the same document obtained by Mrs Trenfield and annexed to her affidavits sworn 11 September 2019 and 22 May 2020 did not bear this notation. This inconsistency was further expounded by other CommSec financial year summaries from different accounts which did include references to the FSF. The primary judge found Mrs Frigger’s explanations to be similarly implausible for a similar purpose: Liability Judgment at [83]–[84].

87 *Thirdly*, other matters concerning Mrs Frigger’s credibility were also canvassed: Liability Judgment at [86]–[87]. Most particularly, the primary judge found her demeanour in the witness box to be unconvincing: Liability Judgment at [88]. The totality of the above evidence led to the primary judge concluding that Mrs Frigger was not a truthful witness: Liability Judgment at [89].

88 Conversely, the primary judge concluded that, unlike Mrs Frigger whose credibility was central to the proceeding being the party with the onus of proof and most of the contentious evidence, Mrs Trenfield presented as an experienced professional in the witness box, although could have been more forthcoming in some circumstances: Liability Judgment at [92]–[95].

89 The primary judge’s general or overarching findings of credit against Mrs Frigger and specific findings of credit against her affecting inferences drawn or not drawn, together with places where the primary judge declined to make an adverse finding against Mrs Frigger were as follows:

|  |  |
| --- | --- |
| **Finding** | **Pinpoint in Liability Judgment** |
| ***General / overarching findings as to credit*** | |
| Mrs Frigger | [51], [86]–[89] |
| ***Specific findings as to credit: inference drawn / refused to be drawn or evidence not accepted related to adverse credit*** | |
| Mrs Frigger’s alteration of the St George Bank statement | [52]–[72] |
| Mrs Frigger’s alteration of the CommSec statement | [73]–[85], [383], [385] |
| Mrs Frigger’s reliance on adverse tax consequences in support of inference that the funds in BOQ1 were part of the FSF | [156] |
| Mrs Frigger’s evidence about the dates when various trustees of the FSF were appointed | [181]–[182], [195], [196(3)] |
| Authenticity of the 2014 Minutes | [183], [468]–[472] |
| False submission of Mrs Frigger as to no notice of contravention being received from FSF auditors | [235], [238] |
| Mrs Frigger’s evidence as to the value of the assets in the FSF | [247] |
| The handwritten 2018 annual return | [248]–[251] |
| The applicants’ tracing exercise (First Reconciliation) | [307]–[310], [313], [316] |
| Mrs Frigger’s explanation of the moneys in the Main Portfolio | [372], [373(3)] |
| Mrs Frigger’s evidence about the ability to inform CommSec whether shares are held beneficially or not | [386]–[388], [403]–[404] |
| Mrs Frigger’s evidence regarding the use of the Main Portfolio | [394]–[397] |
| Mrs Frigger’s evidence regarding date of notification of TFN to share registries | [427], [439] |
| Mrs Frigger’s evidence about income earned from the Residential Properties | [480]–[481] |
| Mrs Frigger’s evidence that she and Mr Frigger have conducted a business of investment in real property since 1985 | [521] |
| ***Instances where the primary judge declined to make an adverse credit finding*** | |
| Whether particular BW1 account statement was deliberately altered by Mrs Frigger | [223] |
| Whether Citibank statements were deliberately altered by Mrs Frigger | [289] |
| Authenticity of the 2014 Declarations | [466]–[467] |

### Conclusions as to evidence

90 As a general observation, the primary judge acknowledged that it can be inherently difficult to prove the requisite manifestation of intention: Liability Judgment at [155]. Notwithstanding, the appellants’ case was made more onerous given the lack of “any verbal statements of any kind, written or spoken, formal or informal, *expressing* an intention that the disputed assets be part of the FSF at relevant times” (original emphasis). The most that was provided were the 2014 Declarations and some internet banking statements, which have already been alluded to above, and assertions by Mrs Frigger.

91 After making relevant findings as to who was a trustee of the FSF and when, the primary judge went on to consider the more important threshold issue of whether the FSF was a regulated superannuation fund within the meaning of the *SIS Act*. Ultimately, it was held that the FSF was a regulated superannuation fund at all material times, and that it could only cease to be in the event of fundamental defects in its constitution such that it no longer complied with the requirements of s 19 of the *SIS Act*: Liability Judgment at [198]–[209], [654].

92 The next critical issue for consideration was whether the disputed assets were part of the FSF, as a regulated superannuation fund, such as to exempt the appellants under the *Bankruptcy Act* s 116(2)(d)(iii)(A).

93 However, as a preliminary issue, and despite the appellants seeking no declaration that the BW1 account was an asset of the FSF, the primary judge noted that the ultimate issue turned upon whether BW1 was an asset of the FSF: Liability Judgment at [211]. This was because the appellants claimed it to be the main operating account of the FSF and that the securities in the Main Portfolio were purchased using funds in BW1. Further, the first respondent accepted that the funds in BOQ1 could be traced back to BW1.

94 As was highlighted previously, evidentiary uncertainties proved to be a significant barrier, including with respect to BW1. In the primary judge’s own words, the evidence was “simply a mess … [and] a morass in which no sure footing can be found”: Liability Judgment at [220]. For example, a balance sheet for the FSF as at 30 June 2019, signed by the appellants and dated 19 June 2020, was likely to be self-serving given that it was prepared by Mrs Frigger after the commencement of the litigation: Liability Judgment at [226]. The unqualified audit report of the 2019 balance sheet also gave the Court little comfort as to the balance sheet’s correctness: Liability Judgment at [229]. Similar findings were made with respect to other balance sheets (see, e.g., Liability Judgment at [232]–[241]). Not a single balance sheet in evidence was found to have been reliably dated as having been produced before the sequestration date, as such the primary judge found that the balance sheets were not reliable evidence: Liability Judgment at [243]. Similar concerns over the reliability of the annual returns produced were also expressed (Liability Judgment at [244]–[251]), as these returns were either likely produced after the sequestration date or had large variations in figures or inconsistencies between versions. The appellants also produced documents concerning the registration of BW1 on the PPSR: Liability Judgment at [277]. However, explanations concerning a number of issues with the registration document were unsatisfactory (Liability Judgment at [278]–[280]) or the document itself was adverse to the appellants’ case: Liability Judgment at [281]. The registration was held simply not to convey the necessary manifestation of intention that BW1 was to be held by the appellants subject to the trusts established by the FSF Trust Deed.

95 At least with respect to the receipt of funds in relation to the Edward Street property, the Residential Properties and the Hobart property, the primary judge held that the appellants had made out part of their case, but evidence from the Armadale property was highly tenuous: Liability Judgment at [294]. The transactional history of the account led the primary judge to ultimately conclude that BW1 was used as an account for the receipt of income, tax refunds and payment of expenses and other outgoings of the FSF, but as well as for other receipts and payments not connected to the FSF: Liability Judgment at [302]. The appellants’ tracing exercise were found to be entirely opaque and unreliable, among other reasons: Liability Judgment at [308]–[325].

96 Ultimately, the totality of the above led the primary judge to conclude that the BW1 account should not be characterised as an asset of the FSF: Liability Judgment at [329]. As the evidence appeared to suggest that the BW1 funds were used for mixed FSF and non-FSF purposes, the most that could be concluded was that it contained FSF funds. The primary judge concluded that it was impossible to ascertain what proportion of the funds could be attributed to the FSF, and could therefore be recoverable by the trustee on the state of the evidence: Liability Judgment at [330].

97 The primary judge then considered, in turn, the particular issues that arose with respect to each of the disputed assets.

### Disputed assets – BOQ1 and BOQ2

98 With respect to the BOQ1 and BOQ2 accounts, the primary judge proceeded on the basis that the ultimate issue to be considered was whether there was an objective manifestation of intention to declare the assets to be trust assets within the FSF, having the result that the appellants hold beneficial interests in the accounts as part of their interests in the FSF as a regulated superannuation fund: Liability Judgment at [31]. This was despite the appellants pleading their case on a narrower basis, namely that the money in those accounts was originally earned by the FSF as rental income from two properties in Perth and Hobart: Liability Judgment at [29].

99 Beginning with BOQ1, the appellants relied on tracing principles and general evidence about their subjective intention to shift funds between accounts in order to establish that the BOQ1 funds were FSF funds: Liability Judgment at [340]–[341]. Although the first respondent accepted that all the funds in BOQ1 could be traced from BW1, given the conclusions the primary judge made regarding the nature of the BW1 funds, the primary judge did not consider that that acceptance by the first respondent led to any inference that all funds coming from BW1 were FSF funds when paid out: Liability Judgment at [340]. The primary judge found that merely pointing to surrounding circumstances which are arguably consistent with a trust on the terms of the FSF existing over BOQ1 was not enough and nothing about the purported investment strategy described by the appellants necessitated that it was carried on by them in their capacity as trustees of the FSF: Liability Judgment at [342]. The evidence was such that the primary judge held that the appellants had not discharged their onus of establishing that on 2 July 2018, when BOQ1 was opened by Mr Frigger in his name, that it was an asset of Mr Frigger held in his capacity as trustee of the FSF: Liability Judgment at [347].

100 Also in evidence was an email dated 13 July 2018 sent from Mr Frigger to the Bank of Queensland which included the account number for BOQ1 and allegedly advised the Bank of the FSF TFN. As the primary judge noted, it was not entirely clear what exactly the appellants’ submission was in relation to this notification. Given that the email was not sent at the same time as when BOQ1 was opened and the initial amount had been deposited (2 July 2018), and that it was sent just prior to the sequestration order being made, the email was to be treated with caution and was likely self-serving: Liability Judgment at [352]–[353]. The primary judge proceeded on the basis that the appellants’ contention was that Mr Frigger was manifesting an intention that BOQ1 become an asset of the FSF by notifying the Bank of Queensland that the TFN for the FSF was the TFN for BOQ1: Liability Judgment at [354], [356]. However, uncertainties as to what Mr Frigger objectively intended to convey in sending the email, given the lack of clarity as to its contents, led the primary judge to conclude that the email did not convey a sufficient degree of clarity as to convey the alleged objective intention: Liability Judgment at [367]–[368].

101 Ultimately, it was found that the appellants had failed to establish that either BOQ1 or BOQ2 were held on the trusts of the FSF Deed or Fund or had otherwise been contributed to the FSF at or before the date of bankruptcy or any time before then (such as the commencement of the bankruptcy): Liability Judgment at [370].

### Disputed asset – Main Portfolio

102 With respect to the Main Portfolio, the primary judge noted, and the appellants accepted, that in order to determine whether they were prevented, as trustees of the FSF, from trading shares listed on ASX because of the sequestration order they would need to establish that the securities were assets of the FSF: Liability Judgment at [34].

103 The primary judge comprehensively canvassed a vast array of evidence that the appellants produced in support of establishing that the securities in the Main Portfolio were FSF assets. His Honour’s observations are summarised below:

(1) Although it is apparent that funds from BW1 were used to purchase shares in the Main Portfolio, nothing establishes that those funds were necessarily assets of the FSF.

(2) The respective financial statements, audit reports, annual returns and PPSR registration are not reliable evidence for the same reasons canvassed above in relation to BW1.

(3) There is nothing on the face of any document issued by CommSec to indicate that the shares in the Main Portfolio are assets of the FSF.

(4) The appellants failed to produce even one record obtained from any share registry in order to prove that the shares the appellants say they held were recorded as being held in their capacities as trustees. This evidence was available for the appellants to produce, but they did not produce it, as a result, the primary judge inferred that such documentary proof did not exist. The limited documents that were produced into evidence made no mention of the FSF or any trust at all, rather the Holder Identification Number (**HIN**) of the relevant securities listed Mr and Mrs Frigger as the holders of the shares: Liability Judgment at [413]. There were also a handful of buy confirmations issued by CommSec in respect of the purchase of securities by the appellants which made no mention of the FSF, but did refer to the applicants in their personal capacities: Liability Judgment at [413].

(5) Although there was evidence that the FSF TFN had been notified to share registries, which was earlier found to have potentially conveyed an objective manifestation of intention, there were a number of issues that led to an inconclusive outcome. This included omissions as to when they were notified or when certain events occurred, any mentions to the FSF, or that it had been notified after the sequestration date.

(6) Four of the securities in the Main Portfolio administered by Link Market Services (**Link**) had been notified of the FSF TFN before the commencement of the bankruptcy, and two more administered by Link had been notified after the commencement of the bankruptcy, but prior to the sequestration date. Even so, the evidence did not establish that the notification of the TFN was made contemporaneously with the acquisition and, therefore, did not support the appellants’ case that there was an objective manifestation of an intention to hold the securities in trust at the time of their acquisition. Further the evidence did not establish that the share registry recorded the securities as held in trust for the FSF. Otherwise, the appellants had not articulated a case that notification of TFN after acquisition but before the sequestration orders was evidence of an objective manifestation of an intention to hold the securities on trust at the time of notifications.

104 Ultimately, these evidentiary issues failed to assist the appellants in discharging the burden of proof. This led the primary judge to conclude that the appellants had failed to prove that any of the securities in the Main Portfolio were assets of the FSF: Liability Judgment at [458].

### Disputed asset – Residential Properties

105 With respect to the Residential Properties, the primary judge proceeded on the basis that the ultimate issue was whether they were assets of the FSF, in light of the written declarations of trust made on 1 July 2014: Liability Judgment at [37]. Again, this was despite the appellants pleading their case on a narrower basis, namely, whether the first respondent had a caveatable interest in the Residential Properties: Liability Judgment at [38].

106 Critical to the determination of whether the Residential Properties were assets of the FSF were the 2014 Declarations in evidence produced by the appellants. This issue primarily turned upon the construction of the following clause: “The Powers of the trustee over the Land is [sic] contained in the FSF Trust Deed dated 1 July 1997”: Liability Judgment at [482]–[483]. The Declarations purported to create a trust as between Mrs Frigger as trustee and Mr and Mrs Frigger as beneficiaries. Each of the Residential Properties were held in Mrs Frigger’s name as registered proprietor. The Declarations were marked to be effective as at 1 July 2014, and were signed by Mrs Frigger (as trustee), Mr and Mrs Frigger (as beneficiaries) and a third person (as witness). Neither of the Declarations were notified in any caveat lodged against either property.

107 Mrs Frigger’s affidavits sworn on each of 6 March 2019 and 17 June 2020 provided no background or context about the 2014 Declarations, nor did they include any documentary evidence in support of statements made by Mrs Frigger that the Residential Properties were contributed to the FSF as an *in specie* transfer, with no consideration being paid: Liability Judgment at [466].

108 Although the first respondent stated, in closing submissions, that the primary judge should find “that the authenticity of those declarations itself is doubtful”, that had not been squarely put to Mrs Frigger until closing submissions. As such, the primary judge proceeded on the basis that the 2014 Declarations were executed by the appellants on or about the 1 July 2014: Liability Judgment at [467].

109 Also in evidence was a document purporting to be minutes of a meeting of the FSF on 1 July 2014 (**1 July 2014 Minutes**). The 1 July 2014 Minutes recorded a resolution accepting the Residential Properties as *in specie* contributions on behalf of Mr and Mrs Frigger. Unlike the 2014 Declarations, the authenticity of the 1 July 2014 Minutes was in issue: Liability Judgment at [468]–[469]. Critically, counsel for the first respondent put to Mrs Frigger that the 1 July 2014 Minutes had been created by her after the proceedings had commenced: Liability Judgment at [469]–[470]. Ultimately, the circumstances were such that the primary judge was persuaded to make the serious finding that Mrs Frigger had deliberately created the 1 July 2014 Minutes for the purposes of putting this altered document into evidence: Liability Judgment at [471]. In particular, the primary judge noted that the 1 July 2014 Minutes were not put into evidence when the 2014 Declarations were made on 12 March 2019, nor had they been discovered prior to then as they were only put into evidence via an affidavit sworn 17 June 2020, despite the 29 November 2019 discovery orders: Liability Judgment at [469]. The primary judge also relied on observations concerning Mrs Frigger’s behaviour in cross-examination. The primary judge noted that Mrs Frigger’s credibility was not assisted by her sudden recollection of certain events, which strongly indicated to his Honour that Mrs Frigger would simply “improvis[e] in the witness box to suit her case, rather than any attempt to tell the truth”: Liability Judgment at [472].

110 Given the unreliability of the various balance sheets discussed above, the primary judge placed no weight on them: Liability Judgment at [474]. The 2018 annual return had a large discrepancy between the amounts for the listed residential real property and the values for the Residential Properties: Liability Judgment at [457]. Other evidence post-dated the sequestration order, and could not be taken as reliable evidence: Liability Judgment at [476], or there was no independent evidence confirming the dates of earlier market-value declarations: Liability Judgment at [477]–[479]. Mrs Frigger’s general and unsupported evidence as to the purpose for which the rent was earned for each of the Residential Properties, coupled with Mrs Frigger’s credibility, led the primary judge to reject her evidence: Liability Judgment at [480]–[481].

111 After examining the authorities on the proper construction of documents purporting to create a trust, the primary judge observed at [488] of the Liability Judgment that:

In each of the [2014 Declarations], the technical language of the creation of a trust is used, in self-described “instruments” expressed in legal language and formally signed and witnessed. The intention of Mrs Frigger in executing them as settlor and trustee is to be found in the language in each of the declarations, albeit it will be seen that a reference in that language to the FSF Deed necessarily requires the provisions of that deed to be taken into account as well.

112 The appellants appeared to submit that the proper construction of the 2014 Declarations meant that Mrs Frigger held the Residential Properties as trustee for the FSF beneficiaries. The primary judge noted that, although there was a clear intention to constitute Mrs Frigger as trustee of the Residential Properties, with herself and Mr Frigger as the beneficiaries, the 2014 Declarations were ambiguous as to the terms of the trusts: Liability Judgment at [490]. The primary judge found that it was significant that the 2014 Declarations appointed no one else except Mrs Frigger as trustee and did not include a requirement to transfer the Residential Properties into the names of any of the other trustees of the FSF, despite cl 33 of the FSF Trust Deed requiring this to be done: Liability Judgment at [491]. Although the 2014 Declarations express that Mr and Mrs Frigger were to be the beneficiaries, not Jessica and Michael Frigger, this was consistent with the FSF Trust Deed: Liability Judgment at [492]. The primary judge noted at [493], that there were significant deficiencies in the 2014 Declarations:

… They do not speak in terms of contributing to or adding to any existing trust. They do not say that the properties are to be contributed to the FSF. They do not say that the properties are to be held by Mrs Frigger, or anyone else, in her capacity as trustee of the FSF. Subject to the point addressed [later in the primary judgment], they do not say that the properties are to be held on the terms of the FSF. They do not say that the beneficiaries take their interest(s) as members of the FSF. And they do not provide that the properties are to be held for the purposes of the FSF, in particular the purpose of providing pensions for members, which is essential for it to be a superannuation fund.

113 After considering possible intentions which could be ascribed to the 2014 Declarations, the primary judge ultimately held that the “preponderant intention” was to create a trust over the relevant property that is separate to the FSF: Liability Judgment at [496]–[500]. The primary judge found that it would “strain the language” of the 2014 Declarations if the Residential Properties were said to be held for the purposes of the FSF, on the terms of the FSF Trust Deed: Liability Judgment at [500].

114 The primary judge also noted that it would not assist the appellants were he to account for the circumstances surrounding the 2014 Declarations. His Honour found that the surrounding circumstances were either irrelevant or, objectively, could do no more than indicate that Mr and Mrs Frigger were husband and wife and members of the FSF at the time of the 2014 Declarations: Liability Judgment at [501]. Moreover, the primary judge found that there would be no sense in making a finding that the Residential Properties became part of the FSF. This was because the 2014 Declarations evinced no intention that these assets were to be held for the purposes and subject to the obligations of the FSF Trust Deed. Further, to find that the Residential Properties were validly contributed to the FSF would be in breach of ss 65 and 66 of the *SIS Act*: Liability Judgment at [505]–[529].

115 Ultimately, the primary judge held that the 2014 Declarations created a trust over the Residential Properties respectively, each with Mrs Frigger as trustee and Mr and Mrs Frigger as beneficiaries: Liability Judgment at [503]. However, the primary judge found that these assets were not held by Mrs Frigger in any capacity as trustee of the FSF, or for the purposes of the FSF, or otherwise on the terms of the FSF Trust Deed save in so far as it defines the powers of Mrs Frigger to deal with the Residential Properties: Liability Judgment at [503], [530]–[531].

### Issues concerning Court of Appeal orders

116 The appellants complained about the first respondent’s conduct in relation to costs orders in the Court of Appeal of Western Australia, which have been described above. The appellants claimed that, in wrongly failing to prevent the costs claims from proceeding to taxation and subsequently dealing with the costs claims in the course of calling for and adjudicating on proofs of debt, the first respondent caused the appellants to suffer losses equal to the amounts so paid out: Liability Judgment at [537]–[538].

117 The first respondent submitted in reply that s 58(3) of the *Bankruptcy Act* neither prevented the successful secured creditors from pursuing cost claims against the appellants, nor did it prevent them from obtaining the payment out of the security for costs: Liability Judgment at [539]. The primary judge acknowledged that, while the appellants’ liabilities for the costs of the appeals were provable debts, s 58(5) of the *Bankruptcy Act* operated such that s 58 did not affect the right of a secured creditor to realise or otherwise deal with his or her security. Further, the successful respondents in the Court of Appeal proceedings had an equitable charge or lien over the amounts that had been paid in as security for costs. There was also no evidence of any loss suffered. The successful respondents were also entitled to have the money paid out of court pursuant to ord 25 r 7 of the *Rules of the Supreme Court 1971* (WA) unless the appellants established that the Court of Appeal should have ordered otherwise: Liability Judgment at [544]–[545].

118 In light of the above, and other reasons not presently relevant, the primary judge rejected the orders sought with respect to the consent orders and costs assessments in the Court of Appeal proceedings: Liability Judgment at [549].

### Issues concerning the removal of trustee in bankruptcy

119 The final issue addressed by the primary judge concerned an order which sought to remove the first respondent as trustee of the appellants’ bankrupt estates. The appellants made numerous allegations to justify the first respondent’s removal, which were helpfully summarised at [576] of the Liability Judgment. It is not necessary to extract that list here. For present purposes, it is sufficient to outline the reasons given by the primary judge in rejecting the order sought by the appellants, in short compass and in the following way.

120 *First*, in relation to the complaints alleging the first respondent’s failure to obtain or review information said to be relevant to the question of the capacity in which assets are owned, the primary judge observed that reliance was made on documents that were:

(a) not in evidence (at [585]);

(b) uncertain as to the contents of evidence (at [586]); or

(c) simply did not establish any shortcoming in the first respondent’s conduct (at [588]).

121 Alternatively, the primary judge held that the relevant complaint had not been properly articulated: Liability Judgment at [593], [597].

122 *Secondly*, in relation to the complaints alleging the first respondent’s failure to take steps required in the administration of the bankrupt estate, the primary judge observed that the appellants had not established that the first respondent had acted other than reasonably or that there was a lack of evidence which could discharge the burden of proof: Liability Judgment at [612]–[613].

123 *Thirdly*, in relation to the complaints alleging that the first respondent inhibited the appellants from dealing with the disputed assets, the primary judge observed that either the complaint had not been properly developed (and had partially been addressed with respect to the reasons concerning BW1), the findings made with respect to the disputed assets negate the complaint, or there was a lack of evidence to properly understand the basis on which the complaints were made: Liability Judgment at [615], [626], [639], [643], [646] and [648].

124 *Fourthly*, in relation to the complaints regarding the correspondence from the first respondent to third parties, the primary judge held that the appellants had not properly articulated their complaint and that the first respondent’s assertion in the letter sent to the ATO on 9 April 2019 had been misconceived: Liability Judgment at [650] and [654]. As such, the appellants had at least made out their complaint to the extent that the first respondent’s subjective purpose for sending the letter was not a purpose which could have advanced the legitimate objectives of the first respondent’s administration of the bankrupt estates: Liability Judgment at [656]. Nonetheless, there was no evidence and no basis to suggest that the first respondent did not subjectively believe that the letter advanced those legitimate objectives, nor was there anything improper in reporting to the regulator that she had a reasonable belief that the FSF was not compliant: Liability Judgment at [656]. The appellants’ submission that certain evidence given by the first respondent was false was rejected by the primary judge.

125 *Fifthly*, in relation to the complaints regarding the allegedly false evidence given by the first respondent, the primary judge held that, although the evidence complained of was incorrect (Liability Judgment at [673], [678]), this was either an oversight by Mrs Trenfield, did not impact her credibility as a witness or did not fall short of the standard of conduct expected of an honest and reasonably competent trustee in bankruptcy: Liability Judgment at [678]. Alternatively, there was simply an absence of evidence to adequately assess the complaint: Liability Judgment at [679]–[680]

126 *Sixthly*, in relation to the complaints regarding the first respondent allegedly signing consent orders providing for the payment of indemnity costs as well as the dismissal of the proceeding in WAD 607 of 2015, the primary judge found that the appellants had not adduced evidence nor made submissions capable of establishing that, as a matter of substance, the first respondent’s decision to discontinue the proceeding was unreasonable, or unlawful, or otherwise fell short of the standard expected of an honest and reasonably competent trustee in bankruptcy: Liability Judgment at [700].

127 *Seventhly*, in relation to the complaints regarding the first respondent’s alleged collusion with Mr Kitay, the primary judge found that the appellants had not adduced evidence to sufficiently establish the factual basis for the relevant complaints: Liability Judgment at [705].

128 *Eighthly*, in relation to the complaint regarding the first respondent’s alleged failure to interview the appellants, the primary judge accepted the appellants’ submission that Mrs Trenfield displayed an inaccurate understanding of her duties in relation to the relevant standards provided for under r 42-30(c) of the *Insolvency Practice Rules (Bankruptcy) 2016* (Cth)(***Bankruptcy Practice Rules***), in relationto the interviewing of bankrupts. The primary judge found that r 42-30(c) is not an unfettered discretion, but rather is a requirement to interview the regulated debtor if this is considered to be necessary: Liability Judgment at [715]. The primary judge did however account for three qualifications to this requirement (see, e.g., Liability Judgment at [716]–[717]). After examining the competing contentions of the parties, the primary judge ultimately held that the complaint was not made out as Mrs Trenfield did have a reasonable basis to consider that the appellants would be uncooperative and belligerent, and would not provide reliable information: Liability Judgment at [736]–[737]. The appellants’ adversarial stance towards the Official Trustee and the first respondent was found by the primary judge to have “[ranged] from uncooperative to aggressive to obscene”. This, along with the adverse credibility findings made against Mrs Frigger in various proceedings established a reasonable basis to conclude that there was no utility in Mrs Trenfield conducting an interview of the appellants: Liability Judgment at [736].

129 Ultimately, despite the primary judge making findings which established certain aspects of the appellants’ complaints, the totality of the above observations were not sufficient to convince the primary judge that these shortcomings warranted the first respondent’s removal as trustee in bankruptcy: Liability Judgment at [739]–[746].

## The appeal

130 The appellants filed a notice of appeal on 13 December 2021 as against Mrs Trenfield. By order dated 17 February 2022, Logan J granted the appellants leave to file an amended notice of appeal.

131 The orders sought by the appellants replicate substantially those orders which were sought in the matter at first instance. The appellants sought the following orders:

(1) that the judgment and orders of 1 December 2021 be set aside;

(2) declarations that the relevant BOQ accounts and shares in the relevant CommSec account are exempted assets pursuant to s 116(2)(d)(3)(A) of the *Bankruptcy Act*;

(3) assessments of damages for the BOQ1 and Main Portfolio (to be assessed by Logan J in separate proceedings), and that the respondent repay amounts paid out from the Court of Appeal matters;

(4) orders to the effect that:

(a) the respondent shall do everything necessary to forthwith remove her caveats over the Residential Properties;

(b) the respondent be removed as trustee of the appellants’ bankrupt estates;

(c) the respondent is not entitled to any remuneration and/or disbursements in relation to the matter at first instance; and

(5) costs of the proceedings below and this appeal.

132 On 16 December 2021, Colvin J made orders dismissing the appellants’ application to stay the primary judgment pending the resolution of the appeal: *Frigger v Trenfield (Application for Stay Pending Appeal)* [2021] FCA 1605. The basis on which the appellants claimed that the stay was necessary was to preserve the right of appeal. Although taking the form of an application for a stay, it is worth noting that the appellants actually sought an injunction restraining Mrs Trenfield from taking certain steps. After reviewing the authorities, Colvin J ultimately held that there was not a real risk that steps will be taken on the basis of the correctness of the decision of the primary judge that would mean that funds could not be recovered if the appeal was successful or that would otherwise jeopardise the appeal.

### The principles of appellate review

133 Whilst it will be necessary to advert to the relevant principles in discussing particular findings and submissions, it is helpful to identify the fundamental principles of appellate review.

134 The principles governing the responsibilities of the Court on appeal in the review of findings of fact are not in doubt. They are found in High Court authority: most conveniently and contemporaneously expressed for present purposes, in *Warren v Coombes*(1979) 142 CLR 531 (***Warren v Coombes***), especially at 545–553, *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* [1999] HCA 3; 160 ALR 588 (***Earthline***) at 619–620 [89]–[91], *Coal and Allied Operations**Pty Limited v Australian Industrial Relations Commission* [2000] HCA 47; 203 CLR 194 (***Coal and Allied Operations***) at 203–204 [14]; *Fox v Percy* [2003] HCA 22; 214 CLR 118 (***Fox v Percy***) at 124–129 [20]–[31], and *Lee v Lee* [2019] HCA 28; 266 CLR 129 (***Lee v Lee***) at 148–150 [53]–[58]. To these cases may be added *Robinson Helicopter Inc v McDermott* (2016) 331 ALR 550 at 558–559, as long as what was said there is not seen as departing from *Fox v Percy*: See *Lee v Lee* at 148–149 [55] and *Aldi Foods**Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 301 (***Aldi Foods***) at 306–307 [2]–[3], 318 [54] and 346 [169].

135 The importance of the expression of principle by the majority (Gibbs ACJ, Jacobs J and Murphy J) in *Warren v Coombes*was that it settled the question as to the nature of the review in an appeal by way of rehearing, by disapproving a line of authority as to a measure of judicial restraint in overturning findings of fact reasonably open on the evidence. The reasons of their Honours stated that in deciding the proper inferences to be drawn from facts undisputed or otherwise found, the appeal court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it. By so doing, it corrects error – error being found by the appeal court reaching a different conclusion to the primary judge.

136 The present importance of the reasons of Kirby J in *Earthline* (apart from the valuable history of appellate review, including a summary of the ebb and flow of the expression of High Court authority over the years in 160 ALR at 609–615 [72]–[86]) is that within his Honour’s reasons at 619–20 [89]–[91] one finds a full, nuanced and clearly expressed description of the advantages of the trial judge, not just in seeing the witnesses, but in relating the oral evidence to the documentary evidence in the whole process of the conduct of the trial as the evidence unfolds.

137 The importance of the reasons of Gleeson CJ, Gaudron J and Hayne J in *Coal and Allied Operations*, at least for present purposes, is that they expressed with clarity what was within *CDJ v VAJ* (1998) 197 CLR 172 at 201–202 [111] per McHugh, Gummow and Callinan JJ and re-expressed what had been said with equal clarity by Gaudron, McHugh, Gummow and Hayne JJ in *Allesch v Maunz* (2000) 203 CLR 172 at 180 [22]–[23] that the statutory provisions providing for the exercise of appellate powers after an appeal by way of rehearing were to be construed as for the correction of error.

138 The importance of the reasons of Gleeson CJ, Gummow J and Kirby J in *Fox v Percy* is that they expressed and reconciled the important features of an appeal by way of rehearing: That it is a real review looking at the whole of the record, but it is conducted within the constraints marked out by the appellate process and the advantages of the trial judge, including the evaluation of a witness’s credibility having seen and heard the person at trial, and the advantage of seeing the evidence unfold during the trial and over a period of time, and that its purpose is the correction of error. That reconciliation, to be found in particular at 214 CLR 127 [27], involved, importantly, the recognition that the advantages of the trial judge do not derogate from the obligation of the appeal court to conduct a real review by way of rehearing according for the purpose of correction of error. If, from this review, and after making due allowance for the advantages of the trial judge, the appeal court concludes that an error has been shown, effect must be given to that conclusion.

139 From time to time, Full Courts of the Court must express the relevant principles in their reasons so as to reveal that they have taken the correct approach to their task undertaking an appeal. This does not require, however, that in so expressing the principles Full Courts do so in language not drawn from the governing High Court cases or from long-established expressions of principle by earlier Full Courts. Indeed, re-expression in different language runs the risk of unnecessary confusion and conflict in precedent in the Court. This tendency and the risks involved were referred to in the reasons of Allsop CJ and Perram J in *Aldi Foods*261 FCR at 307–309 [4]–[10] and 317–318 [52]–[53] in discussing the expression of principle in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424 (***Branir***) at 432–438 [11]–[32], which has been repeatedly followed and applied in this Court and in other intermediate appellate courts for over twenty years. In that case (*Branir*), the detailed review of principle was undertaken in the context of the then recent difficulties expressed about earlier Full Court reasoning (upon which doubts had been cast) that an appeal to this Court was an appeal “stricto sensu”, and not truly by way of rehearing. The view of the Court in *Branir* was that previous authority such as *Duralla Pty Ltd v Plant* (1984) 2 FCR 342 (which had been followed up to 2000) that the appeal was one of error “stricto sensu” and not truly by way of rehearing, was wrong and should not be followed: see especially *Branir* 117 FCR at 432–435 [11]–[20]. That conclusion, however, did (and does) not make error of the primary judge below irrelevant. On the contrary, the rehearing, that is the real review of the evidence, must be engaged in with a view to divining whether relevant findings reveal error: *Coal and Allied Operations*203 CLR at 203–204 [14]; see also *Fox v Percy* at 214 CLR 127–128 [27] and the other references in *Branir* 117 FCR at 435 [22] (though the references in the FCR report of *Branir* at [22] are wrong: the correct page reference to *CDJ v VAJ* is “201­–202” and the correct reference to *Allesch v Maunz* is only “180 [22]–[23]”). The reasons in *Branir* then discussed the nature of error in different kinds of cases and factual decisions, including intellectual property and other cases involving evaluative impression: cf *Aldi Foods*261 FCR at 307–309 [5]–[10], 316–318 [43]–[54] and 346 [169]. Within that discussion one finds guidance as to the contextual nature of the approach to assessing error in any particular case: 117 FCR at 435–436 [24]–[25], and the proper weight or respect to be given to the trial judge’s views and the advantages of the trial judge, including, but not limited to, seeing the witnesses where credibility or reliability is an issue: 117 FCR 436–438 [25]–[29]. As made clear in that discussion, and as is clear from *Warren v Coombes*and *Fox v Percy*, error may be demonstrated, after due regard for and respect is paid to, the advantages and views of the trial judge, by a different conclusion by the appeal court as to the relevant fact or question. Error is not limited to showing why or how the trial judge erred in the process or approach that was taken; error may be concluded from the difference in view of the appeal court as to the conclusion in issue.

140 Here, the relevant guiding principles are most clearly drawn from *Earthline*, *Fox v Percy* and *Lee v Lee*, assisted by certain paragraphs of the reasons of Gibbs ACJ, Jacobs J and Murphy J in *Warren v Coombes*that adopt what Jacobs J had said as President of the Court of Appeal in *Cashman v Kinnear* [1973] 2 NSWLR 495 at 498–499, 499–500 and 509.

141 As we have observed, the primary judge made a number of findings of fact based in whole or in part upon a conclusion of the lack of credibility and lack of honesty of Mrs Frigger in her evidence. Such are findings (whether primary findings or secondary findings based on a combination of impressions about the credibility or reliability of witnesses and other inferences from primary facts: *Lee v Lee* 266 CLR at 148–149 [55]) that must, to be reversed, be shown to be contrary to “incontrovertible facts or uncontested testimony” or be shown to be “glaringly improbable” or “contrary to compelling inferences”, being, as they were, findings affected by impressions about the credibility and reliability of Mrs Frigger as a result of seeing and hearing her give her evidence: *Fox v Percy* 214 CLR at 128 [28]–[29] and *Lee v Lee* 226 CLR at 148 [55].

142 That was not, however, the only advantage of the primary judge. In an important passage in *Earthline*, Kirby J explained the advantages, subtle but real, of a trial judge hearing a long case and being able to assess and place all the evidence in its context as it unfolds and as witnesses (truthful, reliable, or not) deal with it. The passages at 160 ALR 619–620 [89]–[91] are worthy of repetition in full:

[89] None of the foregoing considerations [being Kirby J’s review in [87]–[88] of the many changes to the appeal function and the increasing modern scepticism as to appearance and demeanour as aids to identify the truth] alone requires the abandonment of the respect which appellate courts, by present legal authority, must pay to the advantages enjoyed by the trial judge. Instead, they require renewed attention to precisely what the advantages are which the trial judge has over those enjoyed by the appellate court, conducting a second look at the facts, usually with more opportunity to evaluate particular facts than is possible in the midst of a trial and with the appellate advantage of viewing such facts in the context of the record of the complete trial hearing.

[90] The true advantages in fact-finding which the trial judge enjoys include the fact that the judge hears the evidence in its entirety whereas the appellate court is typically taken to selected passages, chosen by the parties so as to advance their respective arguments. The trial judge hears and sees all of the evidence. The evidence is generally presented in a reasonably logical context. It unfolds, usually with a measure of chronological order, as it is given in testimony or tendered in documentary or electronic form. During the trial and adjournments, the judge has the opportunity to reflect on the evidence and to weigh particular elements against the rest of the evidence while the latter is still fresh in mind. A busy appellate court may not have the time or opportunity to read the entire transcript and all of the exhibits. As it seems to me, these are the real reasons for caution on the part of an appellate court where it inclines to conclusions on factual matters different from those reached by the trial judge. These considerations acquire added force where, as in the present case, the trial was a very long one, the exhibits are most numerous, the issues are multiple and the oral and written submissions were detailed and protracted. In such cases, the reasons given by the trial judge, however conscientious he or she may be, may omit attention to peripheral issues. They are designed to explain conclusions to which the judge has been driven by the overall impressions and considerations, some of which may, quite properly, not be expressly specified.

[91] All of the foregoing considerations leave to be weighed, in some cases at least, the impression which the trial judge holds of a particular witness, perhaps influenced by the witness’ demeanour and the kinds of considerations commonly referred to such as hesitation or displays of partisanship not readily conveyed, or conveyed at all, by the printed record. One can hold different views about whether such considerations should intrude in the assessment of qualified expert witnesses. One can strive to minimise resort to such considerations in the case of lay witnesses, out of recognition of the fallibility of human assessment of credibility from appearances. But because trials remain public procedures for the resolution of disputes, it is inescapable that, in some cases at least, credibility assessments will be required where there is no documentary, electronic or other incontrovertible evidence to resolve the conflict presented for decision. In such cases it will remain the fact that, try as it might, the appellate court cannot procure from the printed record exactly the same materials on which to base the judicial decision as the trial judge had.

143 These paragraphs were expressly approved by Gleeson CJ, Gummow J and Kirby J in *Fox v Percy* 214 CLR at 125–126 [23]:

The foregoing procedure shapes the requirements, and limitations, of such an appeal. On the one hand, the appellate court is obliged to “give the judgment which in its opinion ought to have been given in the first instance” [citing *Dearman v Dearman* (1908) 7 CLR 549 at 561]. On the other, it must, of necessity, observe the “natural limitations” that exits in the case of any appellate court proceeding wholly or substantially on the record [citing *Dearman v Dearman* (1908) 7 CLR 549 at 561. See also *Scott v Pauly* (1917) 24 CLR 274 at 278–281]. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses’ credibility and of the “feeling” of a case which an appellate court, reading the transcript, cannot always fully share [citing *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 at 637; [1985] 1 All ER 635 at 637 per Lord Scarman with reference to *Joyce v Yeomans*[1981] 1 WLR 549 at 556; [1981] 2 All ER 21 at 26. See also *Chambers v Jobling* (1986) 7 NSWLR 1 at 25]. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole [citing *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588 at 619–620 [89]–[91]; 73 ALJR at 330 citing *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 209–10; *Jones v R* (1997) 191 CLR 439 at 466–467; 149 ALR 598 at 619–620].

(Footnotes and citations included.)

See also the discussion of findings based on credibility in the reasons of Gaudron, Gummow and Hayne JJ in *Earthline* 160 ALR at 589–590 [3]–[4] and 607 [63].

144 The discussion by Kirby J at [90] of *Earthline*, expressly adopted by Gleeson CJ, Gummow J and Kirby J in *Fox v Percy*, expresses well what the primary judge’s approach and advantage was in this case: During and after many days of hearing at the trial, which occurred after a background of extended pre-trial consideration of the issues and likely evidence, his Honour, with the advantage of the evidence unfolding before him, conducted a careful examination of the oral testimony, with its difficulties, against a shifting body of arguments, with a mass of documents sometimes contradictory or inconsistent, sometimes explained by the oral evidence (of varying reliability), and revealing, ultimately, in the context of all the evidence, no sure evidentiary footing. In this body of evidence, the primary judge had the advantage, over time, during and after the trial, of relating the documents and the oral evidence together, and evaluating their overall effect in the discharge of the onus of proof. Such does not absolve the Court of the obligation to examine all the material in a full review by way of rehearing, but it reveals why we must give respect to the findings of the primary judge, not just those based directly on seeing and hearing Mrs Frigger’s evidence, in evaluating the findings in question and in reaching the answer to the question whether the onus of proof was discharged at relevant points in the analysis.

145 The ultimate task was expressed by Gleeson CJ, Gummow J and Kirby J in *Fox v Percy* 214 CLR at 126–127 [25]:

Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge’s reasons. Appellate courts are not excused from the task of “weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect.” In *Warren v Coombes*, the majority of this court reiterated the rule that:

‘In general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it.’

As this court there said, that approach was “not only sound in law, but beneficial in … operation.”

See also *Lee v Lee* 266 CLR at 149 [55].

146 The contents of the paragraph from *Warren v Coombes*142 CLR at 551 cited above by Gleeson CJ, Gummow J and Kirby J in *Fox v Percy* as well as the notion of respect and weight being given to the conclusion of the trial judge to which reference was being made, are illuminated in understanding and meaning by a reading of what Jacobs P (as his Honour then was) said in the New South Wales Court of Appeal in *Cashman v Kinnear* [1973] 2 NSWLR 495 at 498–499, 499–500 and 509 that was set out in full in the reasons of Gibbs ACJ, Jacobs J and Murphy J in *Warren v Coombes*142 CLR 549–550, not long before the passage at 142 CLR 551 in the discussion leading up to that passage. The importance of these passages is that they reinforce what Gibbs ACJ, Jacobs J and Murphy J said in *Warren v Coombes*, which underpins the expression of principle by Gleeson CJ, Gummow J and Kirby J in *Fox v Percy* and by Bell, Gageler, Nettle and Edelman JJ in *Lee v Lee*, that the giving of weight and respect to the conclusion of the trial judge and recognising any advantage of the trial judge is done *as part of* the assessment of the appeal court’s own views. *Branir* 117 FCR at 437–438 [29]–[30] is to be understood in that light: see *Aldi Foods*261 FCR at 308–309 [7]–[10] and 316–318 [47]–[53]. The passages of Jacobs P in *Cashman v Kinnear* were as follows:

[At 498–499] … Even though a finding of negligence was open on the evidence, the question still remains whether the conclusion of the trial judge that there was negligence was right or wrong. If I finally reach the conclusion that it was right, the appeal fails. If I finally reach the conclusion that it was wrong, then in my view the appeal succeeds. No ‘judicial restraint’ should lead me, on an appeal to which the statutory provisions of the *Law Reform (Miscellaneous Provisions) Act* *1965*, apply, to refrain from giving effect to that conclusion of fact to which I finally come. It seems to me, though I speak with some diffidence and with great respect, that the only stage at which ‘judicial restraint’ can properly be exercised is upon the initial question whether or not I should arrive at a different conclusion from that of the trial judge. If I apply that restraint, as it has been expressed in many decisions of the House of Lords, the Privy Council and the High Court, I would give great weight to the conclusions of a trial judge. In cases where the credibility of witnesses is involved the weight is so great that an appellant who seeks to overturn findings of facts so based faces an almost, but not quite, insuperable task. But even in cases of the latter category the weight of the trial judge’s conclusion is very great. Even if I am inclined to a different view it is likely that the weight of the trial judge’s view will outweigh that inclination. If, however, on final balance it does not, then I am bound to say that the conclusion of the trial judge is wrong. …

…

[At 499–500] Thus if by judicial restraint is meant the lack of overweening certainty in one’s own opinions so that respect and weight is given to the opinion of the judge below, then it is always something to be sought. The effect of that respect and weight will vary depending upon the subject matter and will be greatest when the case involves a discretionary judgment and next where the subject matter is one of conclusion or evaluation drawn or made from the facts found. But, in truth, this quality of respect must be all pervading whether the subject be fact or law. However, if it be suggested that by judicial restraint a judge exercising his office under the *Supreme Court Act 1970*, and its predecessors should restrain himself from giving effect to his own conclusion once he has, after applying to himself the mental restraint which flows by the process which I have described, finally reached that conclusion then it is in my view a suggestion contrary to that Act and its predecessors and I do not think that it should be adopted in the absence of a clear authority binding this court.

…

[At 509] I, therefore, return to the facts, conscious that I must reach my own conclusion upon them, but at the same time obliged and willing to give great weight to the conclusion of the trial judge. …

147 To the extent that one may find advantage in recourse to the judgments of this Court in explication of these principles, in particular in, but not limited to, intellectual property cases, the consistent expression of principle in *Branir* 117 FCR at 432–438 [11]–[32] and *Aldi Foods*261 FCR at 306–309 [2]–[10], 316–318 [43]–[53] and 346 [169] that were built and expressed upon *Warren v Coombes*, *Earthline*, *Coal and Allied Operations*and (in respect of *Aldi Foods*) *Fox* *v Percy*, are available.

### The order in which we deal with the grounds of appeal

148 The grounds of appeal were summarised at [2] above. It is appropriate to explain the order in which we propose to deal with them. We begin with ground 9, because if ground 9 succeeds, the orders of the primary judge must be set aside and the matter re-heard by another judge. For the reasons that follow, ground 9 should fail. It is, nevertheless, still appropriate to begin with ground 9, because it assists in elucidating circumstances relevant to the disposition of the appeal. As will be seen, the primary judge afforded the appellants procedural fairness at trial. The learned primary judge also, on a number of occasions, explained the onus of proof to the appellants and important matters for them to address in seeking to discharge that onus, an onus that the appellants failed to discharge both below and on appeal. In that context, of the primary judge not only not being unfair, but making clear what the appellants had to prove, we then address the grounds concerning the disputed assets, grounds 2–5, upon which the appellants bore the onus of proof. We then deal with the remaining grounds, grounds 1 and 6–8.

## Application to receive further evidence in the appeal

149 Before dealing with the grounds of appeal it is first necessary to address and explain our reasons for the orders made in respect of the appellants’ wide-ranging and extensive application for the Court to receive further evidence in the appeal.

150 The appellants’ application for the Court to receive further evidence on appeal was made on 21 March 2022. The application was supported by an affidavit of Mrs Frigger of 18 March 2022. On 4 April 2022, Feutrill J made orders to the effect that the application be heard at the same time as the appeal.

151 The Court has a discretion to receive further evidence in an appeal under s 27 of the *FCA Act* and r 36.57 of the *Rules*. The applicable principles are well-established and may be shortly summarised as follows.

152 The power is not limited to ‘fresh’ evidence (i.e., evidence of which the applicant was unaware at the time of the original hearing and with reasonable diligence could not then have been obtained), but the exercise of the power is informed by the principles applicable in common law proceedings with respect to the allowance of a motion for a new trial on the ground of discovery of fresh evidence. The power should be construed liberally, although it is not unfettered, and is to be exercised having regard to the subject matter, scope and purpose of s 27 of the *FCA Act*. That includes having regard to the overarching purpose of the civil practice and procedure provisions described in s 37M of the *FCA Act*. The discretion must be exercised judicially and s 27 should not be construed in such a way as to obliterate the distinction between original and appellate jurisdiction. The principles generally mean the application should provide an explanation of the reasons for failing to adduce the evidence at trial. But, the power is remedial. Thus, an important consideration in determining whether it should be exercised is whether, if the further evidence had been available at the trial, it would have produced, or at least would be likely to have produced, a different result: see, e.g., *CKT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[2022] FCAFC 124 at [32]–[34] and the authorities there cited.

153 In the exercise of the above principles, on 12 May 2022, the Court made certain orders relating to receipt of the documents the subject of the application as part of the appeal book in the appeal. The orders are appended as Schedule 1 to these reasons. What follows are our reasons for the orders of 12 May 2022, clarification of the purpose for which certain of the documents were received in the appeal and an explanation of the extent to which we have considered and taken into account documents that were provisionally received or rejected in the appeal.

154 As a consequence of the orders, an *aide memoire* the respondent had provided to the primary judge and an *aide memoire* the appellants had provided to the primary judge were received in the appeal. These were not received as ‘further evidence’, but as documents that formed part of the submissions the parties made to the primary judge. Parts of the transcript of the proceedings before the primary judge were also received on the appeal. Again, not as ‘further evidence’, but as part of the record of proceedings before the primary judge.

155 The appellants’ interlocutory application dated 12 April 2021 for an order staying the delivery of the primary judge’s judgment pending determination of the appellants’ application in WAD 66 of 2021 for annulment of the sequestration orders was also received on the appeal. An order of the Court dated 30 November 2021 in WAD 159 of 2021 refusing to stay the primary judge’s order dismissing that application pending resolution of the appellants’ application for leave to appeal from that decision of the primary judge was also received on the appeal. These documents were received not as ‘further evidence’, but as court records relating to ground 1 of the re-amended notice of appeal which contains a ground of appeal in which the appellants seek to challenge the primary judge’s decision refusing to stay delivery of the judgement appealed. An affidavit of Mrs Frigger of 14 April 2021 was also provisionally received on that basis for the purposes of ground 1.

156 Two other documents were received in the appeal.

157 The first document is an audit report of the FSF for the financial year ended 30 June 2021 and dated 17 January 2022. That document is ‘further evidence’ and it was received without objection from the respondent. It is an audit report relating to the financial statements of the FSF prepared for the financial year ended 30 June 2021. It was not evidence that could have been available to be adduced at the trial because it was not then in existence.

158 The appellants submitted that it demonstrates that the auditor provided an unqualified audit report for the FSF for the 2021 financial year and that the disputed assets remain assets of the FSF. No financial statements for the 2021 financial year were in evidence before the primary judge and none was included in the application to receive further evidence on appeal. Further, the documents were plainly prepared well after the sequestration orders were made and the dispute between the parties crystallised. In our view, while the document was received in the appeal, it is of no assistance in the resolution of the issues in the appeal.

159 The second document is an affidavit of Mrs Frigger of 17 September 2020. The purpose for which that document was received in the appeal became a matter of contention between the parties. The appellants and respondents each filed further written submissions on the matter.

160 The orders made on 12 May 2022 do not qualify the admission of the document into the appeal book. However, the intention of the Court was not to receive the affidavit as ‘further evidence’ in the appeal, but as part of the record of the proceedings before the primary judge for the purposes of determining the merits of ground 9 of the re-amended notice of appeal.

161 Mrs Frigger’s affidavit of 17 September 2020 was sworn in support of the appellants’ unsuccessful second attempt to re-open their case before the primary judge. The primary judge’s decision to refuse the appellants’ application to re-open to adduce the evidence in that affidavit is the subject of ground 9 of the re-amended notice of appeal. Therefore, the affidavit is relevant to determining if and the extent to which the primary judge made any of the errors asserted in ground 9.

162 For the reasons given shortly, the primary judge made no error in refusing the appellants’ second application to re-open. To the extent that the appellants also pressed for receipt of the documents in the appeal as ‘further evidence’ in support of grounds 2, 3, 4 and 5 of the re-amended notice of appeal, that application is refused. First, because it would circumvent the primary judge’s ruling on re-opening which we consider was made without error and obliterate the difference between appellate and original jurisdiction. Second, and in any event, for reasons given when considering the merits of grounds 3 and 4, the documents if admitted into evidence would not likely have changed the outcome.

163 A number of other documents were provisionally received or rejected, subject to relevance and hearing oral argument on the appeal. The orders were made provisionally because it was necessary to hear the oral arguments on the grounds of appeal before finally determining the relevance and significance of the documents to the appellants’ grounds of appeal. A number of other documents were not pressed by the appellants and, therefore, these documents were not received in the appeal.

164 Certain correspondence between the appellants and share registries was provisionally received in the appeal. As explained later in these reasons, the appellants contend that the primary judge was in error for not finding that the appellants had provided the share registries with the TFN of the FSF before the sequestration orders were made and that fact was evidence of an objective manifestation of an intention that the securities were to be held as assets of the FSF. However, these communications do not provide any evidence that the TFN of the FSF were provided to the share registries before the sequestration orders were made. The communications from Computershare and Boardroom merely confirm that certain securities under a particular HIN have a TFN quoted. The communications do not provide information about when these were quoted. On the face of them, these documents could not have affected the outcome of the trial. Neither the appellants’ submissions nor Mrs Frigger’s affidavit explain the relevance of the documents or manner in which it is contended they could have changed the outcome of the primary judge’s judgment.

165 The appellants submit that these documents are necessary to refute imputations of serious wrongdoing on their part that were the subject of the respondent’s submissions without notice at the trial. The appellants have not identified with any degree of specificity the asserted ‘serious wrongdoing’ or the manner in which it is asserted that the allegations were made without notice. Neither the appellants’ submissions nor Mrs Frigger’s affidavit of 18 March 2022 explain the manner in which the documents are said to refute the unparticularised assertions of wrongdoing.

166 The appellants submit these documents are relevant to their submission that correspondence between the respondent and the share registries should not have been admitted into evidence under s 138 of the *Evidence Act*. For the reasons given shortly, there is no merit in that ground and these documents do not assist to make that ground any more meritorious. Further, the manner in which these documents are relevant to that issue is unclear and unexplained in the appellants’ submissions and Mrs Frigger’s affidavit in support.

167 Affidavits of Ms Trenfield of 16 September 2020 and 11 November 2020; affidavits of Mrs Frigger of 28 July 2020 (in part), 1 October 2020 and 27 October 2020; an affidavit of Mr Frigger of 27 October 2020; an affidavit of Mr Henry Newton of 11 November 2020; and an affidavit of Mr Francois Carles of 11 November 2020 were provisionally received in the appeal with respect to one or both of grounds 7 and 9 of the re-amended notice of appeal and subject to relevance and further oral argument.

168 Regarding the documents provisionally received in the appeal, subject to relevance and oral argument, to the extent these documents were referred to in the appellants’ written and oral submissions we have considered and taken them into account. However, for the reasons given later, none of them individually, collectively, or when taken with the evidence before the primary judge reveals any error on the part of the primary judge.

169 Affidavits of Ms Trenfield of 28 April 2021 and 6 May 2021 were rejected (provisionally) as ‘further evidence’ in the appeal subject to further oral argument on the appeal. No further submissions were made with respect to the affidavit of 6 May 2021. As to the affidavit of 28 April 2021, the appellants relied on that affidavit in support of submissions to the effect that the primary judge should have found that the respondent invited a fraudulent proof of debt from Mr Vilensky, a fraudulent claim from Mr Kitay (the liquidator of Computer Accounting and Taxation Pty Ltd (**CAT**), a company associated with the Friggers and former trustee of the FSF) and determined that HAF was an unsecured creditor in the bankruptcy of the appellants. We confirm our view that the affidavit should be rejected and not received in the appeal. The assertions of fraud are unfounded and unsupported by evidence. Likewise, the assertion that HAF was an unsecured creditor is unsupported by evidence. Further, and in any event, the relevance of these assertions to ground 7 of the re-amended notice of appeal is not self-evident and was not explained.

170 In sum, after hearing oral argument in the appeal, while the documents are of little or no real relevance to the appellants’ case in the appeal, we see no reason to change the provisional rulings made regarding the receipt of documents in the appeal.

171 We now turn to consider ground 9.

## Ground 9: alleged failure to provide procedural fairness

172 The appellants set out in the re-amended notice of appeal, filed on 15 June 2022, the various grounds on which they appeal the whole of the primary judgment. Ground 9 specifically alleges that the primary judge failed to provide the appellants with procedural fairness in case management and at trial. Ten sub-grounds are listed in the re-amended notice of appeal, these are:

(a) The appellants were denied the right to know, and to be given an opportunity to respond, to the case presented against them;

(b) The case management orders of 29 November 2019 (after [*Frigger (No 1)*] was delivered on 24/10/19) informed the appellants what evidence was required to prove the disputed assets were held in FSF;

(c) Notwithstanding that evidence was produced by the appellants, the case against the appellants at trial (and in the appealed judgment) shifted to an indictment of the way the appellants had managed their self-managed superannuation fund;

(d) Allowed pejorative questioning of Mrs Frigger that was irrelevant to proving the disputed assets were held in FSF;

(e) Found that the respondent’s false oral and sworn evidence was *merely* an unwillingness to concede a point to an antagonistic cross-examiner (Mrs Frigger);

(f) Required the appellants to make ‘declarations of trust’ over BOQ1 and BOQ2 prior to the commencement of bankruptcy, in circumstances where those assets came into existence after that date;

(g) The allegation that the appellants had waited until after the sequestration orders and then:

(i) decided which assets were superannuation assets,

(ii) prepared and audited FSF financial statements,

(iii) lodged annual returns

was first raised by the respondent in closing oral submissions after the appellants had closed their case;

(h) The appellants’ application to re-open their case to adduce FSF income tax account transaction list 22-9-14 to 14-8-20, which list manifestly refutes the allegations in (g) above, was dismissed;

(i) The respondent was allowed to adduce evidence which had been obtained by her in contravention of *Corporations Regulations 2001* and *Bankruptcy Act*:

(i) information from share registries regarding the [appellants’] wealth, was used by the respondent for a prescribed purpose contrary to *Corporations Regulation 2C.1.03*;

(ii) information obtained from [CommSec] by falsely stating the Main Portfolio had vested in her, contrary to s 58 (2) *Bankruptcy Act 1966*;

[(iii)] information obtained from FSF external auditor by falsely stating she was carrying out investigations, when in fact she was gathering evidence to impugn Mrs Frigger’s credibility in WAD141/2019, contrary to s 77A *Bankruptcy Act 1966*.

(j) Delivered a judgment with numerous concocted facts and misconstrued points of law irrelevant and inapplicable to the appellants’ case.

(Original emphasis.)

173 Each of these sub-grounds will be addressed in turn.

174 *First*, sub-grounds (a) and (b) allege that the appellants were denied the right to know, and to be given an opportunity to respond, to the case presented against them, and that the case management orders of 29 November 2019 only then informed the appellants of the evidence required to prove the disputed assets were held in the FSF.

175 As summarised above, *Frigger (No 1)* concerned an application for mandatory interlocutory injunctions against the first respondent. In dismissing the application and assessing the evidence in support of the interlocutory application, the primary judge made a number of relevant observations, namely:

(1) His Honour identified in *Frigger (No 1)* at [17] that to succeed in their application for final relief, the appellants would need to establish that, at the commencement of their bankruptcy on 20 July 2018, the shares in the portfolio either did not belong to or were not vested in them, or if they were, they were held on trust for another person;

(2) His Honour further noted at in *Frigger (No 1)* at [18] that to establish that all of the securities were held on trust for another person because they were held subject to the trusts of the FSF, in the absence of evidence of an express declaration of trust, that there needs to be proof of an intention to create a trust, with certainty of subject matter and object, certainty as to the trustee and certainty of the personal obligation annexed to the property to hold it on the trusts alleged;

(3) In identifying uncertainties in the evidence (in *Frigger (No 1)* at [43]), his Honour noted that to succeed at trial, the appellants would need to point to an objectively manifested intention on their part (or the part of any other relevant entity) that the shares were to be held on trust for another person, which can be inferred from all the circumstance: in *Frigger (No 1)* at [44];

(4) As to the evidentiary uncertainties, his Honour made the following acute observations:

(a) The appellants had not produced any direct evidence of any share registry having recorded the beneficial ownership of the shares in their records (at [45]);

(b) The balance sheet for FSF was prepared by Mrs Frigger at an undisclosed time for an undisclosed purpose (at [46]);

(c) There was no evidence as to why the registration of security interest by FSF over the shares in the Main Portfolio was lodged and no context permitting any firm conclusions to be drawn from it (at [48]);

(d) The appellants had not adequately explained the circumstances in which the notation ‘Frigger Super Fund’ came to be fixed on the 2017–2018 financial statement for the Main Portfolio (at [49]);

(e) The appellants had not explained why none of the shares were acquired in the name of HAF, but rather in the appellants’ names (at [50]); and

(f) It was also not clear why the shares that were held at the time that the appellants were replaced as trustees have not been transferred into the name of the new trustee (at [51])

176 In light of the above, it can hardly be said that the appellants were only advised of the evidence required in the orders of *Frigger (No 2)*. It is apt to recall that the orders made on 29 November 2019 were not for the purpose contended by the appellants; they were orders requiring the appellants to provide particular discovery of documents verified by affidavit. Critically, the categories of documents required to be discovered included a wide range of documents, such as financial accounts, tax assessments and tax lodgements. That is, the appellants were to provide discovery of these categories of documents. Importantly, the primary judge in his reasons in *Frigger (No 2)* repeated many of the observations as to the state of the evidence noted in *Frigger (No 1)*, being that it consisted of broad assertions, lacking detail or stated at a high level of generality. It was in this context that the orders for discovery were made. His Honour also made near identical comments as to what the appellants would need to establish to succeed in their application with respect to the BOQ1 and BOQ2 accounts, namely that, at the commencement of their bankruptcy, those accounts neither belonged to, or were vested in them, or if they were, they were held on trust for another person: *Frigger (No 2)* at [15]. Furthermore, as highlighted above, the second discovery orders made on 25 June 2020, provided further clarification as to what documents the appellants needed to provide. Therefore, the primary judge was, in effect, identifying the proofs which the appellants needed to make good at trial.

177 Notwithstanding this, each of the relevant judgments that detailed what was required of the appellants occurred prior to the trial.

178 The appellants must be taken to have been aware of the reasoning of the primary judge in *Frigger (No 1)* and *Frigger (No 2)*. Each identified what the primary judge believed to be the gaps in the evidence which had then been put on by the appellants and also identified the type of evidence that would be required for the appellants to satisfy the burden of proof at trial.

179 In these circumstances, we detect no error in the primary judge’s reasoning nor do we in any way disagree with the conclusion. For these reasons, sub-grounds (a) and (b) must be rejected.

180 As to sub-ground (c), it was readily apparent from the reading of the transcript and the reasons for judgment in *Frigger (No 1), Frigger (No 2)* andthe Liability Judgment that the appellants were on notice of the case that was put against them by the respondent and of what they, the appellants, had to prove in relation to the relevant assets. There is no substance to the allegation in sub-ground (c) that “the case against the appellants at trial (and in the appealed judgment) shifted to an indictment of the way the appellants had managed their self-managed super fund”. Accordingly, sub-ground (c) must be rejected.

181 As to sub-ground (d), we do not accept that a fair reading of the transcript reveals that the cross-examination of Mrs Frigger consisted of pejorative questioning which was irrelevant to the issue of whether the disputed assets were held in the FSF. Our detailed review of the transcript does not disclose any basis which could provide a foundation to support sub-ground (d). For this reason, sub-ground (d) must also be rejected.

182 Further, as to sub-grounds (a)–(d), in the appellants’ written and oral submissions in the appeal they contended that they had understood, at all times before the respondent filed her written submissions on 12 July 2020, that it was common ground and not in issue that the BW1 account (and the funds in it) was an asset of the FSF. Therefore, as regards the appellants’ claim that the funds in the BOQ1 and BOQ2 accounts were assets of the FSF, the only question was whether the funds in the BOQ1 and BOQ2 accounts could be traced to the BW1 account.

183 In substance, the appellants’ contended that the primary judge misunderstood the appellants’ case and what the appellants were required to prove to demonstrate that the funds in the BOQ1 and BOQ2 accounts were assets of the FSF. It is contended that the error commenced in the primary judge’s summary judgment decision in which, it is said, the primary judge misunderstood what was required to be proved. The appellants contended that the primary judge was in error, in effect, for asking the wrong question; the question was not whether there is an objective manifestation that the BW1, BOQ1 or BOQ2 accounts were opened and intended to be assets of the FSF but, whether the funds in the BOQ1 and BOQ2 accounts could be traced to the funds in the BW1 account which were, said to be, unquestionably funds of the FSF.

184 In a similar manner, the appellants contended that the question with respect to the Main Portfolio was not whether there was an objective manifestation to open or hold each of the securities in the CommSec account on trust for the FSF, but, rather whether the securities in the Main Portfolio were acquired with funds that were traceable to the BW1 account.

185 The appellants contended that the trial judge’s asserted misunderstanding of their case and misdirection on the questions to be determined resulted in the trial judge permitting Mrs Frigger to be cross-examined on issues that were not relevant, specifically, the source of the deposits into and the reason for withdrawals from the BW1 account in circumstances in which the appellants had not come prepared to verify each such transaction in the BW1 account because they had been led to believe that it was not in dispute that the funds in that account were funds of the FSF.

186 We do not accept the appellants’ submission to the effect that they were taken by surprise when the respondent disputed and contested the issue of whether the BW1 account was an asset of the FSF at the trial.

187 Mrs Trenfield swore an affidavit, dated 11 September 2019, in opposition to the appellants’ summary judgment application in which she said that, in her view, there was a “need for further information and investigation in relation to the beneficial ownership of the property in [BOQ1] and [BOQ2] (or indeed in relation to any other assets that are allegedly held on trust for the FSF)”. And, that she “had not yet formed a concluded view, in the absence of further information and investigation on whether … all the funds that were held or are held in BW1 are trust funds … [or] … the underlying assets from which the funds were obtained are trust assets”.

188 Mrs Trenfield, in an affidavit dated 22 May 2020 (and filed for the purposes of compliance with the primary judge’s pre-trial orders) deposed to the following:

154. Based on my review of the bank statements for all of the accounts identified above, and based on the information contained in the spreadsheet prepared by Mr Bowness in paragraph 128 above, I believe that BW Account 1 was the main operating account utilised by Mr and Mrs Frigger into which most income was initially or eventually deposited (regardless as to whether the income was generated by a 'trust' asset or a personal asset) and the account from which most expenses were paid (regardless of whether the expenses were personal or trust expenses).

155. In stating my belief above, I am not intending to suggest that all the money deposited into BW Account 1 has been derived from personal assets. I express no opinion as to whether the following properties are held on trust for the beneficiaries of the Frigger Super Fund:

(a) Campbell Street, Hobart which I believe was tenanted by Officeworks; and

(b) [redacted by the Full Court] Edward Street, Perth which was also tenanted.

156. Further, I am not ignoring that there are, for example, some dividends or proceeds of the sale of shares that were deposited into the CDIA Account, CBA Smart Access Account or CBA NetBank Saver Account, and there is another exception that I have noticed, which is a deposit into HSBC Account 2 on 13 October 2017 that notes 'Officeworks' in the transaction details which I have assumed was rent or some other payment required by Officeworks by reason of its tenancy of the Hobart property.

157 I have formed my belief as to the nature of the expenses paid from BW Account 1 based on the transaction descriptions for the debits shown in the various bank statements which include, for example:

(a) regular Mastercard payments;

(b) regular payments to 'Synergy Retail';

(c) rental payments;

(d) Melville rates payments;

(e) payments to Jessica Frigger and Michael Frigger;

(f) payments to lawyers, including Rowe Bristol whom I believe, based on the decision in *Frigger v Rowe Bristol Lawyers Pty Ltd* [2020] WASC 5, were retained by Mr and Mrs Frigger in several proceedings;

(g) a payment labelled "security for costs";

(h) unspecified transfers of $20,000 on 30 July 2018, 31 July 2018, and 20 August 2018;

(i) payments to TPG for internet; and

(j) car registration fees.

189 After the respondent had filed Mrs Trenfield’s affidavit of 22 May 2020, the appellants filed a further responsive affidavit of Mrs Frigger dated 17 June 2020. That affidavit included as exhibit AF6 bank statements for BW1 for the 2015 calendar year as to which Mrs Frigger stated at [20]: “[t]he statement contains evidence of income of FSF trust estate for that calendar year”. The appellants also filed their written opening submissions dated 28 June 2020 in which, amongst other things, as to the BOQ1 and BOQ2 accounts, they submitted that the respondent’s defence in May 2020 was “the same defence in the June and August 2019 affidavits” and that the respondent had no defence to the appellants’ claim.

190 The appellants also applied for and were granted leave to further amend their originating application for the fourth time and filed an affidavit of Mrs Frigger dated 15 June 2020 in support of that application. The affidavit in support and the proposed amendments made no mention of any additional issues regarding the BW1 account or the source of its funds in the originating application or otherwise arising out of Ms Trenfield’s affidavit of 22 May 2020.

191 Further, after the respondent had filed her written opening submissions of 12 July 2020, the appellants made no complaint during their oral opening submission to the effect that the respondent had raised issues in her submissions or affidavit in opposition to the appellants’ originating application that had taken them by surprise or that they needed further time or an opportunity to address issues raised in those documents of which they had not previously been aware or understood were in issue. In fact, the appellants acknowledged that the respondent disputed that the BW1 account was an asset of the FSF.

192 Moreover, in our view, the primary judge had made it quite clear in the reasons for his decision on the summary judgment application referred to above, that the appellants bore the onus of proving, amongst other things, that *all* the funds in the BW1 account were funds of the FSF if and to the extent the appellants contended that funds in the BOQ1 and BOQ2 accounts or securities in the Main Portfolio were to be traced into funds that originated in the BW1 account.

193 Sub-ground (e) seeks to challenge the primary judge’s assessment of the credibility of the first respondent. The primary judge in the Liability Judgment at [90]–[95] made his findings with respect to the credibility of the respondent. The primary judge acknowledged that Mrs Frigger’s aim in cross-examination was to convince the Court that the respondent is a “thoroughgoing liar”: Liability Judgment at [93]. The primary judge acknowledged at [92] that there were occasions in which he did consider that the respondent could have been more forthcoming in her answers. On occasion, Mrs Trenfield became argumentative with the cross-examiner (that is, Mrs Frigger), and would only concede that “you can draw that conclusion from the documents”: Liability Judgment at [92]. The primary judge observed that it was unhelpful for the first respondent not to concede any point put by Mrs Frigger in cross-examination. The primary judge observed that this may have been explicable by an unwillingness to concede any point to a cross-examiner with whom Mrs Trenfield evidently has an antagonistic relationship. The primary judge in the Liability Judgment at [94] and [95] found:

[94] … For the most part Mrs Trenfield relied on documentary evidence and, in contrast to Mrs Frigger, there is no reason to doubt that the documents she presented were what they appeared to be. To the extent that the applicant sought to impugn Mrs Trenfield’s conduct as a basis for removing her as their trustee in bankruptcy, the outcome depended more on an objective assessment of that conduct than on any finding about the credibility of her evidence.

[95] So while I had concerns that some of Mrs Trenfield’s answers in cross-examination were unhelpful, that did not affect my overall view about her evidence. I will need to refer below to further specific allegations of giving false evidence which the applicants made against Mrs Trenfield. They are not made out. Generally, she presented in the witness box as an experienced professional who gave straightforward and forthright answers to a large number of questions which were not always very relevant.

194 With the principles of appellate review that we set out earlier in mind, we have reviewed the transcript of the cross-examination of the respondent by Mrs Frigger. We detect no error in the primary judge’s reasoning and we see no basis to disagree with the primary judge’s conclusions on the credibility of the respondent. For these reasons sub-ground (e) must be rejected. The importance of this conclusion transcends the procedural fairness ground. It underpins the recognition that in a case in which the documentary basis of the appellants’ case was so unreliable and confused and which relied for its context upon the evidence of Mrs Frigger, there was great difficulty in discharging the onus of proof in circumstances where Mrs Frigger’s honesty and credibility were not to be relied upon, especially in the field of reliability or context of documents given that she was found to have fabricated evidence and Mr Frigger did not give evidence. We shall deal further in detail with credit findings in our reasons on grounds 2–5, below.

195 As to sub-ground (f), there does not appear to be any basis on which the appellants can assert their claim that the primary judge required the appellants to make “declarations of trust” over BOQ1 and BOQ2 prior to the commencement of bankruptcy, in circumstances where Mr and Mrs Frigger asserted those assets came into existence after that date. The primary judge in *Frigger (No 2)*, with respect to the appellants’ interlocutory application for summary judgment, identified that to succeed at trial, the appellants would need to establish that, at the commencement of their bankruptcy, the BOQ1 and BOQ2 accounts either did not belong to or were not vested in them, or if they were, they were held on trust for another person: *Frigger (No 2)* at [15]. On the evidence, at the summary judgment application, the appellants alleged that this was established as a result of transactions by which the trustee exchanged other trust assets for BOQ1 and BOQ2. The primary judge pointed out however that the appellants would need evidence establishing that at the point when the funds first became subject to the trust, there was an objectively manifested intention to that effect: *Frigger (No 2)* at [17]. The primary judge critically observed that the extent to which the evidence adduced by the Friggers establishes that BOQ1 and BOQ2 were FSF assets at the time of commencement of the bankruptcy would largely determine the appellants’ summary judgment application: *Frigger (No 2)* at [22]. The primary judge also drew attention to the fact that both BOQ1 and BOQ2 were in Mr Frigger’s name: *Frigger (No 2)* at [15].

196 The primary judge noted, with respect to the FSF itself, the evidence adduced was again “at a high level of generality”, stating that “documents of [certain contributions] or any specific evidence to establish that [these contributions] were transferred to the Friggers in their capacity as trustee of the FSF are absent from the affidavits”: *Frigger (No 2)* at [26]. The primary judge in *Frigger (No 2*) identified, in detail, the gaps in the evidence which resulted in the primary judge dismissing the appellants’ application for summary judgment. There is no basis in the primary judge’s reasons in the Liability Judgment nor in the judgments which preceded it being relevantly *Frigger (No 1), Frigger (No 2), Frigger (No 7) and Frigger (No 8)* to substantiate the appellants’ claim in sub-ground (f) that the primary judge required the appellants to make declarations of trust over BOQ1 and BOQ2 prior to the commencement of bankruptcy in order to succeed. We detect no error in the primary judge’s reasoning nor we do we in any way disagree with the primary judge’s findings in respect of BOQ1 and BOQ2. For these reasons sub-ground (f) must be rejected.

197 Sub-grounds (g) and (h) are also not borne out by the primary judge’s reasons for rejecting an application to re-open the appellants’ case heard on 21 September 2020, and is dealt with in the primary judgment. To repeat, the purpose for the re-opening application was:

(1) to admit into evidence an account transaction list for the FSF which Mrs Frigger had obtained from the ATO Business Portal;

(2) to admit into evidence a copy of the 2017 annual return for the FSF which, Mrs Frigger said, she had posted to the ATO as a paper return; and

(3) to recall Mrs Frigger as a witness to respond to what she described as “numerous false allegations of substantial wrongdoing against the applicants which allegations effectively amounted to tax fraud”.

198 With respect to sub-grounds (g) and (h), there is simply no proper basis upon which these grounds can be asserted. The allegations which the appellants complained of during the re-opening application heard on 21 September 2020, and repeated in the appeal, were, again, substantially addressed in the primary judgment. As has been canvassed in substantial detail above, the appellants were well and truly on notice that whether the financial statements and annual returns were reliable and the possibility that they were prepared after sequestration orders and so were unreliable, and the lack of any evidence as to when they were prepared or lodged, were all in issue. As noted in the primary judgment, these issues were first raised in *Frigger (No 1)*, repeated in *Frigger (No 2)* and comprehensively addressed by the first respondent’s written opening submissions filed on 12 July 2020, all of which occurred before the trial took place. Mrs Frigger was also cross-examined extensively on the date of preparation and reliability of the financial statements and annual returns. To now complain that they only became aware or appreciated that these evidentiary uncertainties were in issue following the first respondent’s closing oral submissions simply has no objective basis.

199 It is readily apparent from a reading of the transcript of the trial, the respondent’s written submissions, and the reasons for judgment in *Frigger (No 1)*, *Frigger (No 2)*, and the Liability Judgment that the appellants were on notice of the case that was put against them by the respondent. The appellants were not ambushed in final address as in substance was alleged in ground 9. They were also on notice that it was for them to show by evidence that the relevant property was at the time of bankruptcy part of the FSF.

200 As was also summarised above, the primary judge dismissed the 21 September 2020 application to re-open on the basis that the appellants had been on notice about these issues, that the application did not fall within any of the four accepted categories when re-opening is sometimes allowed, nor was there any other good reason why re-opening was required: Liability Judgment at [266], [270]–[271]. The primary judge was within his power to exercise his discretion to dismiss the application in light of these circumstances. We detect no error in the primary judge’s reasoning nor do we in any way disagree with the conclusion. For these reasons, sub-grounds (g) and (h) must be rejected.

201 Sub-ground (i) seeks to re-agitate, on this appeal, the appellants’ application to re-open the trial hearing in *Frigger (No 7)*. It will be recalled from the summary above, that the application to re-open the trial hearing in *Frigger (No 7)* was filed after the trial had ended and judgment was reserved. The purpose of the re-opening application was that the appellants wanted the opportunity to object to parts of and exhibits to certain affidavits that had already been received into evidence, as well as to seek to adduce further evidence in support of those objections and additional affidavits sworn by Mr Frigger and Mrs Frigger respectively. The appellants submitted, on the application to reopen, that information from share registries, CommSec and from FSF’s external auditor had been improperly or unlawfully obtained in contravention of the *Corporations Regulations 2001* (Cth) (***Corporations Regulations***) and the *Bankruptcy Act*. The primary judge in *Frigger (No 7)* dismissed the application to re-open on the basis that the appellants had failed to demonstrate any good reason to re-open the trial given that the parties had already closed their cases, that Mr and Mrs Frigger and Mrs Trenfield were cross-examined on the basis of the evidence that had been admitted up to that point, and that judgment had been reserved: *Frigger (No 7)* at [26]. With respect to the claimed inability to object to the first respondent’s evidence, the primary judge noted that the letters the appellant referred to were all in evidence well before the trial started, and that the 3 September 2020 letter had also been obtained during the course of the trial: *Frigger (No 7)* at [27]. The primary judge further noted that the appellants had always been “alive to their ability to allege impropriety against Mrs Trenfield on [the basis that Mrs Trenfield’s letter of 28 August 2019 to CommSec was an ‘abuse’]”: *Frigger (No 7)* at [29]. The primary judge in *Frigger (No 7)* observed at [34] and [41] that the appellants did not present clear evidence of serious illegality or impropriety by another party which justified re-opening the matter. We detect no error in the primary judge’s reasoning in *Frigger (No 7)* for rejecting the application to re-open the matter after the conclusion of the trial. Moreover, we agree with the primary judge’s conclusion. It follows, that sub-ground (i) must be rejected.

202 Lastly, sub-ground (j) alleges that the primary judge delivered a judgment with numerous concocted facts and misconstrued points of law irrelevant and inapplicable to the appellants’ case is scandalous, and misconceived. The appellants failed to identify any of the supposed “numerous concocted facts”. The appellants also failed to identify what is said to be “misconstrued points of law irrelevant and inapplicable to the appellants’ case”. There is absolutely no foundation provided upon which this sub-ground could possibly succeed. Accordingly, sub-ground (j) is rejected.

203 Not only should ground 9 be dismissed, it can be stated with some confidence that Mr and Mrs Frigger, as intelligent people, in the light of all that was said to them and all that must have been apparent to them, must have understood that it was necessary for them to adduce, and that they bore the onus of adducing, all available evidence to show that circumstances existed or acts were done to make all relevant property part of the FSF. They were not treated unfairly by the primary judge. They were treated completely fairly and they were apprised of what they had to do to prove their case, if the evidence existed.

## Grounds of appeal 2 to 5: the disputed assets

204 Grounds of appeal 2–5 are substantially directed to challenging the findings made by the primary judge in respect of the disputed assets. To put those findings in context, it is necessary to summarise the key features of the superannuation system, including provisions of the *SIS Act*, the interaction between superannuation law and the law of trusts, and the principles governing when an asset will be treated as “contributed” to an existing superannuation fund.

### Relevant aspects of the superannuation system, including the SIS Act

205 The following is a broad overview of the relevant provisions of the *SIS Act,* the *Superannuation Industry (Superannuation) Regulations 1994* (Cth) (***SIS Regulations***), and the *Income Tax Assessment Act 1997* (Cth) (***ITAA 1997***) as they apply to the FSF and the claims made by the appellants on appeal.

206 It is important at the outset to note that the superannuation system in Australia is not purely concerned with private interests: In addition to providing for adequate levels of income in retirement for individuals it is also directed towards meeting the public policy challenges presented by Australia’s ageing population. The contours of the superannuation system have accordingly evolved over time in line with the prevailing economic climate and the policy objectives of the government of the day. By way of illustration, the Howard Government reduced taxation rates or provided for tax-free arrangements for certain funds to “improve incentives to save, increase retirement incomes, and strengthen incentives for older Australians to stay in the workforce”: see the Hon Peter Costello MP, Treasurer, Second Reading Speech, *Tax Laws Amendment (Simplified Superannuation) Bill 2006*. Following the Global Financial Crisis, the Rudd Government introduced reforms to support “the longer term sustainability of our pension system”, including lowering the concessional contributions cap, and temporarily reduced the matching rate of superannuation co-contribution: see the Hon Wayne Swan MP, Treasurer, Second Reading Speech, *Appropriations Bill (No. 1) 2009-10* ‘Budget Speech 2009-10’. Superannuation is thus a highly regulated area of economic activity.

207 The prudent and transparent management of superannuation funds is a matter of public concern and is subject to governmental oversight. The *SIS Act*, together with the *Superannuation Industry (Supervision) Consequential Amendments Act 1993* (Cth), was designed to “give effect to measures to substantially increase the level of prudential protection provided to the superannuation industry, and represent a substantial strengthening of the security of superannuation savings and in protecting the rights of superannuation fund members”: see, the Parliament of the Commonwealth of Australia, Superannuation Industry (Supervision) Bill 1993, Explanatory Memorandum, 1.

208 These aims are reflected in the objects of the *SIS Act*, which are relevantly described in s 3 as follows:

*Supervision of certain superannuation entities*

(1) The main object of this Act is to make provision for the prudent management of certain superannuation funds, approved deposit funds and pooled superannuation trusts and for their supervision by APRA, ASIC and the Commissioner of Taxation.

*Basis for supervision*

(2) The basis for supervision is that those funds and trusts are subject to regulation under the Commonwealth’s powers with respect to corporations or pensions (for example, because the trustee is a corporation). In return, the supervised funds and trust may become eligible for concessional taxation treatment.

209 As is evident from this description, favourable taxation treatment is intimately connected with the regulation and operation of superannuation funds. Relatedly, and of particular relevance to this appeal, the legislative regime applicable to bankruptcy is protective of a bankrupt’s interest in a regulated superannuation fund.

210 Accordingly, management of one’s personal superannuation fund has consequences for members of the broader community: consequences for taxation, and consequences for creditors. This context supports the conclusion that the appellants must be capable of pointing to *objective acts in the world* that manifested their intention to hold the disputed assets in the FSF or other facts which lead to the conclusion that assets are held within the FSF. A general assertion that the appellants subjectively wished to benefit from favourable taxation treatment is not enough: apart from the fact that the rationality and contextual persuasiveness of that assertion is only assessable with the benefit of the full context of the appellants’ financial position, the prescriptive and stringent regulations applicable to superannuation funds and the consequences for the community at large of an asset being held in a superannuation fund suggest that objective acts and the requisite degree of clarity in drawing the relevant conclusion are required.

#### Regulated superannuation funds and self-managed superannuation funds

211 By s 10 of the *SIS Act*, the term “regulated superannuation fund” has the meaning given by s 19. In essence, the *SIS Act* requires that the superannuation fund has a trustee, that the sole or primary purpose of the fund is the provision of old-age pensions, and that there must be an election by the trustee that the *SIS Act* applies in relation to the fund.

212 A “regulated superannuation fund” may be a “self managed superannuation fund” (**SMSF**). By s 10 of the *SIS Act*, a self-managed superannuation fund means a fund as defined in s 17A. The basal requirements of a SMSF where there is more than one member are as follows. First, a trust deed must be created which establishes the SMSF trust. While this is not an explicit requirement stated in s 17A, it must be a requirement by reason of the requirement for a trustee for a regulated superannuation fund in s 10 of the *SIS Act*. Secondly, a SMSF must not have more than four members: s 17A(1)(a). Thirdly, all of the members of the SMSF must be trustees of the SMSF, or the SMSF must have a corporate trustee, of which all the members must be a director: s 17A(1)(b)–(d).

213 There was no dispute on appeal that the FSF was a regulated SMSF within the meaning of the *SIS Act*.

214 There are a number of record keeping and audit requirements for SMSFs in the *SIS Act*, including:

(1) Trustees must keep and maintain accounting records for a minimum period of five years (s 35AE), such records including a statement of financial position and an operating statement in respect of each income year (s 35B).

(2) An approved SMSF auditor must be appointed each financial year to give the trustee a report, in the approved form, of the operations of the entity for that year (s 35C).

(3) Trustees must keep minutes of all meetings and retain the minutes for a minimum of ten years (s 103).

(4) Trustees must keep up to date records of all trustee or director of corporate trustee changes and trustee consents for a minimum of ten years (s 104).

(5) Trustees who become a trustee on or after 1 July 2007 must sign and retain a trustee declaration in respect of the SMSF (s 104A). This declaration is that the trustee understands his or her duties as trustee of the SMSF.

(6) Trustees must keep copies of all member or beneficiary reports, so long as they are relevant and in any event for at least ten years (s 105).

#### Superannuation law and the concept of “vesting” relied upon by the appellants

215 A critical element of the appellants’ case on appeal was that the disputed assets formed part of their respective “allocated pensions”, which “vested” in the appellants, but were still said to form part of their interest in the FSF and therefore fell within the exception in s 116(2)(d)(iii)(A) of the *Bankruptcy Act*.

216 By way of their submissions as to vesting, Mr and Mrs Frigger contended that the primary judge misdirected himself as to the ultimate question that needed to be determined in respect of each of the disputed assets the subject of grounds of appeal 2, 3, 4 and 5 by wrongly (according to the appellants) focusing upon whether the disputed assets were held on trust rather than whether the disputed assets had vested in them.

217 The appellants put their contentions as to “vesting” in the following terms in paragraph 3 of their written submissions dated 8 April 2022:

Mrs Frigger’s member account balance vested in her on 1 July 2009 in the form of an allocated pension. Similarly, Mr Frigger commenced drawing an allocated pension on 1 July 2010 and his member account balance vested in him on that date. All assets in FSF trust estate were treated as segregated assets in each of Mr & Mrs Frigger’s allocated pensions. Liquid assets were split between each of the Friggers’ allocated pensions. The Friggers had powers, duties and control over their allocated pensions as trustees *and* as vested members…

218 At paragraphs 6 and 7 of the appellants’ written submissions in reply dated 2 May 2022, this submission was further articulated as follows:

6 The trial judge erred at law by requiring FSF, a statutory trust, to bear all the indicia of a trust as would be recognized by a court of equity, by finding that the disputed assets were required to be identified as trust assets, in circumstances where the disputed assets had fully vested in the appellants and were no longer subject to a prohibition not to be used for the legal owner’s benefit: [JJ3, 25, 26, 30, 31, 32, 33, 34, 96, 97, 98, 99, 100-119, 120, 121, 122-125, 132, 134, 135, 141, 144, 145, 149, 150, 151, 152, 154, 155, 156, 159, 165, 167,281, 169, 171, 174, 176, 178, 186, 187, 193-196, 214, 215, 221, 223, 225, 248, 251, 333, 336, 337, 338, 341, 342, 343, 346, 347,352, 353, 354, 357]. The assets comprising the appellants allocated pensions had fully vested in the appellants when the allocated pensions commenced, but FSF continues as a statutory superannuation fund for the purpose of concessional tax treatment, and requires trustees to be appointed to comply with the record-keeping and reporting obligations under SIS Act. The trial judge’s error was consequent on the respondent’s opening submissions B.04 @ [4.1] “Formation of trusts”.

7 [RS4]: the respondent confuses apples and oranges. Withdrawing lump sums from a superannuation fund [JJ328], is not the same as transferring a member’s account balance to an allocated pension. Jackson J erred in fact in *Frigger v Trenfield [2019] FCA @ [42]* he found that “Mr & Mrs Frigger are professional people at or approaching retirement age.”

219 This position was advanced in similar terms at the hearing of this appeal (T51.16–20), where Mrs Frigger, in response to a question from the Chief Justice, stated:

The only thing that I was saying, your Honour, is that I don’t believe that we had to say that the assets in the Frigger Super Fund which comprised our allocated pensions were held on trust with the characteristic that the person, the legal owner, could not use it for its own benefit. That is the – I think is the differentiation between a simple discretionary fund trust and superannuation fund and we say in our case because we have reached preservation age our super fund had been transferred or converted into an allocated pension. We were the beneficial owners.

220 Given the reliance placed on the concept of “vesting”, it is necessary to explain that concept by reference to provisions of relevant legislation. Ultimately, however, it is unclear that the appellants’ arguments as to vesting support their case in respect of the disputed assets.

#### Phases and types of superannuation benefits

221 There are two phases for superannuation assets: an accumulation phase (also known as the “growth phase”) and a retirement phase. During the accumulation phase, all contributions are “preserved” or “quarantined” in that they cannot be accessed (subject to limited exceptions). Upon reaching what is known as the “preservation age”, the retirement phase commences and the consequence of that is that “superannuation benefits” can be accrued and become payable.

222 The *SIS Regulations*govern when a person is deemed to have reached “preservation age”. As both Mr and Mrs Frigger were born before 1960, their preservation age was 55: reg 6.01(2) *SIS Regulations*.

223 Once a person’s preservation age has been reached, in the retirement phase, funds can be paid as a lump sum or transferred into a superannuation income stream known as a pension or annuity. A “pension” is defined in s 10 of the *SIS Act* to include a “benefit provided by a fund”, if the benefit is taken under the *SIS Regulations*to be a pension for the purposes of the Act. Regulation 1.06 provides that a benefit is taken to be a pension where the superannuation fund under which it is provided meets the standards of sub-regulation (9A) and does not permit the “capital supporting the pension to be added to by way of contribution or rollover after the pension is commenced.” Sub-regulation (9A) also requires that a pension be paid at least annually, in accordance with the minimum amounts stipulated by Sch 7 of the *SIS Regulations*.

224 The *SIS Regulations*also enable a person who has attained their preservation age to receive superannuation benefits without retiring from their employment and entering the retirement phase by way of a “transition to retirement income stream”. An important feature of the transition to retirement income stream is that (subject to certain conditions) the superannuation fund remains in the accumulation phase.

225 There are taxation consequences associated with moving from the accumulation phase to the retirement phase. Investment earnings on assets in the retirement phase which constitute “exempt current pension income” are tax free: ss 295-380 and 295-385 of the *ITAA 1997*. By contrast, realised gains on investment earnings in the accumulation phase are subject to a 15% capital gains tax (**CGT**), or 10% for assets held for longer than 12 months: s 295-85 of the *ITAA 1997*. To qualify for exemption from CGT liability, two types of tax calculation can be applied. Relevantly for the present case, the segregated method requires that the pension assets:

(1) be “invested, held in reserve or otherwise dealt with at that time solely to enable the fund to discharge all or part of its liabilities … [in respect of] superannuation income stream benefits of the fund at that time”: s 295-385(3)(a) and 4(a) of the *ITAA 1997*; and

(2) either

(a) an actuary’s certificate is obtained for the relevant income year to the effect that the assets and earnings expected to be made would provide the amount required to discharge in full all or part of the fund’s liabilities in respect of superannuation income stream benefits: s 295-385(3) of the *ITAA 1997*; or

(b) the assets meet the definition of a prescribed superannuation stream benefit in the *ITAA Regulations 1997* (Cth), which includes an “allocated pension” within the meaning of the *SIS Regulations*: reg 295-385.01(a)(i).

226 We make reference to the taxation consequences associated with the different phases of superannuation because the appellants sought to support their claims regarding vesting and the payment of allocated pensions in part by reference to the desire to deal with their assets in a tax-effective way: see, for example, paragraph 5 of the appellants’ outline of submissions as re-filed on 17 July 2022. In that regard, caps imposed on superannuation contributions by taxation legislation are also relevant.

#### Caps on contributions

227 There are limits on how much one can pay into a superannuation fund each financial year without incurring additional taxation liabilities known as the concessional (before tax) contributions cap and the non-concessional (after tax) contributions cap. The amount of each cap depends on one’s personal circumstances, however, by way of illustration, the general concessional contribution cap from 1 July 2017 to 30 June 2021 was $25,000 and the non-concessional contributions cap was $100,000 [Australian Taxation Office, ‘Super contributions – too much can mean extra tax’, 15 December 2022]

228 If the concessional contributions cap is exceeded, the excess concessional contributions amount is included in a person’s assessable income and is taxed at the applicable marginal tax rate. If the non-concessional contributions cap is exceeded a person may be liable to pay tax on the excess at the highest marginal tax rate: see Div 291 and Div 292 of the *ITAA 1997* and the *Superannuation (Excess Non-concessional Contributions Tax) Act 2007* (Cth).

#### The transfer balance cap

229 From 1 July 2017, the Government introduced what is known as a “transfer balance cap”, which is a cap on the capital value of any assets which may be transferred to a tax-free pension account: see Div 294 of the *ITAA 1997*. The transfer balance cap was originally $1.6 million but was increased to $1.7 million on 1 July 2021. Any gains or losses on the pension account over time are not considered for the purpose of the cap, and therefore the account cannot be ‘topped up’ if investment losses result in the amount in the pension account dropping below the transfer balance cap. The cap applies to the combined balance of all superannuation monies in the retirement phase.

230 To ensure the transfer balance cap is not exceeded, SMSFs are required to keep a “transfer balance account” report and report to the ATO any transfer balance account events (i.e. debits or credits) to assets in the retirement phase.

231 Where assets in the retirement phase exceed the transfer balance cap, those assets must either be commuted into a lump sum payment and paid out of the superannuation fund, or paid back into the retirement phase and therefore become subject to CGT treatment. In addition, if the transfer balance cap is exceeded, excess transfer balance tax must be paid: see s 294-30 of the ITAA 1997 and s 5 of the *Superannuation (Excess Transfer Balance Tax) Imposition Act 2016* (Cth).

#### Conclusions regarding the appellants’ submissions on “vesting”

232 There are a number of difficulties with the appellants’ submissions as to the alleged vesting of their allocated pensions.

233 *First*, the documentary evidence does not appear sufficient to establish that the disputed assets in fact formed part of an allocated pension (or part of a transition to retirement income stream). Indeed, in the FSF Balance Sheet dated June 2017 at Appeal Book Pt C Tab 24.56, the Main Portfolio and the Residential Properties are said to be “Accumulation Phase Assets” and are not in either of Mr or Mrs Frigger’s “Allocated Pensions”.

234 Similarly, the FSF Balance Sheet dated June 2018 at Appeal Book Pt C Tab 24.58 records the BW1 account, the Main Portfolio, and the Residential Properties as being “Accumulation Phase Assets” and are not in the “Allocated Pension” of either Mr or Mrs Frigger.

235 Indeed, were the disputed assets part of a pension account it would appear that Mr and Mrs Frigger would exceed the permitted transfer balance cap. It is also possible that with a contribution as large as the Residential Properties, Mr and Mrs Frigger would exceed the applicable caps on contributions and therefore be liable to taxation at the highest marginal rate, as noted by the primary judge at [501] of the Liability Judgment.

236 It is therefore difficult to see how the appellants’ claims that the disputed assets formed part of their “allocated pension” can be supported on the basis of the documentary evidence.

237 *Secondly*, it is unclear that the appellants’ arguments as to vesting in fact assist the appellants or change the required analysis in respect of the disputed assets in any meaningful way. The appellants seem to contend that once a pension has been allocated, there is a legal and/or beneficial vesting (we note in this regard the appellants’ replacement of the word “beneficially” with “personally” throughout the re-amended notice of appeal dated 15 June 2022) of that asset in the recipient as an individual, and not in their capacity as a trustee of a regulated SMSF. For example, in paragraph 19.7 of the appellants’ submissions filed 28 June 2022 the appellants contend that:

There was no “trust” relationship over BOQ1 and BOQ2, the appellants hold their interests in possession as tenants-in-common being the underlying assets of their allocated pensions; they are the legal and beneficial owners…

238 Whether this contention is supported by the documentary evidence is, however, questionable given that, for example, the 2018 FSF balance sheet referred to above records BOQ1 as being an “Accumulation Phase Asset” and not in either Mr or Mrs Frigger’s “Allocated Pension”.

239 Even if the appellants’ contention as to the vesting of pension assets in themselves personally is correct, it may tend to undermine rather than support the appellants’ case, as pointed out by the respondent in the respondent’s submissions dated 4 July 2022:

… if at the time of the appellants’ bankruptcy the disputed assets were held by the appellants, legally and beneficially in their own right, free from any restraints imposed by any law or any trust instrument, then they were no longer ‘*held in a regulated super fund*’ for the purposes of s 116(2)(d)(iii)(A) of the *Bankruptcy Act* and they vest in the first respondent as trustee in bankruptcy.

240 Alternatively, if the disputed assets despite being “fully vested” continued to form part of the FSF and accordingly were “held in a regulated super fund”, then the terms of the FSF Trust Deed and principles of trust law are relevant in the determination of whether a disputed asset was in fact part of the FSF and no error may be discerned from the primary judge having regard to those principles. We therefore turn to the relationship between superannuation law and trust law.

### The relationship between superannuation law and trust law

241 Despite the regulatory framework established by the *SIS Act and SIS Regulations*, the general law of trusts has a significant role to play in the regulation of superannuation funds. This is because many superannuation funds continue to be constituted by way of a trust deed, with the result that the general law of trusts applies to them: see J D Heydon, *Jacobs’ Law of Trusts**in Australia* (8th ed, Lexis Nexis Butterworths, 2016) (***Jacobs’ Law of Trusts***) at [29-01]–[29-05]; S Jones, *Australian Superannuation Handbook* (Thomson Reuters, 2021) at [5-100]; and G E Dal Pont, *Equity and Trusts in Australia* (7th ed, Lawbook Co, 2019) at [28-50]. As the High Court explained in *Finch v Telstra* (2010) 242 CLR 254 (at [35]):

Because of the potentially lengthy time periods over which superannuation savings are accumulated, it was natural, and it is now in many instances mandatory, for a trust mechanism to be employed.

242 As noted above, in the case of a “regulated superannuation fund” like the FSF it is mandatory for a trust mechanism to be employed.

243 Consequently, except to the extent that provisions of the *SIS Act* or *SIS Regulations*or the terms of a trust (permissibly) provide otherwise, the provisions of the *SIS Act* co-exist with the general law of trusts with the result that the principles governing the creation of an express trust and contribution of property to an existing trust apply to regulated superannuation funds: see *Cowan v Scargill* [1985] Ch 270 at 290-292 (Megarry VC), which was cited with approval in *Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593 at 609-610; *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* (1998) 152 ALR 332 at 346 (Heerey J, Lockhart J agreeing); *Jacobs’ Law of Trusts*at [29-01]–[29-05]; and Lord Browne-Wilkinson, “Equity and its Relevance to Superannuation Schemes Today” at p 28 in M S Donald and L B Beatty (eds) *The Evolving Role of Trust in Superannuation* (The Federation Press, 2017).

244 As the primary judge observed in the Liability Judgment at [97], it is orthodox to speak of three ‘certainties’ in the context of express trusts, each of which must be present for a trust to be found to exist. These are: (i) certainty of intention to create a trust; (ii) certainty of the property that is the subject matter of the trust; and (iii) certainty of objects, that is, certainty as to whom the beneficiaries of the trust are: see *Kauter v Hilton* (1953) 90 CLR 86 (***Kauter v Hilton***) at 97 (Dixon CJ, Williams and Fullagar JJ); *Associated Alloys Pty Limited v ACN 001 452 106 Pty Limited (in liquidation)* [2000] HCA 25; 202 CLR 588 (***Associated Alloys***) at 604 [29] (Gaudron, McHugh, Gummow and Hayne JJ).

245 A central question in respect of appeal grounds 2, 3, 4 and 5 is whether the disputed assets were held in the FSF on trust for the beneficiaries of that fund and therefore, pursuant to s 116(2)(d)(iii)(A) of the *Bankruptcy Act* are not assets divisible among Mr and Mrs Frigger’s creditors. Speaking in terms of the ‘three certainties’, the controversy centres upon whether Mr and Mrs Frigger intended that the disputed assets be contributed to and be held on trust in the FSF. As we have said, on appeal, the appellants challenged the way the primary judge framed this aspect of the case below. We address the appellants’ arguments in detail at [335]–[344] and [526]–[537] below.

### When will an asset be treated as “contributed” to a regulated superannuation fund?

246 In dealing with grounds of appeal 2, 3, 4 and 5 it is helpful to understand, in general terms, when an asset will be treated as “contributed” to a regulated superannuation fund. An asset may be treated as contributed to a superannuation fund if three things are satisfied:

(1) a person intended to contribute the asset to a superannuation fund; and

(2) the asset in question is capable of being contributed to a superannuation fund; and

(3) the person effected the contribution of the asset such that it is held in the superannuation fund.

#### Intention to contribute an asset

247 The primary judge approached the question of intention to contribute property to an existing trust in reliance on principles applicable to ascertaining whether intention to create a trust was present: see paragraph [105] of the Liability Judgment. This approach is sensible given that, as noted by the primary judge, in Australian law when property is ‘contributed’ to an existing trust what in fact occurs is that a new trust is created over the property on the same terms as the pre-existing trust, with the result that the property is to be dealt with in the same manner as any property already constituting the fund: *Atwill v Commissioner of Stamp Duties (NSW)* (1970) 72 SR (NSW) 415 at 426 (Mason JA); *Kennon v Spry* [2008] HCA 56; 238 CLR 366 at [229] (Kiefel J); *Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation* [2018] FCAFC 122; 264 FCR 587 at [195] (Steward J); see also, W A Lee et al, *The Law of Trusts*(Thomson Reuters, 2022) at [2-501].

248 In general, the onus of proving an intention to create a trust lies with the person who claims that the trust was created: see *Re Armstrong* (1960) VR 202 at 206; *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271 at 277 (Gummow J). This is a matter which is to be assessed objectively, without having regard to the subjective intention of that person: *Byrnes v Kendle* (2011) 243 CLR 253 (***Byrnes v Kendle***) at [17]–[18] (French CJ), [94], [104]–[105] and [114]–[116] (Heydon and Crennan JJ).

249 As Millett LJ put it in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 (at 185) (which was cited with approval in *Byrnes v Kendle* by Gummow and Hayne JJ at [55]):

A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter them.

250 Consequently, where it is apparent from the circumstances that a person has objectively intended for property to be held on trust, that intention cannot be negated by an assertion that the person did not intend to bring about that result: see for example, *Re Courtenay House Capital Trading Group Pty Ltd (in liq)* [2018] NSWSC 404 (***Re Courtenay House***) at [23]–[26] and *Markopoulos v Marco* [2020] WASC 79. The same may be said where a person asserts that they intended to create a trust, but such an intention cannot be discerned from the surrounding circumstances. In each case, it is a person’s intention, as it appears objectively, which will prevail. Thus, as Professor Scott observed in the first edition of his treatise, *The Law of Trusts*(1st ed, 1939, volume 1) (***Scott on Trusts***) at §23:

An express trust, unlike a constructive trust, is created only if the settlor properly manifests an intention to create a trust. It is not enough that he secretly intends to create a trust; there must be an outward expression of his intention.

251 To speak of a certainty of intention is therefore to speak of the intention which is to be discerned from a person’s words or conduct. For this reason, later editions of *Scott on Trusts* speak of a “manifestation of intention” – that is, a person’s intention as it is expressed outwardly: see, for example: Scott, *The Law of Trusts*(5th ed, 2006, volume 1) at §4.1; and see also, *Jacobs’ Law of Trusts*at [5-02]. This terminology has also been adopted by the courts. In *Re Kayford Ltd (in Liq)* [1975] 1 All ER 604, for example, Megarry J observed (at 607) that the relevant question is “whether in substance a sufficient intention to create a trust has been manifested”. Similarly, in *Legal Services Board v Gillespie-Jones*(2013) 249 CLR 493, Bell, Gageler and Keane JJ said (at [119]):

Whether or not parties intend to create in a third party that is appropriate to be created by a trust relationship falls in each case to be determined by reference to **the outward manifestation of the intentions**of the parties within the totality of the circumstances.

(Emphasis added.)

See also, more recently: *Bosanac v Commissioner of Taxation* [2022] HCA 34 at [44] (Gageler J) and [93] (Gordon and Edelman JJ).

252 As Gummow and Hayne JJ observed in *Byrnes v Kendle* (at [56]), there is good sense in such a rule. Issues of the construction to be placed on the words or actions of alleged settlors are apt to arise long after the event and, as is the case here, trusts may give rise to proprietary interests which engage third parties who are strangers to the original actors.

253 These concerns are especially apt in circumstances where the acceptance of an assertion that assets are held on trust may defeat the interests of creditors of the putative trustee: *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62 (***Korda***) at [205] (Keane J); see also: *Re Courtenay House* at [19]–[20]. Therefore, although the Court may infer an intention to create a trust if this is warranted by the circumstances, it will not infer this intention readily. This approach coheres with that which was said by Mason CJ and Dawson J in *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, where their Honours observed (at 618) that, unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, the Court ought not to be astute to discover indications of that intention: see also, *Byrnes v Kendle* at [272] (Gummow and Hayne JJ).

254 In undertaking this inquiry, the Court may have regard to “all of the relevant circumstances”, including the language used by the parties, the nature of the transaction, and the circumstances attending the relationship between them: *Associated Alloys*at 605; *Kauter v Hilton* at 100 (which was cited with approval in *Byrnes v Kendle* at [54] by Gummow and Hayne JJ). This can include conduct which has occurred after the disposition of property and, in a commercial context, may also include commercial necessity: see, for conduct occurring after the disposition of property: *Trustee of the Property of Cummins (a bankrupt) v Cummins*[2006] HCA 6; 227 CLR 278 (***Cummins v Cummins***); *In the matter of Tresdar Pty Ltd* [2019] NSWSC 179 at [149]–[151]; see, for commercial necessity: *Eslea Holdings Ltd v Butts*(1986) 6 NSWLR 175 at 189–90; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 121 ( Mason CJ and Wilson J); *Re Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491 at 503 (Gummow J) and *Korda* at [10] (French CJ).

255 Importantly, however, the mere fact of commercial necessity or the convenience which may result from a finding that property is held on trust will, absent other circumstances, generally be insufficient to evidence an intention to create a trust. As the Court observed in *Korda* (at [11] (French CJ) and [204]–[208] (Keane J)), the context in which a legal arrangement is made is not a substitute for examining the precise language employed by the parties. That a trust structure may be commercially beneficial or indeed, necessary, does not displace the need to establish an intention to create a trust. The relevant inquiry remains whether, having regard to all of the circumstances, that intention has manifested itself outwardly.

256 It follows that in the context of this appeal, Mr and Mrs Frigger must demonstrate that, having regard to all of the relevant circumstances, they intended for the disputed assets to be held for the benefit of the beneficiaries of the FSF.

257 The above does not mean, however, that if an asset is found to be a trust asset or within a fund, natural accretions to, or the fruit generated by, it, such as by interest, rent or dividends may not naturally, in all the circumstances, be concluded likewise to be trust property or part of the fund.

#### Nature of the asset sought to be contributed

258 Contributions to a regulated superannuation fund must comply with the *SIS Act* and Part 7 of the *SIS Regulations*. If a contribution does not comply with the *SIS Regulations*, the contribution which is in breach must be returned per reg 7.04(4). Contributions must also comply with the terms of the superannuation fund trust deed, which may have more restrictive requirements than either the *SIS Act* or *SIS Regulations*.

259 The *SIS Act* and *SIS Regulations*impose restrictions on the types of contributions that can be made to a superannuation fund. There are restrictions on acquiring assets from related parties which were important to the primary judge’s consideration of whether the Residential Properties were capable of being legally contributed to the FSF. For the reasons given later, we do not consider it necessary to resolve that issue in this appeal.

#### Effecting the contribution of property to a superannuation fund

260 In the Liability Judgment at [131], the primary judge found that:

The concept of a ‘contribution’ is also important here, as a superannuation fund is made up of contributions … The term is employed frequently in the SIS Act and SIS Regulations (and the FSF Deed). The legislation imposes detailed restrictions on the kinds of contributions that a regulated superannuation fund may accept in relation to a member, but the restrictions only apply after the member reaches the age of 65, which neither of the applicants had by 1 July 2014. Other than that, **a review of the SIS Act discloses nothing that goes specifically to when an asset is, or is not, to be considered part of a regulated superannuation fund**.

(Emphasis added.)

261 In the absence of prescriptive requirements in the *SIS Act* or *SIS Regulations*, the ATO’s Taxation Ruling 2010/1 entitled “Income tax: superannuation contributions” (**Ruling**) provides some guidance to trustees of SMSF (and others) as to when an asset will be treated (at least by the ATO) as having been contributed to a superannuation fund. Although the Ruling was prepared for the purposes of administering taxation law, given that it is expressed to be directly relevant to the *SIS Act* and *SIS Regulations*, and given the appellants’ reliance on other ATO rulings (for example, SMSFR 2009/1 at Appeal Book Pt 2SC 28.31), it is appropriate to have regard to the document, at least by way of contemporaneous guidance to the appellants. That is, the Ruling provides an indication of the kind of records that one would expect the appellants to have created, or to be in existence, if the disputed assets were ‘contributed’ to the FSF and provided the appellants with an indication of the kind of evidence that may prove such contributions were, in fact, made. However, we express no view on the accuracy of the guidance provided in the Ruling.

262 According to [4] of the Ruling, a contribution in the superannuation context is “anything of value that increases the capital of a superannuation fund provided by a person whose purpose is to benefit one or more particular members of the fund or all of the members in general”. According to [10]–[11], the capital of a superannuation fund might be increased directly by transferring funds to the superannuation provider, rolling over a superannuation benefit from another superannuation fund, transferring an existing asset to the superannuation provider or creating rights in the superannuation provider (an *in specie* contribution) or increasing the value of an existing asset held by the superannuation provider; or indirectly by paying an amount to a third party for the benefit of the superannuation provider, forgiving a debt owed by the superannuation provider or shifting value to an asset owned by the superannuation provider.

263 In the case of an electronic transfer of funds, the funds will be treated as contributed when the funds are received by the superannuation provider such that the capital of the fund is actually increased or augmented: see [12]–[13] of the Ruling, see also *Liwszyc v Commissioner of Taxation* [2014] FCA 112; 218 FCR 334.

264 An *in specie* contribution is made when the superannuation provider obtains ownership of the asset from the contributor. Where legal ownership is evidenced by a system of formal registration, such as shares in a publicly listed company or Torrens System land, legal ownership will pass when the superannuation provider is registered as the owner, although beneficial ownership may be transferred earlier. A superannuation provider acquires the beneficial ownership of real property when the provider obtains possession of a properly executed transfer that is in registrable form together with any title deeds and other documents necessary to procure registration of the superannuation provider as the legal owner of the land. A superannuation provider acquires the beneficial ownership of shares or units in an Australian Stock Exchange listed company or unit trust when the provider obtains a properly executed off-market share transfer in registrable form: see [18]–[24] of the Ruling.

265 Paragraph 25 of the Ruling warns in respect of beneficial ownership that:

A contributor or superannuation provider who seeks to argue a contribution of property occurs when beneficial, not legal, ownership of property passes must retain sufficient evidence of the relevant transactions and events to precisely identify when the change of beneficial ownership occurs.

266 It should also be noted that the trust deed itself may impose requirements as to how assets are to be contributed to an existing trust.

267 With the above framework in mind, we turn to substantive consideration of grounds of appeal 2–5.

### Background to and issues in the ‘dispute’

268 Section 125 of the *Bankruptcy Act* provides:

**125 Certain accounts of undischarged bankrupt**

(1) Where a prescribed organization has ascertained that a person having an account with it is an undischarged bankrupt, then, unless the prescribed organization is satisfied that the account is on behalf of some other person, it shall forthwith inform the trustee, in writing, of the existence of the account and, subject to subsection (2), shall not make any further payments out of the account, except under an order of the Court of which a copy has been served on it or in accordance with written instructions from the trustee.

(2) If, within 1 month from the date on which the prescribed organization informed the trustee of the existence of the account, a copy of an order of the Court in respect of the account has not been served on the prescribed organization and it has not received written instructions from the trustee within that period in respect of the account, the prescribed organization is entitled to act without regard to any claim or right the trustee may have in respect of the account.

…

(3) In this section:

***co‑operative society*** means:

(a) a society registered or incorporated as a co‑operative housing society under a law of a State or Territory; or

(b) any other society whose principal business consists of borrowing moneys from its members and lending those moneys to its members and that is registered or incorporated under a law of a State or Territory relating to co‑operative societies.

***prescribed organization*** means a bank, a co‑operative society or any other financial organization of a kind prescribed by the regulations for the purposes of this definition.

...

269 BankWest and Bank of Queensland are prescribed organisations for the purposes of the BW1, BOQ1 and BOQ2 accounts.

270 By letters dated 25 July 2018, the Official Trustee gave written instructions to BankWest and the Bank of Queensland that had the effect of preventing BankWest from making payments out of the BW1 account and Bank of Queensland from making payments out of the BOQ1 account under s 125 of the *Bankruptcy Act*. The appellants characterise that circumstance as the Official Trustee ‘freezing’ these accounts. For ease of reference we are content to adopt that description.

271 On 26 July 2018, the Official Trustee lodged absolute caveats over the Residential Properties. The Official Trustee claimed an interest in the land on the basis that the estate of Mrs Frigger had vested in the Official Trustee under s 58 of the *Bankruptcy Act*.

272 By letters dated 27 July 2018, the Official Trustee gave written instructions to BankWest to remove the stop or freeze on the BW1 account and to Bank of Queensland to remove the stop or freeze on the BOQ1.

273 A file note of Ms Michelle Tilke of the Official Trustee records that a decision to unfreeze bank accounts at BankWest and Bank of Queensland had been made “as based on the information provided by Mrs Frigger it appears that bank accounts are for the superannuation fund”. Another file note of Ms Tilke records that: “The bank account number is the same as the bank account number disclosed on the annual return for the SMSF. Prima facie, it appears the bank account is for the SMSF despite being in personal names”.

274 The information Mrs Frigger provided to the Official Trustee included an email from Mrs Frigger to Ms Tilke dated 27 July 2018 which attached three documents.

275 The first attachment is a document entitled “Account Details” for the BOQ1 account that is a print out of a webpage of website of the Bank of Queensland. The document includes a description of the account name “Frigger Super Fund”. That appears to be a ‘nickname’ for that account that the appellants added to the online banking platform in the manner described in the primary judge’s reasons (Liability Judgment at [338] and [724]).

276 The second attachment is a document entitled “Transaction Listing” for the BW1 account that is a print out of a webpage of the BankWest website. The document records transactions of the BW1 account from 26 June 2018 to 26 July 2018. In the body of the email Mrs Frigger indicates that GST for the FSF is paid from that account, all the income is rent, dividends and interest that is earned by assets in the FSF and expenses relate to those assets. She also said that the appellants received an allocated pension from that account as payments made to their credit card.

277 The third attachment is digital version of a tax return of the FSF for the 2017 financial year. In the body of the email Mrs Frigger indicated that the tax return identified the BW1 account as the bank account of the FSF. The BW1 account was the account nominated in the tax return for super payments and tax refunds.

278 On 30 July 2018, Mr Maher Ty of the Official Trustee sent an email to Bank of Queensland with a written instruction to maintain the freeze on the BOQ1 and BOQ2 accounts and to ignore the letter of 27 July 2019 instructing the bank to remove the freeze on those accounts.

279 On 31 August 2018, the respondent and Mr Paul Allen were appointed joint and several trustees of the appellants’ estates. On the same day, they wrote to Bank of Queensland and, in effect, directed it to maintain the freeze on the BOQ1 and BOQ2 accounts. It is common ground that neither the respondent nor Mr Allen at any time directed BankWest to re-freeze the BW1 account. Ms Trenfield gave evidence to the effect that no direction to freeze that account was made because by the time of her appointment the balance was less than $5,000. The primary judge accepted that explanation (Liability Judgment at [618]).

280 On 21 September 2018, the respondent and Mr Allen lodged an absolute caveat over, amongst other properties, the Bayswater and Como properties. They claimed an interest in the land as a consequence of Mrs Frigger’s interest in that land vesting in them under s 68 (sic) of the *Bankruptcy Act*.

281 As noted above, on 12 March 2019, Mrs Frigger commenced proceedings in the Court by way of an originating process supported by an affidavit of hers. Insofar as the disputed assets are concerned, the originating application sought declarations to the effect that BOQ1 is an asset held by Mr Frigger on bare trust for the beneficiaries (members) of the FSF and that the Como and Bayswater properties were held by Mrs Frigger on bare trust for the beneficiaries of the FSF. The appellants also sought an order, in effect, directing the respondent to remove the caveats she had lodged over the Como and Bayswater properties.

282 On 14 June 2019, orders were made to join Mr Frigger to the proceedings and to amend the originating application to include a claim for a declaration that BOQ2 was held by Mrs Frigger on bare trust for the beneficiaries of the FSF.

283 By letter dated 28 August 2019, the respondent and Mr Allen represented to CommSec that the securities in the Main Portfolio vested in the appellants’ trustee in bankruptcy and, amongst other things, requested CommSec to suspend all transactions on the CommSec account with effect from 28 August 2019. It is common ground that CommSec acceded to the respondent’s request. A screen shot of the CommSec website was in evidence indicating that the account was locked. The appellants characterise that letter as having the effect of freezing the Main Portfolio. Again, we are content to adopt that description as the effect of CommSec’s response to the respondent’s letter.

284 On 20 September 2019, the Court granted the appellants leave to further amend the originating application. As a consequence of that order, the originating process was amended to include the appellants’ claim for an order directing the respondent to send a letter of retraction to CommSec.

285 The appellants were not the trustees of the FSF at all material times. Regarding the trustee(s) and members of the FSF at different times, the primary judge made the following findings of fact (Liability Judgment at [196]) that were not challenged on appeal.

I make the following findings on the basis of the above evidence:

(1) CAT was a trustee of the FSF from its inception in 1997 until its winding up in 2010.

(2) Mrs Frigger and Mr Frigger were trustees of the FSF from early 2008 until 21 July 2018, being the date on which Mrs Frigger said that the deed of amendment was executed (see further (4) below).

(3) It is not possible to make a firm finding as to when Jessica Frigger and Michael Frigger first became trustees. As I have said, the 2008 deed of amendment in evidence does not mention them, the purported 2014 minutes are not authentic (see below), and only the deed of amendment of 1 July 2018 terminating their trusteeship provides any firm evidence that they were trustees. Mrs Frigger's oral evidence that they were appointed in 2008, when they were minors, is not reliable. But despite the general unreliability of the ABR, I find that Jessica and Michael were trustees from at least the date shown on it, 6 July 2016. There was no reason to doubt the implication made in the deed of amendment dated 1 July 2018 that they were trustees of the FSF at that time. If so, they must have been appointed at some time before 1 July 2018. Under s 17A(1)(d) of the SIS Act, each individual who is a member of an SMSF must also be a trustee of that fund, or a director of the fund's corporate trustee, if it is to meet the definition of an SMSF. Records that are reliable as to membership, such as the annual returns and membership statements indicate they were members from well before 6 July 2016. This makes it inherently likely they were appointed trustees by that time.

(4) In point of fact, HAF was the sole trustee from 21 July 2018 until 15 April 2020. HAF's appointment was purportedly backdated to 1 July 2018 but there is no need in this proceeding to determine what effect that had, if any. For the purposes of this judgment, it is both sufficient and correct to proceed on the basis that HAF was not appointed in fact until 21 July 2018.

(5) From 15 April 2020 until 5 June 2020, the applicants and both their children were trustees of the FSF. Jessica and Michael ceased to be trustees of the FSF on the latter date. The applicants have been the only members and the only trustees since that date.

(6) The applicants have been members of the FSF from its inception on 1 July 1997 and at all times thereafter.

(7) Jessica Frigger and Michael Frigger were members of the FSF from 1 January 2008 to 5 June 2020. While the evidence about the start and end dates of their membership is not substantial, there is no reason on the face of that evidence to doubt it: see the discussion of the member's statements above and see *Frigger (No 6)* at [24] [25]. Those dates are inconsistent with the ABR search, but for the reasons I have given the ABR records for the FSF are not reliable.

286 The appellants continued to carry out transactions on the CommSec account after the sequestration orders were made and up to the point at which CommSec suspended the account. That is, transactions were performed on the account between 21 July 2018 and 28 August 2019 when CommSec suspended the account. In that period, HAF, not the appellants, was the trustee of the FSF.

287 Another CommSec account had been opened by CAT (then named Serenity Holdings Pty Ltd) apparently at the time when CAT was trustee of the FSF. That CommSec account had the account designation “SERENITY HOLDINGS PTY LTD <FRIGGER SUPER FUND ACCOUNT>” as is usual for accounts opened by a body corporate acting in a trustee capacity.

288 CAT was placed into voluntary liquidation in December 2009. In January 2010, Mr Kitay was appointed provisional liquidator of CAT. In May 2010, an order was made to wind CAT up in insolvency and Mr Kitay was appointed liquidator: *Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd* [2010] WASC 38; *Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd (No 2)* [2010] WASC 113; *Professional Services of Australia Pty Ltd (administrator appointed) v Computer Accounting and Tax Pty Ltd (No 3)* [2010] WASC 93. Notwithstanding that CAT was in liquidation and under the control of its liquidator, it appears that Mr and Mrs Frigger continued to control and operate the CommSec account in CAT’s former name of Serenity Holdings (Liability Judgment at [399]–[402]).

289 A CommSec financial year summary for the 2015 financial year for the Serenity Holdings account indicates that there were no securities held on that account as at 30 June 2015. A financial year summary for the 2019 financial year indicates that a number of purchases and sales were made on the Serenity Holdings account from 3 to 28 June 2019.

290 Mrs Frigger gave evidence during her cross-examination that there was a third CommSec account in the name of H & A Frigger. However, no documents associated with such an account were tendered in evidence (Liability Judgment at [406]).

291 On 11 January 2019, an audit report for the FSF for the financial year ended 30 June 2016 was signed on behalf of the auditor of the FSF. On 16 March 2019, an audit report for the FSF for the year ended 30 June 2017 was signed. On 17 June 2019, an audit report for the FSF for the year ended 30 June 2018 was signed.

292 The significance of the dates of these audit reports is that they pre-date the respondent’s letter to CommSec of 28 August 2019 and the amendment to the originating application introducing the claim with respect to the Main Portfolio. Therefore, to the extent these documents record the Main Portfolio as an asset of the FSF they are not necessarily ‘self-serving’, in the sense that they may not have been prepared during or in contemplation of legal proceedings about ownership of the Main Portfolio.

293 There are some further assets which the primary judge accepted were assets of the FSF. Those findings are not challenged on appeal, but it is necessary to briefly mention them because the appellants contend that income and expenses relating to these assets passed through the BW1 account as transactions of the FSF.

294 At the time when CAT was trustee of the FSF it became the registered proprietor of the Armadale property. There was a BP Service Station business operated on that land. Initially, CAT carried on the BP Service Station business. However, after changes to SMSF rules, ownership of the land was separated from the business. Thereafter, the BP Service Station business was carried by the appellants, in their personal capacities, in partnership. The partnership leased the land from CAT and paid rent for the land.

295 During the 2016 financial year the Armadale property and BP Service Station business were sold. The sale was completed on 11 February 2016 when the balance of the proceeds of the sale were evidently paid into the BW1 account. Thereafter, the Armadale property ceased to be an asset of the FSF. It was not in issue on the appeal that the Armadale property had been an asset of the FSF and the BP Service Station business had been personal property of Mr and Mrs Frigger.

296 On 29 October 2014, the appellants acquired the Hobart property as trustees of the FSF. It was leased to Officeworks. The Hobart property was an asset of the FSF. Rental income from Officeworks was paid into the BW1 account. The Hobart property was sold in 2019 and the balance of the proceeds of the sale were paid into the BW1 account on 29 May 2019. It was not in issue in the appeal that the Hobart property had been an asset of the FSF.

297 We also make the observation that the BW1 account bank statements indicate that the purchases on the Serenity Holdings CommSec account commenced a few days after the proceeds from the sale of the Hobart property ($10,548,597.20) were evidently deposited into that bank account on 29 May 2019. That suggests a causal link between the sale of the Hobart property, as an asset of the FSF, and the acquisition of securities on the Serenity Holdings CommSec account using the proceeds from that sale as assets of the FSF. In the same period (i.e., after 3 June 2019) securities continued to be purchased and sold on the CommSec account held in the personal names of the Mr and Mrs Frigger (i.e., the Main Portfolio). The primary judge observed that use of the Serenity Holdings CommSec account, rather than the CommSec account held in the personal names of Mr and Mrs Frigger for these purchases was not satisfactorily explained by Mrs Frigger or by any other evidence (Liability Judgment at [394]–[398], [403]–[405]).

298 Mrs Frigger was the registered proprietor of the Edward Street property which is commercial land leased to third parties. Rental income from that property was paid into the BW1 account. It was not in issue in the appeal that the Edward Street property was an asset of the FSF.

299 The respondent accepted and the primary judge found that many transactions recorded in the bank statements of the BW1 account were transactions concerning FSF assets. These were in the form of rent received from the Hobart property and Edward Street property. There were also payments out of the account that appeared to be for expenses associated with ownership or maintenance of those properties. Many transactions on the BW1 account also evidently relate to income, costs and expenses of the Residential Properties. Other transactions are evidently dividends received from securities held in the Main Portfolio and sales and purchases of securities in the Main Portfolio.

300 There were many other transactions that were not self-evidently transactions relating to an asset accepted to be a FSF asset or a disputed asset. In respect of these transactions, the primary judge was not satisfied that the transactions and funds relating to them were FSF transactions. Therefore, he was not satisfied that all funds passing through the BW1 account were funds of the FSF. Accordingly, he was not satisfied that BW1 was an account of the FSF (Liability Judgment at [329]–[332]).

301 The respondent accepted and the primary judge found that *all* the funds in the BOQ1 and BOQ2 accounts were derived from funds originally held in the BW1 account (Liability Judgment at [340]). Therefore, if *all* the funds in the BW1 account were FSF funds it would follow that *all* the funds in BOQ1 and BOQ2 would be of the same character unless these were payments made to the appellants as pensions or lump sum payments made to them as members of the FSF.

302 The consequence of the primary judge concluding that the evidence was not sufficient to demonstrate that *all* transactions on the BW1 account were transactions of the FSF was that he was not satisfied that all funds in the BOQ1 and BOQ2 accounts were assets of the FSF (Liability Judgment at [347]).

303 Even if there were evidence by which it was demonstrated that non-self-explanatory transactions recorded in the bank statement of the BW1 account relate to an asset accepted to be an asset of the FSF, or a disputed asset, or otherwise a transaction of the FSF, to demonstrate that *all* funds in BOQ1 and BOQ2 are funds of the FSF it would remain necessary to demonstrate that the Main Portfolio and Residential Properties are also assets of the FSF. That is because many transactions on the BW1 account self-evidently relate to income, costs and expenses of those assets. If they are not assets of the FSF, then clearly not all funds passing through the BW1 account could have been FSF funds.

304 It follows that the key issues in the proceedings were:

(1) whether the evidence established that *all* transactions on the BW1 account were transactions of the FSF;

(2) whether the evidence established that the Main Portfolio was an asset of the FSF; and

(3) whether, the evidence established that the Residential Properties were contributed *in specie* as assets of the FSF.

### Onus of proof

305 In the appellants’ originating application they sought to invoke the jurisdiction of the Court under s 30 of the *Bankruptcy Act*, alternatively s 90-15(3)(a) of Schedule 2 – Insolvency Practice Schedule (Bankruptcy) of that Act, alternatively s 21 of the *FCA Act* as the source of the Court’s power to grant the declarations and make the orders directing the respondent requested in the application. No question arises in this appeal as to whether the Court has power to make orders of the kind sought in the appellants’ originating application (as amended) under one or more of these provisions.

306 Section 90-15(3)(a) of the Bankruptcy Schedule is invoked for the purposes of the appellants’ application to remove the respondent as their trustee in bankruptcy. Section 30 of the *Bankruptcy Act* and s 21 of the *FCA Act* are invoked in support of their applications for declaratory and orders in the nature of injunctive relief.

307 Section 30(1) of the *Bankruptcy Act* provides:

**30 General powers of Courts in bankruptcy**

(1) The Court:

(a) has full power to decide all questions, whether of law or of fact, in any case of bankruptcy or any matter under Part IX, X or XI coming within the cognizance of the Court; and

(b) may make such orders (including declaratory orders and orders granting injunctions or other equitable remedies) as the Court considers necessary for the purposes of carrying out or giving effect to this Act in any such case or matter.

308 The power to make orders under s 30(1)(b) must be exercised for the purposes of carrying out or giving effect to the *Bankruptcy Act* in a particular case. Those purposes are to provide for “appropriation and equitable distribution of the assets of the insolvent debtor, and upon this, the debtor’s release from future liability in respect of his or her existing debts”. In line with these objects and the breadth of the language in s 30(1), the provision is not to be construed narrowly. It extends to the grant of declaratory and injunctive relief to prevent the scheme of the *Bankruptcy Act* from being defeated: *Coshott v Prentice* [2014] FCAFC 88; 221 FCR 450 (***Coshott v Prentice***) at [92]–[94] (Siopis, Katzmann and Perry JJ).

309 Section 34A of the *Bankruptcy Act* provides:

**34A Standard of proof**

(1) Where, in proceedings in the Court (other than proceedings for an offence), it is necessary, for a purpose relating to a matter arising under this Act, to establish, or for the Court to be satisfied as to, a particular fact (including a contravention of this Act), it is sufficient if that fact is established, or the Court is satisfied as to that fact, as the case may be, on the balance of probabilities.

(2) Subsection (1) has effect except to the extent that this Act expressly provides otherwise.

Thus, the appellants carried the onus of proving the facts upon which their claims for declaratory and injunctive relief rested to the extent they relied on s 30 of the *Bankruptcy Act*.

310 Section 21 of the *FCA Act* provides:

**21 Declarations of right**

(1) The Court may, in civil proceedings in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.

(2) A suit is not open to objection on the ground that a declaratory order only is sought.

311 Section 140 of the *Evidence Act* provides:

**140 Civil proceedings: standard of proof**

(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

(a) the nature of the cause of action or defence; and

(b) the nature of the subject matter of the proceeding; and

(c) the gravity of the matters alleged.

312 A party that approaches the Court for declaratory relief bears the onus of proving the facts upon which that party relies for the requested declaration: *Hung v Warner, in the matter of Bellpac Pty Ltd (Receivers and Managers Appointed) (In Liquidation)* [2013] FCAFC 48 at [20]–[32]; see, also,*Jones v Sutherland Shire Council* (1979) 2 NSWLR 206 at 212; *Blanch v British American Tobacco Australia Services Ltd* [2005] NSWSC 241; 62 NSWLR 653 at 655; *Rosenbaum v Baidarman (No 2)* [2021] NSWSC 574 at [291]. Likewise, a party that seeks injunctive relief must prove the facts upon which the injunction is sought. Therefore, the appellants carried the onus of proving the factual foundation for their assertions that the disputed assets were assets of the FSF and, thereby, formed part of their interests in that fund for the purposes of s 116(2)(d)(ii)(A) of the *Bankruptcy Act*.

313 The respondent made no cross-claim in the proceedings by which she sought, in effect, declaratory relief to the effect that the disputed assets vested in her as the trustee in bankruptcy of Mr and Mrs Frigger estates as bankrupts. Or, that the disputed assets were otherwise available for division amongst Mr and Mrs Friggers’ creditors. The respondent also did not defend the appellants’ claims in the proceedings on the footing that the disputed assets had vested in her. She simply required the appellants to prove the factual foundation for the relief sought in the originating application. That is, the respondent made no positive case in the proceedings and put the appellants to proof of theirs. That is understandable in circumstances in which the legal title to the disputed assets was evidently held by Mr Frigger (BOQ1), Mrs Frigger (BOQ2, Como and Bayswater properties) and Mr and Mrs Frigger (Main Portfolio).

314 While in the context of applications under ss 120 and 121 of the *Bankruptcy Act* it is well-established that the trustee in bankruptcy has the overall burden of proving that the transaction is voidable: see e.g., *PT Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515, a bankrupt (or other party asserting the claim) bears the onus of proving that property is not beneficially owned by a bankrupt. In *Coshott v Prentice* in dismissing Mr Coshott’s appeal from findings of the primary judge that a half interest in real property was not held by Mr Coshott in trust for a superannuation fund, the Full Court, after setting out the reasons for considering that there was an absence of evidence to support Mr Coshott’s case, made the following observations which are apposite to this appeal (at [80]–[82]).

[80] We are reinforced in this view by the fact that the onus lay upon the Coshott parties to establish that Robert’s interest was held on trust and that it was within their ability to have led evidence explaining the acknowledgment and passage of moneys through Schlotzsky’s account to purchase the interest which was relied upon in support of that case. In this regard, reliance may properly be placed upon the principle tracing back to the remarks of Lord Mansfield in *Blatch v Archer* (1774) 98 ER 969 at 970 that “all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted”. As Hodgson JA (with whose reasons Beazley JA agreed) explained in *Ho v Powell* (2001) 51 NSWLR 572 at [14]-[15]:

[I]n deciding facts according to the civil standard of proof, the court is dealing with two questions: not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision.

In considering the second question, it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so.

(Citations omitted.)

[81] Thus, where the evidence relied upon by a party bearing the onus of proof does not itself clearly discharge the onus, the failure by that party to call or give evidence that could cast light on a matter in dispute is relevant to determining whether the onus is being discharged: *Hampton Court Ltd v Crooks*(1957) 97 CLR 367 at 371 (Dixon CJ); *Shalhoub v Buchanan* [2004] NSWSC 99 at [71] (Campbell J). This principle is therefore wider than that in *Jones v Dunkel* (1959) 101 CLR 298. As Austin J in *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1 explained at [440], “[w]hereas *Jones v Dunkel* reinforces an inference drawn against the party who has not called evidence, to the effect that the evidence would not have assisted that party’s case, *Blatch v Archer* leads either to the drawing of such an inference, *or to some other assessment of the weight of evidence,* unfavourable to the party against whom the principle is applied” (emphasis added).

[82] In short, the Coshott parties bore the onus of proving the trust over Robert’s interest but failed to call or give evidence explaining the documents and transactions on which they rely. Yet Robert, in particular, was in the best position to explain them. This cannot be ignored when weighing the limited evidence they relied upon to support their case with all the other evidence which tended to undermine it.

315 For reasons we will come to later, there was a similar absence of evidence or explanation (or evidence or explanation from a credible witness) of the documents and transactions pertaining to the disputed assets. We have already noted that the appellants were in the best position to adduce evidence from other witnesses or documentary sources and, in spite of applications to re-open at the trial and for further evidence to be received in this appeal, no material of the kind that one would expect to exist if the disputed assets were genuinely held as assets of the FSF has been produced. The absence of that evidence cannot be ignored when weighing the evidence upon which the appellants relied and the other evidence and inferences available from that evidence which tended to undermine the appellants’ case.

### Errors of fact involving credit

316 We have already referred to the findings of credit against Mrs Frigger: see [83]–[89] above, and the principles of appellate review. The following is appropriate to add at this point concerning central findings made by the primary judge.

317 The primary judge was not bound to accept the evidence of Mrs Frigger even if that evidence was not contradicted by evidence from another source. As noted earlier in these reasons, the primary judge made a number of findings that affected the credit of Mrs Frigger. The primary judge expressed the effect of his conclusions on Mrs Frigger’s credit in the following way (Liability Judgment at [89]):

Nevertheless, for the above reasons, and for others which will appear in the course of discussion of evidence below, I do not accept Mrs Frigger as a witness of truth. That conclusion has a serious impact on the applicants' case, as it was based entirely on her evidence. I cannot accept her evidence as true unless it is supported by independent evidence or the inherent probabilities of the situation. And the fact that Mrs Frigger is not above altering documents she provides to the court impacts on what can be treated as independent evidence. If a document came from the applicants, it must be treated with caution.

318 None of grounds 2, 3, 4 or 5 of the re-amended notice of appeal pleads that the primary judge made any error of fact or law in making his adverse findings of credit against Mrs Frigger. Indeed, the pleas in para 4(e) (ground 3 – BOQ1 and BOQ2) and para 5(e) (ground 4 – Main Portfolio) of the re-amended notice of appeal are predicated on acceptance of the primary judge’s adverse finding of credit concerning Mrs Frigger. There the appellants plead (albeit with understated mischaracterisation of the nature of primary judge’s adverse credit findings):

4(e) [The primary judge’s] adverse credibility finding against Mrs Frigger because she mistakenly typed her name on a St George Bank Account statement (being one of thousands of FSF Financial Records), does not affect or alter the legal and beneficial ownership of BOQ1 and BOQ2.

…

5(e) [The primary judge’s] adverse credibility finding against Mrs Frigger because she added the words “Frigger Super Fund” to Commsec Financial Year Summary for 2018 does not affect or alter the legal and beneficial ownership of the Main Portfolio.

319 Nonetheless, the appellants’ written submissions formally assert that the primary judge made a mixed error of fact and law in finding (Liability Judgment at [51]) that Mrs Frigger knowingly altered documents which she put into evidence in order to create the false impression that the documents supported the appellants’ case. The appellants submitted that the primary judge’s adverse credibility finding was unexplained, or insufficiently explained so as to bring it within an error of fact of the kind referred to in *Fox v Percy*.

320 It is not clear from the grounds of appeal and the appellants’ submissions precisely how principles expressed in *Fox v Percy* at [28]–[29] and *Lee v Lee* at [55] are sought to be invoked.

321 It appears that the appellants contend that the primary judge’s finding as to Mrs Frigger’s credit, and in particular that she knowingly altered the St George Bank account statement and CommSec financial year summary and tendered them in evidence to create the false impression that these documents supported the appellant’s case, was inconsistent with incontrovertible facts or uncontested testimony, glaringly improbable or contrary to the compelling inferences of the case. The appellants’ submissions do not condescend to particularise the incontrovertible facts or uncontested testimony with which it is alleged the primary judge’s conclusions were inconsistent. Nor do they explain how it could be said that his conclusions were glaringly improbable or contrary to the compelling inferences of the case. Otherwise, the appellants relied on the following matters.

(1) It was asserted that Mrs Frigger had tendered separately a correct (unaltered) copy of the St George Bank account statement. Implicitly, that is to negate the inference that Mrs Frigger sought to tender the altered document for the purpose of creating a false impression.

(2) It was asserted that the altered copy of the CommSec financial year summary for 2018 was mischaracterised as share certificate ownership rather than a list of shares. The meaning of that submission is unclear and it was not clarified during the appellants’ oral submissions. It may be a reference to the explanation that Mrs Frigger gave at trial for adding the notation ‘Frigger Super Fund’, which was said to be for the auditor and to identify the securities as assets of the FSF.

(3) It was asserted that the minutes of the trustees meeting of 1 July 2014 were produced after the respondent challenged the effect of the declarations of trust in Ms Trenfield’s affidavit of 22 May 2020. Implicitly, the production at that time for that reason is said to explain the reasons for the appellants not having produced the document at an earlier point in time.

(4) It was asserted the respondent’s counsel obfuscated, apparently during his cross-examination of Mrs Frigger, her explanation that the $80,000 St George Bank term deposit was a personal claim against the liquidator of CAT that had been contributed *in specie* to the FSF. The meaning of that submission is also unclear and it was not clarified during the appellants’ oral submissions.

(5) It was asserted that the primary judge gave no weight to the fact that the respondent had apparently contended in another proceeding involving an unrelated party that a bank account that does not contain the words ‘as trustee for’ or ‘trust’ did not necessarily mean that the funds were not held on trust (citing *Parbery v QNI Metals Pty Ltd* [2020] QSC 143). The point of that submission is unclear.

322 None of these matters disclose appellable error. The primary judge’s reasons reveal that he gave careful and detailed consideration to relevant matters of importance and his conclusions are not ‘glaringly improbable’, ‘contrary to the compelling inferences’ or inconsistent with incontrovertible facts or uncontested testimony.

323 The primary judge did not accept Mrs Frigger’s explanations for the late production of the correct St George Bank account statement or the explanations for the original tender and production of the altered version of the St George Bank account statement. He found them implausible for various reasons (Liability Judgment at [65]–[69]). He also rejected her explanations, in part, based on her demeanour (Liability Judgment at [70]). He also made an adverse finding of credit because Mrs Frigger did not correct the error in the record until forced to do so (Liability Judgment at [71]). There is no error in the primary judge’s reasoning.

324 As to the CommSec financial year summary, it is possible that the appellants’ submissions are making reference Mrs Frigger’s explanation that she added the words ‘Frigger Super Fund’ to “identify the list of shares and its market value for the purpose of satisfying the external audit”. The primary judge rejected her explanation for a number of reasons. It was inconsistent with the documents the respondent had obtained from the auditor which did not contain the notation ‘Frigger Super Fund’ and she was not able to explain the absence of the notation from the documents in the auditor’s possession (Liability Judgment at [77], [81]). She gave an explanation of the manner in which she altered the document which the primary judge found unconvincing (Liability Judgment at [78]). She provided no explanation for the original production and tender of the altered document despite being on notice an explanation was required (Liability Judgment at [82]–[83]). Independently, the primary judge considered that tender of the document affected her credit because she knew it had been altered, but did not say so in her evidence (Liability Judgment at [85]). There is no error in the primary judge’s reasoning.

325 As to the purported minutes of the trustees meeting of 1 July 2014, the primary judge found that document was fabricated for the purposes of use as evidence in the proceedings. The primary judge considered, based on the late production of the document, Mrs Frigger’s answers to questions put to her during cross-examination and her propensity to produce and tender altered documents, that the minutes were fabricated (Liability Judgment at [469]–[471]). The primary judge also relied on his observations of her as a witness (Liability Judgment at [472]). Again, there is no error in the primary judge’s reasoning.

326 As to the $80,000 St George Bank term deposit, Mrs Frigger was cross-examined about a statement she had made in an affidavit filed in the proceedings that resulted in the sequestration orders in which she had said an amount of $80,000 was an asset of the FSF. In a hearing before Colvin J, she sought to resile from that statement and claim that it was a personal asset that could be set-off against the debt that was the subject of the bankruptcy petition. She said her evidence in the proceedings below that her attempt to resile from that statement before Colvin J was a mistake. Therefore, the appellants’ submission concerning the St George Bank term deposit appears to be a reference to her cross-examination and explanations given during her cross-examination on that topic. The primary judge concluded that the upshot of her cross-examination was that it demonstrated that she had a readiness to change what she tells the Court in order to suit what she perceives to be her interest on the particular occasion (Liability Judgment at [86]–[87]). We see no error in that conclusion.

327 As to the respondent’s apparent position regarding the nomenclature of bank accounts in other unrelated proceedings, the primary judge could not be in error for not attributing any weight to a submission the respondent made in unrelated proceedings between unrelated parties on different facts and issues. There is no merit in that submission.

328 It follows that the appellants have not provided any reason for the Court to depart from the primary judge’s adverse findings of credit. In particular, there is no reason that this Court should not approach its review of the grounds of appeal and asserted errors of fact from the perspective that Mrs Frigger was not a witness of truth. Moreover, her evidence on a topic of controversy should not be accepted unless it was supported by independent evidence or the inherent probabilities of the situation.

### Errors of fact involving inference

329 Grounds 2, 3, 4 and 5 of the re-amended notice of appeal contain contentions that the primary judge made errors of fact in failing to draw inferences from information contained in exhibits tendered in evidence that are alleged to have been consistent with the oral evidence of Mrs Frigger and the appellants’ case below.

330 The primary judge made a number of findings of primary facts and also of secondary facts based on inferences drawn from other facts (primary or secondary) that he found to be established on the evidence. The process of drawing inferences is evaluative. None of the grounds of appeal plead that any specific finding of primary or secondary fact which the primary judge made was wrong. In substance, the grounds of appeal challenge the primary judge’s ultimate conclusion that the state of the evidence was such that the appellants had not proven, on the balance of probabilities, that the disputed assets were assets of the FSF. More specifically, the primary judge failed to draw the inference from other established facts that the appellants had formed the intention and taken all necessary steps to give legal effect to transactions that rendered the disputed assets held on trust for the benefit of the members of the FSF as a regulated SMSF. In the review of such findings the advantage of the primary judge here was, at the very least, that which was described by Kirby J in *Earthline* at [89]–[91] and adopted by Gleeson CJ, Gummow J and Kirby J in *Fox v Percy*, to which we have referred.

331 Having due regard to the self-representation of the appellants, there remain significant difficulties in identifying in the pleaded grounds of appeal any asserted appellable error of fact of the primary judge. The pleaded grounds are largely an invitation to rehear the trial at first instance and reach a different conclusion to the primary judge on the same evidence. As we have said, the primary judge had a real advantage in having the case unfold before him and the opportunity to deal with the mass of material before him over time as it came forward. The appellants’ submissions primarily consisted of strongly expressed disagreement with the conclusions of the primary judge on a long list of factual findings. Ultimately, the appellants’ grounds and submissions boil down to an assertion that the primary judge was wrong for failing to draw the ultimate inferences in favour of finding that the disputed assets were assets of the FSF.

332 In the context of matters raised in this appeal, it is also important to keep in mind that inference is to be distinguished from conjecture or speculation. “There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture”: *Caswell v Powell Duffryn Associated Collieries*[1940] AC 152 at 169–170 (per Wright LJ). See also *Hawkins v Powells Tillery Steam Coal Co Ltd* [1911] 1 KB 988 at 991–992 (per Cozens-Hardy MR) at 995 (per Fletcher Moulton LJ) at 996 (per Buckley LJ). In that case Buckley LJ said at 996–997:

When it is said that a person who comes to the Court for relief must prove his case, it is never meant that he must prove it with absolute certainty. No fact can be proved in this world with absolute certainty. All that can be done is to adduce such evidence as that the mind of a tribunal is satisfied that the fact is so. This may be done either by direct evidence or by inference from facts. But the matter must not be left to rest in surmise, conjecture or guess. Here there was no evidence to prove that this man's death resulted from an accident arising out of and in the cause of his employment. It may have so resulted or it may have resulted from a different course. According to the medical evidence wind in the stomach would produce the belching from which the man suffered at the time; that may have produced such pressure upon the heart as to lead to a fatal result. That was one possible cause. The exertion arising from the employment was another possible cause. It is not enough to say that the latter is a possible cause. It must be established to my satisfaction that it was the cause. Is it proved, that is to say, is it established to my satisfaction by facts which are given in evidence, that the death of a man resulted from the employment? In my opinion there is no evidence to prove it. It is simply a guess. I might guess that it came from it, when after all it came from something else. That will not do; the applicant must prove her case.

See, also, *Holloway v McFeeters*(1956) 94 CLR 470 (***Holloway v McFeeters***) at 476-477, 480-481.

333 In *Cummins v Cummins*, where a bankrupt’s trustees in bankruptcy sought to prove, by inference from established facts, that the bankrupt’s ‘main purpose’ in making a transfer of property fell within one of the purposes proscribed under s 121(1) of the *Bankruptcy Act* and, as such, the transfer was void, the High Court said (at [34]) (citations omitted):

What had been required for the Trustees to succeed at trial was that the circumstances appearing in the evidence gave rise to a reasonable and definite inference, not merely to conflicting inferences of equal degree of probability, that, in making the August transactions, Mr Cummins had the "main purpose" required by the statute. …

334 It follows that to succeed in this appeal the appellants must demonstrate that the circumstances appearing in the evidence gave rise to a reasonable and definite inference, not merely to conflicting inferences of equal degree of probability, that the appellants, as trustees of the FSF, had formed the intention and taken such actions as were necessary to render disputed assets held in the personal name of Mr Frigger or Mrs Frigger or both assets of the FSF. Further, the state of the evidence before the primary judge must be such that this Court is not merely inclined to the view that such a reasonable and definite inference was open, but that the primary judge was ‘wrong’ not to draw it.

### The primary judge’s approach to intention to create trusts

335 Grounds 2–5 of the re-amended notice of appeal and the appellants’ submissions raise a number of asserted errors of the primary judge relating to what the appellants contend was their case below and what findings of fact the primary judge should have made in reliance on inferences to be drawn from documents. The documents largely concerned financial statements (balance sheets) and tax returns of the FSF read with bank statements and CommSec financial years summarise of trading activities.

336 The starting point for the appellants’ contentions is an assertion that the primary judge was wrong to embark on a consideration of whether or not there was evidence of an objective manifestation of an intention to create a trust over the funds in the BW1, BOQ1 and BOQ2 accounts and the securities in the Main Portfolio (CommSec account). The appellants contend that their case before the primary judge was that the funds in the BW1 account were income from assets of the FSF. The trustees made a decision to transfer that income to the FSF accumulation account in the exercise of the power in cl 19 of the FSF Trust Deed (we note the power is more accurately identified as the power in cl 20.4) and that capitalised income was used to make further investments of the FSF. The income (interest, rent, dividends and realised capital gains) was said to be derived from the BW1 account, the Armadale, Hobart, Edward Street, Como and Bayswater properties and securities of the Main Portfolio. The appellants contend that there was no need for the primary judge to consider if there were an objective manifestation of an intention to create a trust over the assets in question because the funds from which they were derived were already held in trust on the terms of the FSF Trust Deed.

337 We do not consider that the primary judge misunderstood the manner in which the appellants put their case at trial. The primary judge observed that the appellants’ case involved an allegation that the money in the BOQ1 and BOQ2 accounts was derived from income earned from FSF assets and it was the respondent who had submitted that it was necessary for the appellants to demonstrate an objective manifestation of an intention to hold the funds on trust on the terms of the FSF (Liability Judgment at [29]–[30]). However, the primary judge considered that it was necessary for the appellants to demonstrate an objective manifestation of an intention that the funds in the accounts were held as part of their interests in the FSF as a regulated superannuation fund (Liability Judgment at [31]). Similarly, the appellants had to establish (by evidence) that the securities in the Main Portfolio were assets of the FSF (Liability Judgment at [34]).

338 Regarding the BW1 account, the primary judge considered the question of whether the BW1 account was an asset of the FSF was relevant to the question of whether or not the disputed assets were also assets of the FSF (Liability Judgment at [211]). The primary judge understood that the appellants’ case turned on undertaking a ‘tracing’ exercise and that exercise involved identifying that funds of the FSF were paid into the BW1 account and paid into the BOQ1 account or used to acquire securities in the Main Portfolio (Liability Judgment at [212]–[215]). That required the appellant to demonstrate that *all* funds in the BW1 account during the relevant period were funds of the FSF. That could be achieved by proving that all inflows of funds were income derived from FSF assets or by proving that the funds in the BW1 account were an asset of the FSF. That is, there was an objective manifestation of an intention to hold *all* funds in the BW1 account in trust for the co-trustees of the FSF. If so, it would provide a more ready basis for an inference to arise that one asset substituted for another was intended to remain property of the FSF. Thus, the primary judge observed (Liability Judgment at [215]):

… in practice both parties conducted their case on the basis that if BW1 was found to be a trust asset, that would be relevant to determining the ownership of the funds which flowed from that account and ultimately into BOQ1. That is consistent with the principles I have summarised above as to when the court may infer the intention necessary for a trust to arise.

339 While the primary judge rejected the application of the formal rules of tracing to the appellants' case, he accepted that “the concept of tracing described in *Foskett v McKeown* may provide useful guidance for assessing that factual contention” (Liability Judgment at [213]–[214]). The primary judge also accepted that “if a trustee exchanges one asset for another, an intention that the latter asset is subject to the relevant trust may be more readily inferred” (Liability Judgment at [215]). Therefore, the primary judge accepted, in substance, that it was open to the appellants to demonstrate the factual foundation for their case on the basis for which they contended.

340 The primary judge considered that it is necessary to demonstrate an objective manifestation of an intention to create a trust to establish that a trust over property has been created (Liability Judgment at [96]–[104]). Further, necessary intention may be established from clear inference (Liability Judgment at [103]). Although these principles relate to the creation of a trust, his Honour considered the principles equally applicable to the question of whether assets have become subject to an existing trust (Liability Judgment at [105], [115]). The primary judge accepted that such an intention may be inferred from circumstances, but it needed to be manifested in “some outwardly observable way” (Liability Judgment at [106]–[115]).

341 The primary judge then observed (Liability Judgment at [120]–[121]):

[120] While the question of whether the applicants hold the disputed assets on trust is an important one, it is not the ultimate question raised by the applicants' claims. As I have said at [23] above, the applicants do not seek any declaration that the assets are 'property held by the bankrupt in trust for another person' within the meaning of s 116(2)(a) of the *Bankruptcy Act*, and I have also referred to the difficulties that cases such as *Boensch v Pascoe* would pose if the applicants did attempt to seek such a declaration. The ultimate question is whether the applicants' interests in the assets are part of their interests in a regulated superannuation fund for the purposes of s 116(2)(d)(iii)(A) of that Act.

[121] Whether the FSF is a regulated superannuation fund, and whether the applicants have an interest in it, is considered below. But the truly contentious issue is whether the disputed assets are assets *of that fund*. On the case put by the applicants, only then will the applicants' interests in them be protected from the claims of the creditors of the bankrupt estates. For a superannuation fund which has been administered with attention to formalities and the requirements of the SIS Act and SIS Regulations, this last logical step may be uncontentious or even assumed. But as will be seen, the FSF has not been administered in that way.

342 While it is fair to say that the primary judge’s reasons focused on the extent to which the evidence established an objective manifestation of an intention to create a trust over or contribute to a trust the funds held in the BW1, BOQ1 and BOQ2 accounts, the securities held in the Main Portfolio and the Residential Properties (Liability Judgment at [135]–[196]), it was not, by any means, the only consideration to which he had regard. The primary judge also considered the extent to which an inference may be drawn from surrounding circumstances, particularly in circumstances of a family arrangement, that *all* funds in the bank accounts were intended to be funds of the FSF and *all* securities in the Main Portfolio were intended to be assets of the FSF (Liability Judgment at [148]–[154]). The primary judge also considered the extent to which funds or assets may be traced into funds or assets that were accepted to be or were established as funds or assets of the FSF (Liability Judgment at [211]–[215], [282]–[325], [329]–[331]).

343 The primary judge did not approach the forensic task from the perspective that the appellants could only succeed if they were able to establish an objective manifestation of an intention to create a specific trust over the BW1, BOQ1 and BOQ2 accounts or the Main Portfolio or contribute them to the FSF *in specie* before their bankruptcy. The primary judge considered the substance of the appellants’ case and the extent to which there was objective evidence that the funds in the BW1 account were funds of the FSF and, to the extent they were, if those funds could be traced into the BOQ1 and BOQ2 accounts and securities in the Main Portfolio.

344 It was in his consideration of the evidence that the primary judge concluded that the appellants had failed to establish the factual foundation for the relief claimed.

### Record keeping obligations of SMSF trustees

345 The sequestration orders were made on 20 July 2018. However, the primary judge found that the relevant act of bankruptcy occurred on 8 November 2017. Accordingly, that was the date of commencement of the bankruptcy and the date at which the property of the appellants that is divisible amongst the creditors of their bankrupt estates is to be determined (Liability Judgment at [136]–[140]). That finding was unchallenged on appeal.

346 The question of whether BW1, BOQ1 and BOQ2 accounts and the Main Portfolio were assets of the FSF arose in the first instance because the legal title to those assets was not held in the name of all of the co-trustees of the FSF at the date of bankruptcy or sequestration orders. The BW1 account was evidently opened in and held in the name of Mrs Frigger. The BOQ1 account was opened in the name of Mr Frigger. The BOQ2 account was opened in the name of Mrs Frigger. The Main Portfolio was opened and held in the joint names of Mr and Mrs Frigger. None of these accounts had an account designation ‘ATF the Frigger Superannuation Fund’ or similar as is typical when accounts are opened with financial institutions by a person acting in a trustee capacity. Mrs Frigger was also the registered proprietor and holder of the legal title to the Como and Bayswater properties.

347 In these circumstances the appellants plainly carried the onus of proving that, notwithstanding the legal title to the assets was held by one or both of Mr and Mrs Frigger, the asset was held for the benefit of the members of the FSF. Due to the record keeping obligations of trustees of a SMSF under the *SIS Act* and *SIS Regulations*, it is to be expected that if the disputed assets were genuinely assets of the FSF, the records of the trustees would contain evidence of decisions of the trustees and transactions entered into before 8 November 2017 and 20 July 2018 and other records identifying them as assets of the FSF.

348 As to this context and these requirements, the primary judge made the following observations with which we agree (Liability Judgment at [148]–[156]).

[148] The disputed assets are all assets which are capable of being acquired, held and disposed of for investment purposes, such as cash deposited in high interest bank accounts, listed shares and other securities, and commercial and residential real property which is leased to rent-paying tenants (although, as mentioned, the first respondent alleges that any purported contribution of the Residential Properties to the FSF entailed certain contraventions of the SIS Act).

[149] It will be seen that, to a significant extent, the dealings that surround the FSF meet Gummow J's description in *Herdegen* at 278 of 'private family dealings where some imprecision of thought and expression might perhaps be expected', and also to 'a pattern of business dealings each in legal form intended to follow those before it, with a resulting abbreviation in attention to detail'. If allowance is made for the private and family context of the FSF, that could make it easier for the court to discern the existence of a trust over disputed assets, despite the lack of formalities.

[150] Against that, however, is the reality that, family dealings or not, the trust in question was situated in a complex and prescriptive web of laws intended to regulate matters such as the concessional tax treatment of superannuation contributions and income. This tends to speak against finding that assets were part of a trust: cp. *Herdegen* at 278. That is because in the context of that web of rules a failure to observe formalities, or even to express informally an intention to include an asset in a trust, supports an inference that the necessary intention was absent. Although the SIS Act does not displace any of the rules relating to the creation of trusts, its prescriptions enable complying regulated superfunds to obtain concessional tax benefits. Hence, one would expect a trust which has been purportedly created to obtain those tax benefits to comply with the rules which enable that to occur. A failure on the part of the relevant parties to comply with the rules may support the inference that no trust was thereby intended at all. That is all the more so where, as here, at least one of the putative trustees, Mrs Frigger, is a qualified accountant who holds herself out as having detailed knowledge of the relevant laws. While the 'family' nature of the FSF may lead the court to be less strict about any formalities required for an asset to be held on trust, the regulated nature of the FSF points away from any such relaxation of those requirements.

[151] For example, s 34(1) of the SIS Act provides that each trustee of a superannuation entity must ensure that the prescribed standards applicable to the operation of the entity are complied with at all times. Section 31(1) permits the SIS Regulations to prescribe standards applicable to the operation of regulated superannuation funds and to trustees of those funds. Regulation 4.09A(2) contains the following prescribed standard:

A trustee of a regulated superannuation fund that is a self managed superannuation fund must keep the money and other assets of the fund separate from any money and assets, respectively:

(a) that are held by the trustee personally; or

(b) that are money or assets, as the case may be, of a standard employer-sponsor, or an associate of a standard employer-sponsor, of the fund.

This standard is also reflected in s 52(2)(g) of the SIS Act, which effectively implies into the FSF Deed a covenant to the same effect: see s 52(1).

[152] It may be expected that the trustees of an SMSF wishing to comply with this requirement will be careful to ensure that any assets that are part of the fund are clearly identified as such. They would take steps to ensure that formal records of their ownership of fund assets note the trustee capacity in which they held the assets. They would not hold fund assets in the name of only one of the trustees where the trustees are individuals who are likely also to hold assets in a personal (non-trustee) capacity. And yet, almost without exception, assets said to be part of the FSF lack such clear identification, or any identification, as trust assets. Significant assets are held in the name of one or the other of the individual trustees only. Those circumstances tend to indicate that they are not FSF assets at all.

[153] In the same vein, Mrs Frigger gave evidence that in managing and administering the FSF, she used certain guides published by the ATO. One of the guides she annexed, titled 'Ownership and protection of assets' contained the following passages (ACTF 18 p 131):

You need to manage your fund's investments separately from the personal or business investments of members, including your own. This includes ensuring the fund has clear ownership of its investment assets.

…

To protect fund assets in the event of a creditor dispute, and prevent costly legal action to prove who owns them, assets should be recorded in a way that:

* distinguishes them from your personal or business assets
* clearly shows legal ownership by the fund.

Fund assets (other than money) should be held in the name of either:

* the individual trustees 'as trustees for' the fund
* the corporate trustee 'as trustee for' the fund.

The assets can't be held in the name of a trustee or a member as an individual.

…

An unavoidable restriction (such as state law) may prevent your SMSF from holding assets using the fund's name.

If assets cannot be held in the fund's name, ownership by the fund must be clearly established. You can do this by executing a caveat, or creating an instrument or declaration of trust to enable the fund to assert its ownership.

If possible, documents such as sale agreements should be executed in the name of the trustees 'as trustees for' the fund.

[154] As will be seen, this guide largely describes what the applicants *have not* done in relation to the disputed assets. They have not observed the guidelines about clearly distinguishing assets from personal assets and recording the legal ownership of the fund. There is no evidence of them having recorded ownership in their capacity as trustees of the FSF at any time before the making of the sequestration order. They have not executed any instruments that clearly enable the fund to assert its ownership. The only formal instruments of any kind in relation to disputed assets are the 2014 Declarations over the Residential Properties and, as will be described, they are ambiguous and their effect is contestable. That the applicants did not comply with these guidelines supports an inference that the disputed assets were not part of the FSF.

[155] I am conscious that the necessary manifestation of intention can be inherently difficult to prove, especially when dealings go back many years. An inability to prove that words were spoken does not necessarily support a firm finding that the words were not in fact spoken. But it is significant that in this case, apart from the 2014 Declarations, and some internet banking 'nicknames' which I will come to, the applicants have not pointed to any verbal statements of any kind, written or spoken, formal or informal, *expressing* an intention that the disputed assets be part of the FSF at relevant times. Their case is largely based on assertions in affidavits by Mrs Frigger of the existence of the necessary intention, and circumstantial evidence from which intention can (they say) be inferred.

[156] As an example of that circumstantial evidence, Mrs Frigger's affidavit ACTF 2 sworn 8 May 2019 (para 5) refers to adverse tax consequences which would follow if the funds in BOQ1 were not part of the FSF and implicitly points to the improbability that '[m]y husband and I, both as trustees of the FSF and in our personal capacities have effectively lied in hundreds of income tax returns and annual returns since 1997 in relation to assets and income'. For reasons which should be obvious by now, that appeal to the court's belief in the honesty of Mrs Frigger, at least, is not persuasive.

### Duties and powers of SMSF trustees

349 Although a self-managed superannuation fund is regulated under and affected by the provisions of the *SIS Act*, *SIS Regulations*and the *ITAA 1997*, it is, nonetheless, a form of trust. The FSF has a trust deed, trustees, trust property and beneficiaries (members). The trusts created for the purposes of the superannuation legislation are also regulated by the *Trustees Act* and the general principles of law applicable to trusts to the extent these laws are not inconsistent with the superannuation legislation.

350 The FSF Trust Deed created the FSF as a self-managed superannuation fund for the purposes of the superannuation legislation. Serenity Holdings Pty Ltd (later Computer Accounting and Taxation Pty Ltd or CAT) was appointed trustee of the FSF. CAT was placed into liquidation in 2010. The evidence regarding any changes and appointments of new trustees was not clear, but, nonetheless, as noted earlier in these reasons, the primary judge made findings (not challenged in this appeal) (Liability Judgment at [196]) to the effect that Mr and Mrs Frigger were trustees from early 2008 until 21 July 2018. For part of that period, from at least 6 July 2016 until 21 July 2018, Mr Michael Frigger and Mrs Jessica Frigger were also trustees. That is, from at least 6 July 2016 until 21 July 2018 there were four trustees of the FSF. H & A Frigger Pty Ltd (or HAF) was appointed sole trustee on 21 July 2018 and remained the sole trustee until 15 April 2020. On 15 April 2020, Mr & Mrs Frigger, Mr Michael Frigger and Ms Jessica Frigger were again appointed co-trustees and HAF retired.

351 The significance of the primary judge’s findings concerning the individuals who were trustees of the FSF is that at all material times up to 20 July 2018 (the date of the sequestration orders) the trustees of the FSF were either Mr and Mrs Frigger, as co-trustees, or Mr and Mrs Frigger, Mr Michael Frigger and Ms Jessica Frigger, as co-trustees.

352 Decisions of co-trustees must be unanimous: *Luke v South Kensington Hotel Co* (1879) LR 11 Ch D 121 at 125. In the case of *In the Estate of William Just (deceased) (No 1)* (1973) 7 SASR 508 (***Estate******of Just***), where money had been paid into a bank account held in the name of one of two co-trustees, Jacobs J said (at 513–514):

… In the case of co-trustees of a private trust, the office is a joint one. Where the administration of the trust is vested in co-trustees, they all form, as it were, but one collective trustee and therefore must execute the duties of the office in their joint capacity. Sometimes, one of several trustees is spoken of as the active trustee, but the court knows of no such distinction: all who accept the office are in the eyes of the law active trustees. If anyone refuses or is incapable to join, it is not competent for the other to proceed without him, and if for any reason they are unable to appoint a new trustee in his place, the administration of the trust must devolve upon the court. Though a trustee joining in a receipt may be safe in permitting his co-trustee to receive in the first instance, yet he will not be justified in allowing the money to remain in his hands longer than reasonably necessary. The proper course is to pay trust money into a joint bank account in the names of both or all the trustees. …

353 In general, a trustee must discharge the duties and exercise the powers of trustee personally. Where there are co-trustees, in the absence of unanimous agreement, actions taken independently of the other co-trustees lack authority and do not bind all trustees: see, e.g., *Lee v Sankey* (1872) LR 15 Eq 204 at 211; *Astbury v Astbury* [1898] 2 Ch 111 at 115–116; *Pelham v Pelham & Braybrook* [1955] SASR 53 at 57. A co-trustee is not and cannot be bound by a decision of the majority and each co-trustee must turn his or her mind to the exercise of the applicable power and decide on the action to be taken: see, e.g., *Cock v Smith* (1909) 9 CLR 773 at 800; *Re Billington* [1949] St R 102 at 111, 115.

354 As the authors of Ford and Lee: *The Law of Trusts*(looseleaf at 13 February 2020, Thomson Reuters) (**Ford and Lee**) observe (at [9.11090]): “A consequence of the unanimity rule is that trust business cannot be transacted except at a meeting at which all the trustees, or their delegates, are present; and that where the trustees cannot agree about a course of action the status quo prevails.” In the case of a regulated superannuation fund, if the superannuation entity has a group of individual trustees, the trustees must keep, and retain for at least 10 years, minutes of all meetings of the trustees at which matters affecting the entity were considered: s 103(1) *SIS Act*.

355 It may also be possible for co-trustees to ratify an action taken by another trustee without prior agreement: *Meeseena v Carr* (1870) LR 9 Eq 260 at 262–263; *Hansard v Hansard* [2015] 2 NZLR 158 (***Hansard v Hansard***) at [47] citing Thomas Lewin and others, *Lewin on Trusts*(18th Ed, Sweet & Maxwell 2018) at [29-209]. However, for ratification to be effective, the ratifying co-trustee(s) must know of the essential detail of the act or decision in question. It must be more than passive acquiescence to a decision made by another trustee. The act of ratification must show that the co-trustee(s) considered the exercise of power as trustee and consented to the action taken. Thus, “[s]ubsequent approval of financial statements [by all trustees] may therefore not be sufficient to amount to ratification of actions taken without the unanimous approval of trustees”: *Hansard v Hansard* at [51]. Something more than mere approval of financial statements would be necessary to demonstrate the required ‘act of ratification’.

356 Property of the trust must be held jointly and it is a breach of the trustees’ duties not to ‘get in’ the trust property and hold the legal (or where applicable equitable) title to that property jointly or otherwise hold the property under joint control: *Lewis v Nobbs*(1878) 8 Ch D 591 (***Lewis v Nobbs***) at 594; *Guazzi v Pateson* (1918) 18 SR (NSW) 275 at 282. As Hall VC explained in *Lewis v Nobbs*, the rationale for the duty is to ensure that trust property is not dealt with improperly by one of the co-trustees or without the agreement of all co-trustees.

357 Clause 140 of the FSF Trust Deed required the trustees of the FSF to ensure that money received by the fund was, amongst other things, deposited to the credit of the fund in an account kept with a bank chosen by the trustees. That is, chosen by the co-trustees by unanimous agreement.

358 While there may be circumstances in which property is conveyed to, or acquired, by one of a number of co-trustees as trust property with the consent of the other trustees, it remains the duty of all trustees to ensure that title to the property is ultimately convey to and held by all co-trustees jointly within a reasonable time thereafter: *Estate of Just* at 513–514. Any inconvenience that might result from the changing composition of the co-trustees from time to time does not absolve the trustees of that duty: see, e.g., *Trustees of the Kean Memorial Trust Fund v Attorney-General (SA)* [2003] SASC 227; 86 SASR 449 at [94].

359 Further, in the absence of an express provision permitting mixing, it is also a duty of a trustee to keep personal and trust property separated: *Associated Alloys*at 605 [34]. A trustee has a positive duty “to distinguish the piece of property he … acquires from other similar things which he may obtain for himself or in which he may be interested”: *Van Rassel v Kroon* (1953) 87 CLR 298 at 302–303 (Dixon CJ); Heydon and Leeming, *Jacob’s Law of Trusts in Australia* (8th ed, LexisNexis, 2016) at [17-02]. It is also trite that a trustee cannot unilaterally repudiate the trust and appropriate the trust property: Ford and Lee (looseleaf as at 14 May 2021) at [17.4530].

360 A co-trustee is obliged, as part of the duty to get in trust property, to bring proprietary claims against another trustee who, in breach of trust, has misappropriated or mixed trust property with his or her own property. Likewise, a trustee who has participated in such a breach of trust has an obligation, notwithstanding his or her own wrongdoing, to make good the trust property and, if necessary, to institute proceedings against other trustees who participated in the wrongdoing to make good the loss: *Young v Murphy* [1996] 1 VR 279 at 282–284, (per Brooking J), 300 (per Phillips J), 319 (per Batt J).

361 The above principles have significance in this appeal because the evidence before the primary judge was to the effect that Mrs Frigger alone held the legal title to the funds in the BW1 and BOQ2 accounts, Mr Frigger alone held the legal title to the funds in the BOQ1 account and Mr and Mrs Frigger jointly held the legal title to the securities in the Main Portfolio. Also, Mrs Frigger held the legal title to the Como and Bayswater properties. Therefore, the legal title to the disputed assets was not held by the co-trustees of the FSF jointly immediately before the sequestration orders were made or by the sole trustee of the FSF (H & A Frigger) immediately after the sequestration orders were made. There was no evidence before the primary judge that any of the individual co-trustees had taken any steps at any time to ‘get in’ the trust property and have funds held in a bank account in the joint names of the four individual trustees (or HAF), to transfer the securities in the Main Account into a CHESS holding account held in the joint names of the four individual trustees (or HAF), or to transfer the Como and Bayswater properties into the joint names of the four individual trustees (or HAF).

362 Likewise, with the exception of a purported minute of meeting of the four individual trustees said to have been held on 1 July 2014, which the primary judge rejected as a fabrication, there was no evidence of any meetings of the individual co-trustees at which unanimous decisions were made to take steps to authorise the use of bank accounts in the names of individual trustees, to hold funds of the FSF or the use of the CommSec account in the joint names of Mr and Mrs Frigger to hold securities of the FSF. Nor was there any evidence of any meetings at which a unanimous decision was made to the effect that rent from the Armadale, Hobart, Edward Street, Como and Bayswater properties was to be paid into the BW1 account held in Mrs Frigger’s individual name. Similarly, there was no evidence of any meetings at which a unanimous decision was made to the effect that dividends and the proceeds from sales of securities held in the Main Portfolio were permitted to be paid into the BW1 account and the purchase price of securities acquired for the Main Portfolio withdrawn from the BW1 account. There was no evidence of any meetings at which a unanimous decision was made by all trustees to approve the financial statements and tax returns of the FSF. Thus, there was no evidence of any act of ratification of any actions taken by Mrs Frigger or Mr Frigger in respect of the operation of the BW1, BOQ1 and BOQ2 accounts or CommSec account by all co-trustees.

363 Insofar as H & A Frigger is concerned, there was no evidence of any meetings of directors of that company. By cl 4 of the FSF Trust Deed, HAF was obliged to make decisions under the FSF Trust Deed by resolution of the directors of that company. HAF was obliged to keep and retain for at least 10 years, minutes of all meetings of the directors at which matters affecting the FSF were considered: s 103(2)(a) *SIS Act*.

364 Further, while it may be possible for a trustee to delegate the performance of actions or functions to an agent and cl 126 of the FSF Trust Deed contains an express power of the trustee to delegate “any power or duty on any terms the trustee thinks fit”, where the trustee is a group of individuals, the power of delegation must be exercised by the unanimous agreement of all co-trustees. There was no evidence that the power of delegation had been exercised unanimously or at all to confer any powers of management or control on Mr Frigger or Mrs Frigger in respect of the BW1, BOQ1 and BOQ2 accounts, the CommSec account or the Residential properties.

365 It follows from the above that there was no evidence of decisions or acts of the trustees of the FSF that one would expect to exist if the trustees had performed their duties and the disputed assets were genuinely assets of the FSF. There was a complete absence of evidence of any unanimous decisions of the trustees to enter into the transactions that are summarised in the financial statements that were in evidence or to permit the disputed assets to be held by individual trustees. In short, there was no evidence of any ‘act in the world’ performed by any person for or on behalf of the trustees before the sequestration orders were made that is consistent with the appellants’ case. The appellants made no attempt to bridge that gap in the evidence upon their unsuccessful applications to re-open before the primary judge or in the extensive application for the Court to receive further evidence in this appeal.

### Tracing

366 In this appeal, in effect, the appellants seek to side-step the absence of evidence of compliance with trustee duties by contending that the co-trustees were not under any obligation to hold assets jointly, that the funds in the BOQ1 and BOQ2 accounts and securities in the Main Portfolio could be ‘traced’ to income derived from assets of the FSF and that income was accumulated in the exercise of the power in cl 19 of the FSF Trust Deed.

367 The contention that the trustees of the FSF were not obliged to hold trust assets jointly is wrong for the reasons we have already given. Leaving to one side that problem, the substance of the appellants’ submission is that the Court should ignore any failures to comply with the duties of a trustee of a regulated SMSF and focus on whether specific property *now* held in the names of Mr Frigger, or Mrs Frigger, or both Mr and Mrs Frigger is property in which the members of the FSF have an equitable proprietary interest. The effect of the appellants’ submission is that the disputed assets are ultimately held in trust for the benefit of the members of the FSF and, implicitly that, Mr and Mrs Frigger have obligations, as trustees, to convey the legal title to that property to all co-trustees of the FSF.

368 The primary judge made the observation that the appellants had not relied on s 116(2)(a) of the *Bankruptcy Act* which provides that ‘property held by the bankrupt in trust for another person’ is not divisible amongst the bankrupt’s creditors (Liability Judgment at [23], [120]). That observation appears to have informed, in part, the primary judge’s approach to the ‘tracing’ exercise the appellants advanced at the time.

369 The primary judge observed (Liability Judgment at [213], [317]), ‘tracing’ is means of identifying property of a claimant. It is neither a right nor a remedy, but a process by which a claimant demonstrates what has happened to the claimant’s property. It is a preliminary to a personal or proprietary claim in respect of the property identified: *Foskett v McKeown* [2001] 1 AC 102 (***Foskett v McKeown***) at 128; *Evans v European Bank Ltd* [2004] NSWCA 82; 61 NSWLR 75 at [132]–[139]; *Heperu Pty Ltd v Belle* [2009] NSWCA 252; 76 NSWLR 230 at [89]. The primary judge considered the appellants’ reliance on these principles to be misconceived because they apply in circumstances of misappropriation or other wrongdoing and, in this case, no claim or remedy for wrongdoing was sought in the proceedings. Nonetheless, the primary judge applied the concept of tracing to the evidence in a ‘non-technical’ sense and accepted that that tracing principle may provide useful guidance for assessing the appellants’ factual contentions (Liability Judgment at [214]).

370 In *Frigger (No 6)* an application by the respondent to join Mr and Mrs Frigger and Mr Michael Frigger and Ms Jessica Frigger as respondents to the proceedings in their capacities as trustees of the FSF was dismissed, but, insofar as Mr and Mrs Frigger were concerned, the originating application was to be amended such that they sued both in their personal capacities, as bankrupts, and in their representative capacities, as trustees of the FSF. H & A Frigger was also joined as a respondent, as trustee of the FSF.

371 The appellants sought declarations to the effect that disputed assets were held in the FSF on trust for the beneficiaries (members) of that fund. Therefore, those declarations may be considered to have been sought, in part, as trustees, in substance, against themselves as individuals. In that context and in circumstances in which the trustees were duty-bound to ‘get in’ trust property, we are not so sure that the absence of a formal claim against Mr and Mrs Frigger for some form of restitution of ‘trust property’ renders the formal tracing rules referred to in *Foskett v McKeown* inapplicable.

372 If it were possible to identify specific property in which the members of the FSF have a beneficial interest that was held by Mr Frigger, Mrs Frigger or both Mr and Mrs Frigger, as at the date of their bankruptcy or the sequestration orders, in breach of their duties as trustees of the FSF to hold those assets jointly with all co-trustees, we would not have much hesitation in concluding that the property in question formed part of the property of the regulated superannuation fund in which the appellants have an interest. Mr and Mrs Frigger would remain duty bound to restore that property to the current co-trustees of the FSF. It is a proprietary claim not a personal claim that would support declarations and orders of the kind requested in the amended originating application.

373 However, ‘tracing’ is a factual enquiry whether or not undertaken in support of a proprietary claim. It requires evidence. It involves demonstrating causal or transactional links from the original property to the property now said to be a substitute for the original property. It does not necessarily require that one asset is ‘substituted’ directly for another. In the process of demonstrating causal or transaction links “common sense and reasonable inference play their part”: *Toksoz v Westpac Banking Corporation* [2012] NSWCA 199; 289 ALR 577 at [7]–[10]. See, also, J Edelman, ‘Understanding Tracing Rules’ (2016) 16 *QUT Law Review* 1 at 7–11; *Goldus Pty Ltd (Subject to a Deed of Company Arrangement) v Cummins (No 4)* [2021] FCA 1095; 157 ACSR 118 at [265]–[283].

374 The process of tracing funds (property) through bank accounts involving numerous transactions over many years can be complex and costly. It is usually undertaken with the assistance of a forensic accountant and evidence is given about the transactions underlying the entries in the bank statements and the links between those entries, such that the links between the claimant’s original property and the putative substitute property are proven. Sometimes it is not possible to identify the links and the property cannot be traced into and out of a bank account. Whatever the case may be, it necessary for there to be evidence to establish the transactional or causal links.

375 In this case, whatever view is taken about the applicability of the rules of tracing referred to in *Foskett v McKeown*, the primary judge approached the evidence to ascertain whether, as a matter of fact, the funds in the BOQ1 account and the securities in the Main Portfolio could be ‘traced’ by evidence and causative links between the various transactions recorded in the account statements. The primary judge was not satisfied, on the evidence, that it was possible to undertake that tracing exercise (Liability Judgment at [282]–[319], [340], [393]–[406]). The appellants contend in the appeal that the primary judge erred for failing to be so satisfied. The appellants’ contentions in that respect are considered below, however, no error has been demonstrated in the primary judge’s approach to the factual ‘tracing’ enquiry that he undertook.

376 We now turn to consider the nature of the evidence before the primary judge and what, if any, inferences were available to be drawn from ‘independent’ evidence that were consistent with the appellants’ case and Mrs Frigger’s evidence.

### Evidence of FSF financial records

377 Mrs Frigger gave evidence to the effect that, from inception, the FSF was audited by independent auditors. A copy of an audit report of Mr Mark Baghdassarian of Just SMSF Audits for the 2016 financial year, dated 11 January 2019, was an exhibit to her affidavit of 6 March 2019. A balance sheet for the FSF as at 30 June 2018 and a tax return for the 2018 financial year were also exhibits to that affidavit. Mrs Frigger gave evidence to the effect that these were “the latest balance sheet of FSF and annual return” as of 6 March 2019.

378 A number of other financial documents of the FSF were exhibits to Mrs Frigger’s affidavit of 20 April 2020. These included the following documents:

(1) Profit and loss statements and balance sheets for the 2016, 2017 and 2018 financial years. Mrs Frigger gave evidence to the effect that the FSF earned income from funds in the BOQ1 and BOQ2 accounts that is recorded in these financial records of the FSF. Mrs Frigger said these documents were copies of “audited financial statements of FSF for the period 1 January 2015 until 30 June 2018”.

(2) An affidavit or Mrs Frigger sworn 3 August 2018 and filed in Federal Circuit Court of Australia proceedings PEG 409 of 2018 in support of an application the appellants made in those proceedings for an interim injunction against the Official Trustee. The exhibits to that affidavit included a tax return of the FSF for the 2017 financial year. In that affidavit Mrs Frigger deposed that the document “is a copy of the SMSF annual return for 30 June 2017”.

(3) PPSR registration certificates dated 10 October 2017 concerning the BW1 account and dated 10 April 2014 concerning the Main Portfolio. Mrs Frigger described these PPSR registrations as “for secured interest, being trust receipts, in favour of FSF”.

(4) Correspondence with Computershare, Linkmarket and Advanced Share share registries concerning the Main Portfolio.

379 An affidavit of Mr Ty Maher, an officer of the Official Trustee, affirmed 19 September 2018 and filed in PEG 409 of 2018, was an exhibit to Ms Trenfield’s affidavit of 12 June 2019. The exhibits to Mr Maher’s affidavit included:

(1) An email from Mrs Frigger to the Official Trustee dated 27 July 2018 attaching a copy of the tax return of the FSF for the 2017 financial year.

(2) An email from Mrs Frigger to the Official Trustee dated 22 August 2018 attaching a copy of a tax return of the FSF for the 2016 financial year and a draft copy of the FSF tax return for the 2018 financial year.

380 Ms Trenfield gave evidence to the effect that she wrote to Just SMSF Audits requesting that all files in its possession relating to the affairs of Mr and Mrs Frigger and the FSF pursuant to ss 77A and 129 of the *Bankruptcy Act*. Just SMSF Audits responded and certain of the documents Ms Trenfield received from Just SMSF Audits were tendered as exhibits to her affidavit of 22 May 2020. These documents were as follows:

(1) Audit reports signed by Mr Mark Baghdassarian of Just SMSF Audits for the 2016 financial year, dated 11 January 2019, and for the 2017 financial year, dated 16 March 2019.

(2) Annual returns for the FSF for the 2016 financial year, and 2018 financial year, both of which are undated.

(3) Balance sheets and profit and loss statements for the FSF as at 30 June 2016 and 30 June 2017.

(4) Financial statements and reports for the period 1 July 2016 to 30 June 2017.

(5) Trustee declarations of the market value of various assets.

(6) Member statements for the 2016, 2017 and 2018 financial years for each of Mr Frigger, Mrs Frigger, Ms Jessica Frigger (the appellants’ daughter) and Mr Michael Frigger (the appellants’ son).

(7) Minutes of meetings of the trustees of the FSF for the financial years ended 30 June 2016 and 30 June 2017 both dated 7 January 2019.

(8) Audit management letters from Just SMSF Audits to the trustees of the FSF dated 11 January 2019 and 16 March 2019.

381 Further financial documents of the FSF were exhibits to Mrs Frigger’s affidavit of 17 June 2020. These included:

(1) Profit and loss statement and balance sheet for the 2018 financial year.

(2) An audit report of Ms Bastin of Just SMSF Audits for the 2018 financial year dated 17 June 2019.

Mrs Frigger gave evidence to the effect that these documents were included in the correspondence Ms Trenfield received from Just SMSF Audits.

382 Pursuant to the leave to reopen that the primary judge granted the appellants on 7 and 9 September 2020, the appellants were permitted to tender into evidence as further exhibits:

(1) An audit report of Ms Kylie Wee for the FSF dated 18 August 2020 for the financial year ended 30 June 2019.

(2) A balance sheet for the FSF as at 30 June 2019 signed by Mr and Mrs Frigger.

(3) A tax return for the FSF for the 2019 financial year.

383 These were also exhibits to the affidavit of Mrs Frigger of 2 September 2020. Otherwise, the primary judge refused the appellants leave to reopen to adduce the proposed evidence of Mrs Frigger in that affidavit.

384 In the course of the appellants’ written and oral submissions they also sought to rely, for the purposes of grounds 2, 3, 4 and 5, on a number of the documents that were the subject of their application for the Court to receive further evidence in the appeal. For the sake of clarity, the following documents upon which the appellants relied in their submissions were not received in the appeal as further evidence on grounds 2, 3, 4 and 5.

(1) Mrs Frigger’s affidavit of 2 September 2020. This was not pressed. However, exhibits AF1 and AF4 of that affidavit were tendered in evidence.

(2) Just SMSF Audits audit management letter to the trustees of the FSF dated 18 August 2020 which was Exhibit AF2 of Mrs Frigger’s affidavit of 2 September 2020. This was not pressed.

(3) A profit and loss statement for the FSF for the financial year ended 30 June 2019 which was Exhibit AF3 of Mrs Frigger’s affidavit of 2 September 2020. This was not pressed.

(4) Declaration of Trust dated 1 July 2018 which was Exhibit AF5 of Mrs Frigger’s affidavit of 2 September 2020. This was not pressed.

(5) Mrs Frigger’s affidavit of 17 September 2020. This was not received for any purpose other than ground 9.

(6) A document entitled ‘Account transactions by Tax Office process date’ for the FSF for the period 22 September 2014 to 14 August 2020 which was Exhibit AF1 of Mrs Frigger’s affidavit of 17 September 2020 (**ATO accounts transaction report**). This was not received for any purpose other than ground 9.

(7) A copy of a tax return for the FSF for the 2017 financial year which was Exhibit AF2 of Mrs Frigger’s affidavit of 17 September 2020. This was not received for any purpose other than ground 9.

(8) A letter from Mrs Frigger to Computershare dated 20 December 2021 which was Exhibit AF1 of Mrs Frigger’s affidavit of 18 March 2022.

(9) A letter from Computershare to Mrs Frigger dated 7 January 2022 which was Exhibit AF2 of Mrs Frigger’s affidavit of 18 March 2022.

(10) An email from Ms Demi Mudi of Boardroom Pty Ltd to Mrs Frigger dated 31 December 2021 which was Exhibit AF3 of Mrs Frigger’s affidavit of 18 March 2022.

385 The following documents were received provisionally:

(1) A letter from Mrs Frigger to Computershare dated 20 December 2021 which was Exhibit AF1 of Mrs Frigger’s affidavit of 18 March 2022.

(2) A letter from Computershare to Mrs Frigger dated 7 January 2022 which was Exhibit AF2 of Mrs Frigger’s affidavit of 18 March 2022.

(3) An email from Ms Demi Mudi of Boardroom Pty Ltd to Mrs Frigger dated 31 December 2021 which was Exhibit AF3 of Mrs Frigger’s affidavit of 18 March 2022.

As we have already explained, none of these documents is of any assistance to the appellants’ case in the appeal.

386 Separately, a copy of an audit report of Ms Wee of Just SMSF Audits for the FSF dated 17 January 2022 for the financial year ended 30 June 2021 was received in the appeal as further evidence without objection by the respondent. Again, as we have already explained, this document is not of any assistance to the appellants’ case in the appeal.

### Documents containing hearsay

387 The appellants’ case in the appeal on the asserted errors of fact in grounds 2, 3, 4 and 5 of the re-amended notice of appeal largely turns on what inferences arise from statements of fact contained in the FSF financial records referred to above and certain other documents.

388 Documents may provide direct or inferential evidence of certain facts. For example, that a letter or email was sent or received on or around a date of the document may be inferred, as a fact, from the date and nature of the document. That deposits and withdrawals of sums of money were made into and out of an account for the purposes described in a bank statement may be inferred from the nature of the document. That a PPSR registration was made on the date recorded in the document may be inferred from the nature of the document.

389 Documents may also contain direct or indirect statements of fact made by the author(s) of the document. These are unsworn statements made out of court that are hearsay or, in the language of s 59 of the *Evidence Act*, comprise a ‘previous representation’. As such, these statements are not admissible in civil proceedings unless they fall within one or more of the exceptions set out in ss 60–64, 66A–75, 81–84, 87 and 88 of the *Evidence Act*. Even if admissible under an exception, the Court retains a discretion to exclude or limit the use of it under ss 135 and 136 of the *Evidence Act* if, for example, a document contains hearsay that is considered highly unreliable.

390 Under ss 69(1) and 69(2) of the *Evidence Act* the hearsay rule does not apply to a document (**business record**) that:

(1) is or forms part of the records belonging to or kept by a person, body or organisation in the course of or for the purposes of a business, or at any time formed part of such a record;

(2) contains a previous representation made or recorded in the document in the course of, or for the purposes of the business (business records); and

(3) the previous representation was made by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

391 However, under s 69(3) of the *Evidence Act*, the exception to the hearsay rule does not apply to a business record if the previous representation was prepared or obtained for the purposes of conducting or for or in contemplation of or in connection with, an Australian or overseas proceeding. Put another way, business records containing ‘self-serving’ statements are not admissible under ss 59 and 69 of the *Evidence Act*: see, e.g., *Vitali v Stachnik* [2001] NSWSC 303 at [12].

392 The expression ‘self-serving’ when used in relation to evidence generally refers to an out of court statement of a witness made after proceedings have commenced or are contemplated that is consistent with the case of the party calling the witness. Under the common law rules of evidence ‘self-serving’ statements are not admissible. There are exceptions such as where an out of court statement is tendered as an admission against interest and the statement also contains self-serving components. Self-serving statements may also be excluded or their use limited under ss 135 or 136 of the *Evidence Act*.

393 A document containing a previous representation may be admitted into evidence notwithstanding that it is not otherwise admissible under an exception to the hearsay rule by agreement between the parties or it may be tendered and admitted without objection from the other party. In these circumstances, the previous representation is in evidence and may be given such probative weight as the trial judge may consider appropriate on all relevant issues: see, e.g., *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206 at 214, 219–220; *McLennan v Taylor* (1967) 85 WN (PT1) (NSW) 525 at 528–529, 537–538, 540.

394 While a business record containing self-serving statements is not admissible, such a document may be tendered by one or other of the parties without objection and, thereby, a previous representation in the document may be admitted into evidence. However, even though a previous representation is admitted into evidence, that says nothing of the probative weight of the representation and the trial judge may give that statement such weight as is considered appropriate in the circumstances. That may include taking into account the atmosphere or context in which the documents were prepared that might make them ‘self-serving’ or any other matter that affects the weight of the previous representation: see, e.g., *Australian Securities and Investments Commission v Big Star Energy Ltd (No 3)* [2020] FCA; 389 ALR 17 at [41]–[43]*.*

### The documents upon which the appellants rely

395 Broadly, the appellants contended in the appeal that the primary judge was wrong not to draw the ultimate inferences in their favour from statements in FSF financial records and certain other documentary evidence.

#### Audit reports and balance sheets

396 The appellants contend that the trustee(s) of the FSF complied with s 35E of the *SIS Act*, on time and lodged annual returns on time. The appellants contended that audited tax returns for the financial years ended 30 June 2015, 2016 and 2017 were lodged before the sequestration orders were made and for the financial year ended 30 June 2018, were lodged on 7 September 2018.

397 In support of that contention they rely on a document entitled ‘Account transactions by Tax Office process date’ extracted from the ATO Business Portal. The document was exhibit AF1 to the affidavit of Mrs Frigger of 17 September 2020. That is, the appellants rely on a document that was the subject of their failed second application to re-open. For the reasons given earlier, that document is not received in the appeal as further evidence for the purpose of grounds 2, 3, 4 and 5 of the re-amended notice of appeal.

398 Otherwise, audit reports for the 2016, 2017 and 2018 financial years were in evidence. Each of these was prepared during 2019. The balance sheets the subject of those audits were also apparently in evidence. The audit report for the 2019 financial year and a signed balance sheet for that audit were also in evidence. The significance of the audited balance sheets is that these documents record the BW1, BOQ1 and BOQ2 accounts, the CommSec account (Main Portfolio) and the Residential Properties (i.e., all the disputed assets) as assets of the FSF as of 30 June 2016, 30 June 2017, 30 June 2018 and 30 June 2019.

399 Financial records of the FSF were tendered in evidence without objection by the appellants and by the respondent. Accordingly, the primary judge received any previous representations in those documents and was entitled to give them such probative weight as he considered appropriate in the circumstances. The primary judge characterised previous representations contained in business records and other documents prepared after 20 July 2018 where the person who had or might reasonably be supposed to have had personal knowledge of the asserted fact was one of the appellants as “self-serving” (Liability Judgment at [226], [231]–[232], [244], [255]). Where the date of preparation of such documents was not known, the primary judge characterised the previous representations as potentially “self-serving” (Liability Judgment at [248]). The primary judge afforded little or no weight to the documents he characterised as either “self-serving” or “potentially self-serving” (Liability Judgment at [244]).

400 The primary judge considered the balance sheet as of 30 June 2019 to have been a document prepared by Mrs Frigger after the commencement of the proceedings and “likely to be self-serving”. As to what the primary judge meant by “self-serving” his Honour said (at [227]):

I interpolate here that, as noted in *Frigger (No 2)* at [79], Mrs Frigger took objection to the description of documents as self-serving, as she understood it to mean that they were forged or otherwise fraudulent. But it does not necessarily mean that. Describing a document as self-serving is simply an application of the common sense principles which Banks-Smith J summarised in *Australian Securities and Investments Commission v Big Star Energy Ltd (No 3)* [2020] FCA 1442; (2020) 389 ALR 17 at [43]:

A court is plainly able to evaluate the weight or cogency of the material contained in documents and draw relevant inferences. For example, it is open to take into account the absence of any cross-examination or testing of the evidence. It is open to take into account the atmosphere or context in which a document is prepared that might cause it to be self-serving: *Vitali v Stachnik* [2001] NSWSC 303 at [12] (Barrett J). Also relevant is the nature of the document and whether it is a 'canonical business record' to which s 69 of the *Evidence Act* is directed or something created with, for example the purpose of persuasion: *Australian Competition and Consumer Commission v Air New Zealand (No 7)* (2013) 209 FCR 361; 301 ALR 392; [2013] FCA 83 at [23] (Perram J). …

401 Therefore, the focus of the primary judge’s reason for characterising documents as ‘self-serving’ was that at the time the documents were prepared the proceedings were contemplated or it was otherwise then in the appellants’ interests for the disputed assets to be recorded as assets of the FSF. The primary judge indicated that he was not using the expression as short-hand for documents that would not be admissible under s 69(3) of the *Evidence Act* or under common law principles. Rather, he was describing ‘common-sense’ principles for attributing little or no weight to hearsay in a document based on the atmosphere or context in which it was prepared or the nature of the document in question.

402 Regardless of the purpose for which the FSF balance sheets were prepared, any financial records coming into existence after the sequestration orders were made purporting to record the disputed assets as assets of the FSF were likely to be ‘self-serving’ in accordance with the common-sense principles to which the primary judge referred. After the sequestration orders were made, and particularly after the dispute between the parties as to what assets were personal assets of the appellants crystallised, any person in the position of the appellants had an incentive to create financial records that were consistent with their case below and that identified the disputed assets as assets of the FSF. It was not necessary for litigation to be on foot or contemplated for that incentive to be present. The incentive arose as soon as the appellants were made bankrupt. Therefore, in accordance with the common-sense principles to which the primary judge referred he was entitled to afford little weight to previous statements in documents prepared after 20 July 2018 irrespective of the notional purpose for which the document came into existence. He was also entitled to afford previous statements in documents of an unknown date little or no weight for the same reason.

403 It is also important to appreciate that the weight of previous representations in documents where Mrs Frigger might reasonably be supposed to have been the source of the asserted fact was also affected by the primary judge’s conclusion that Mrs Frigger was not a witness of truth. Thus, in the case of documents of that type, the common-sense self-serving approach to weight the primary judge took was all the more justified because the source of the asserted fact was a witness who the primary judge had found was not credible.

404 Leaving to one side the question of weight, there is a further question of what inferences or findings of secondary facts may be made as a result of an assertion of fact contained in a balance sheet of the FSF or other document to the effect that particular identified property is an asset of the FSF. The mere fact that an asset is recorded in a balance sheet does not, in the absence of other evidence, lead to an inference that all acts in the world necessary to render that property an asset held on trust for the benefit of the members of the FSF have been taken.

405 A balance sheet is a summary of transactions that are considered by the trustees of the FSF to have been transactions relating to the FSF during or prior to the financial year to which the balance sheet relates. It may be inferred from a balance sheet that the books and records of the FSF contain documents or statements of a person with personal knowledge of the facts that record the individual transactions that comprise the property identified in the balance sheet as assets. It may also be inferred that the trustees of the FSF have, at some time before the preparation of the balance sheet, made a decision and determined that the individual and collective transactions are to be treated as transactions of the FSF. However, without more, an inference does not arise that all necessary steps have been taken to render the treatment or allocation of the asset in the financial statements of the FSF legally effective. Thus, without more, the mere allocation of an asset in a balance sheet as an asset of the FSF is no more than bare assertion of that fact.

406 Here, in substance, the appellants contend that the balance sheets are more than bare assertion because the financial statements of the FSF have been audited and apparently found to be compliant in accordance with the superannuation and taxation legislation. The inference that might be drawn from these matters is that records of historical transactions consistent with the allocation of the assets in the balance sheet exist. If so, these documents were not tendered in evidence.

407 The appellants submitted that the primary judge’s conclusions that the balance sheets were “self-serving” were tantamount to findings that the appellants had committed “tax fraud” because the appellants as trustees of the FSF were obliged to prepare financial statements and tax returns and have these audited under the provisions of the *SIS Act*, *SIS Regulations*and *ITAA 1997*. The appellants also submitted that only the ATO (as the applicable regulator) has standing pursuant to s 253 of the *SIS Act* to monitor the FSF and its approved SMSF auditor, to apply to the court for an order and to certify that that the trustees had failed to comply with the *SIS Act*. The appellants contended that primary judge’s finding that the FSF records failed to comply with prescribed standard, in circumstance where the ATO (s 289(2) *SIS Act*) has not certified such a failure to this court, is a nullity.

408 The premise underlying the appellants’ submissions, that the primary judge had made a finding that the financial statements and tax returns of the FSF were non-compliant with the *SIS Act*, is incorrect. The primary judge made no such finding. As explained earlier in these reasons, the primary judge attributed no weight to financial statements and tax returns prepared after the sequestration orders adopting a common-sense approach to ‘self-serving’ documents in that the appellants had an incentive to prepare documents consistent with their case before the primary judge after the sequestration orders were made.

409 That audit reports, balance sheets and tax returns were prepared for the purposes of ‘compliance’ with the *SIS Act*, *SIS Regulations*and *ITAA 1997* does not affect the primary judge’s views about the weight of previous representations in those documents. After the sequestration orders were made, the appellants had the same incentive to persuade the auditor and regulators that assets were assets of the FSF as the appellants had to persuade the respondent and the Court of those matters. Affording little or no weight to these documents does not equate to a finding of ‘fraud’ or that the documents were falsely prepared or inaccurate. It is simply a common-sense reason for discounting the weight of previous representations in the documents.

410 The second aspect of the appellants’ submissions, that the ATO has exclusive authority to determine if there has been compliance with the *SIS Act*, is also incorrect. Sections 253 and 289 of the *SIS Act* fall within Part 25 of that Act which deals with monitoring and investigation. Section 253 sets out the objects of Part 25 which include to ensure that the Regulator (ASIC, APRA or ATO, as applicable) has sufficient power to monitor and investigate superannuation entities, approved SMSF auditors and audits of self-managed superannuation funds.

411 Section 289 sits in Part 25 Division 7 which deals with offences. The provision confers a discretion on the Regulator to certify that a person has failed to comply with a requirement of the *SIS Act*. The discretion is enlivened “if the Regulator is satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under [the *SIS Act*]”. If the Regulator does so, the Court may inquire into the case and may order the person to comply with the requirement as specified in the order.

412 Section 289 is a provision that the Regulator may utilise to obtain compliance with the requirements of the *SIS Act*. The Regulator is not obliged to utilise the provision and it certainly does not place any limit on the power of this Court to inquire into questions of fact for the purpose of determining if a declaration should be made under s 30 of the *Bankruptcy Act* or s 21 of the *FCA Act*.

413 As the power of the Regulator to certify a failure to comply is discretionary, the absence of a certificate does not infer that the Regulator has or has not been satisfied of a non-compliance with the requirements of the *SIS Act*. The Regulator may be satisfied that there has been non-compliance, but there is reasonable excuse. The Regulator may be satisfied that there has been non-compliance without reasonable excuse, but has decided not to exercise the power under s 289(2). Further, the absence of a certificate provides no evidence of what, if any, monitoring or investigations the Regulator has performed in respect of the FSF.

414 For all the above reasons, that the appellants may have succeeded in persuading the auditor and Regulator that the FSF financial statements and tax returns for certain financial years were compliant with the *SIS Act* provides no grounds for attributing greater weight to these documents or considering that in some way the absence of regulatory action demonstrates the veracity or truth of the facts asserted in them.

415 As to the audit report for the 2019 financial year, the primary judge said (at [228]–[229]):

[228] There is also an unqualified auditors' opinion on the 2019 balance sheet in evidence (Ex 37, Ex 38). The auditor opines that the financial report presents fairly the financial position of the fund. But I place little weight on that. The source of the auditor's information must have been Mrs Frigger, at a time when she was concerned to establish that all the disputed assets were FSF assets. Also, I doubt the thoroughness of the audits. I say that without intending to criticise the auditors. It would appear that the scope of their engagement was very limited. In a submission (contained in affidavit ACTF 2 sworn 8 May 2019 at para 5) Mrs Frigger said that the FSF 'is required to engage an independent auditor to verify all assets and income of the FSF in order for the fund to continue to be complying and obtain tax benefits'. But the evidence as to the modest fees charged by Just SMSF Audits suggests that no extensive audit of the basis on which assets were said to be part of the FSF was conducted. For example, the deduction claimed in the 2019 annual return for the FSF for auditors' fees was $440 (Ex 39). In 2016 it was only $330 (KAT 4 p 389). That makes it unlikely that the auditors conducted any thorough review and verification of the assets of the FSF.

[229] In light of that, the fact of an unqualified audit report on the 2019 balance sheet cannot, with respect to the auditors, give the court any comfort that the balance sheet is correct. If the applicants are unable to establish to the court's satisfaction on the basis of all the evidence that the disputed assets are FSF assets, then it is difficult to know how they have convinced the auditors of that (if they did). It is not clear that the auditors had any evidence that is not before the court and if they did, the court could not rely on their hearsay opinion about it. The question of whether an asset is part of the FSF is a matter of the application of the law to the evidence and not a matter of accounting, so the audit report can add nothing to the court's own consideration of the issues. That is all the more so since nobody involved in the audit has given evidence.

416 There was little evidence from Mrs Frigger concerning the context and circumstances in which the audit reports and balance sheets of the FSF were prepared. As to the audits, neither Mr Baghdassian nor Ms Wee gave evidence at the trial. Therefore, there was no evidence from them to explain the audit performed, the records reviewed or the facts upon which the opinions expressed in the audit reports were based.

417 Regarding management of the FSF, the primary judge made the following observations (Liability Judgment at [174]):

Mrs Frigger's evidence, which I accept as inherently probable, is that from its inception she and Mr Frigger managed the FSF and made all investment decisions (ACTF 1 para 10; ACTF 18 para 23). I also accept her evidence that Mr Frigger has managed the Main Portfolio, although whether he did so as trustee of the FSF, or on behalf of the trustee(s), or on behalf of he and Mrs Frigger in their personal capacities, is a separate question. I also accept that Mrs Frigger, as a qualified accountant, managed all accounting records of the FSF, attended to the banking of income and capital, and prepared and sent out invoices to tenants of investment properties (whether FSF assets or not). Mrs Frigger procured the required annual audits of the FSF, although, as will be seen, there is no specific evidence of any audit having been conducted before the sequestration order. She attended to the filing of income tax returns (ts 223 ln 30, 228 ln 10).

418 With the exception of an electronic lodgement declaration for the tax return for the FSF for 2016 financial year, which the primary judge accepted was lodged with the ATO some time before 6 April 2017 (Liability Judgment at [257]), the primary judge was not satisfied that any of the evidence established that any balance sheet or tax return of the FSF that was in evidence was prepared before 20 July 2018 (the date the sequestration order was made).

419 As noted above, the audit reports tendered in evidence for the 2016, 2017 and 2018 financial years were all prepared in 2019. The primary judge inferred that the auditors prepared the audit reports “a short time after receiving the accounts to be audited” (Liability Judgment at [231]). The primary judge also found that it was inherently likely that the documents submitted to the auditor were produced a short time before they were submitted. Further, that it was likely that the audited balance sheets “were generated after the sequestration order” (Liability Judgment at [231]). The primary judge concluded that all these balance sheets were likely prepared after 20 July 2018 and, therefore, likely to be self-serving (Liability Judgment at [232], [239], [240], [243]).

420 The primary judge noted other concerns with respect to the reliability of the balance sheets for the 2016, 2017 and 2018 financial years.

(1) There were two versions of the 2016 balance sheet that made no mention of BW1 as an asset of the FSF. A further comparison balance sheet, which included BW1 as an asset of the FSF, was not audited, was of an unknown date and had widely fluctuating BW1 balances (Liability Judgment at [241]–[242]).

(2) There were two versions of the 2017 balance sheet in evidence. In one version, BW1 is identified as a FSF asset. In another version there is a reference to ‘Retirement Advantage Account’ in three separate places, but is not clear if that is a reference to BW1. One of the balance sheets was a ‘working paper’. Regardless of which balance sheet was ‘correct’, the auditor’s report for the 2017 financial year was heavily qualified. These included complaints of unanswered requests for further information (Liability Judgment at [237]).

(3) There were two versions of the 2018 balance sheet in evidence. Each balance sheet recorded different assets. The audit report for 2018 was also qualified by a statement to the effect that there were unanswered requests for further information (Liability Judgment at [233]–[234]).

421 The primary judge then concluded (Liability Judgment at [241]):

The applicants sought to counter this by referring to a balance sheet for 2017 which contained comparison figures for 2016 which do refer to BW1 (KAT 4 p 416). But the purpose and time of preparation of that version of the 2017 balance sheet is uncertain, as is whether it was audited. It would appear that it is unlikely that it was audited, since it appears that the different balance sheet I have just described *was*audited (in 2019). There is no basis to prefer the comparison figures balance sheet to the apparently audited balance sheets just mentioned.

422 We do not consider the primary judge made any error in according little or no weight to assertions of fact contained in financial documents of the FSF where those documents were prepared after 20 July 2018 or at an unknown time. In those circumstances, the balance sheets could not be relied upon as evidence of the fact of historical transactions of the FSF allocated to it or recorded in its financial recorded before the balance sheets were prepared for the audit. No inference arises from established facts that a legally effective transaction by which the disputed assets became assets of the FSF took place *before* 20 July 2018. Nor are these documents evidence of an objective act of the trustees of the FSF consistent with an intention to hold the assets on trust for the FSF performed *before* 20 July 2018. At most, these documents provide some evidence of ratification after 20 July 2018 of transactions entered into before 20 July 2018.

#### Taxation returns

423 The appellants contend that an objective manifestation of an intention to exercise the trustees’ power to accumulate income of the FSF and utilise that income to acquire the funds in the BOQ1 and BOQ2 accounts and securities in the Main Portfolio was evidenced in the FSF tax returns for the 2016, 2017 and 2018 financial years. The appellants also contend that the tax returns for these financial years record the Residential Properties as assets of the FSF.

424 As to the Main Portfolio, the appellants also contend that the tax returns evidence that the Commissioner of Taxation accepted that the securities in the Main Portfolio were assets of the FSF because the trustees of the FSF claimed franking credits on securities held in that portfolio and refunds of income tax were paid to the trustees (into the BW1 account) for the FSF. The appellants contend that the evidence demonstrated that refunds were paid to the FSF before the sequestration orders were made and, therefore, TFN must have been provided to the registries for the Main Portfolio securities and the Commissioner of Taxation in respect of securities in the Main Portfolio before the sequestration orders were made.

425 In support of these contentions, the appellants contend that tax returns were lodged with the ATO before the sequestration orders. In that respect, the appellants rely on an ATO accounts transaction report. As already noted, that document is not received in the appeal as further evidence.

426 In any event, the primary judge accepted that the tax return for the FSF for the 2016 financial year that was in evidence was lodged with the ATO and it was lodged some time before 6 April 2017 (Liability Judgment at [257]). However, the primary judge was of the view that the document was of no assistance to the appellants for the following reasons (Liability Judgment at [256]):

… It shows the account details of BW1 as the account for the destination of tax refunds for the FSF (KAT 4 p 387). It lists cash and term deposits of $3,177,000, listed shares of $931,114, and non-residential real property of $9,268,000 (KAT 4 p 395). It does not break any of these numbers down so it is not possible to tell what accounts made up the cash balance. Also, the amount for cash and term deposits, curiously, is in a different font to the other amounts, suggesting that it may have been entered at a different time to those other amounts. So this annual return provides no clear evidence as to what were the assets of the FSF as at 30 June 2016.

427 For reasons that are given later, we are of the view that it is possible to identify the assets, other than BW1, referred to in that tax return. However, the document and any balance sheet in evidence that could be the source of the information contained in it, remains unreliable. Therefore, the primary judge was not in error for concluding that the document provides “no clear evidence as to what were the assets of the FSF as at 30 June 2016” (Liability Judgment at [256]).

428 The primary judge placed no weight on the tax return for the 2017 financial year that was in evidence. Regarding that document, the primary judge said (Liability Judgment at [252]–[254]).

[252] There is an ATO SMSF annual return for the year 2017 in evidence (KAT 1 p 43; KAT 4 p 153; ACTF 14 p 107). It was submitted by Mrs Frigger to the Official Trustee on 27 July 2018 - that is, seven days after the sequestration order. In a covering email to the Official Trustee, Mrs Frigger said the annual return showed that as at 30 June 2017 the FSF had more than $2 million in cash and term deposits. She acknowledged in cross-examination that she submitted it to the Official Trustee in order to persuade him that BOQ1 should be unfrozen because it was an FSF asset (ts 258). It shows the account details of BW1 as the account for the destination of tax refunds for the FSF (KAT 1 p 44). It also shows under the heading 'Assets and liabilities' cash and term deposits of $2,085,456, although it does not break down where these deposits are held. That is much less than the total amounts shown in bank statements as at that time for St George, Bankwest and Citibank accounts appearing in a version of the balance sheet as at 30 June 2017 (KAT 4 p 414). Also, the annual return shows a total value of assets of the FSF of $5,980,228, significantly less than other values which can be found in the evidence.

[253] In any event, it is not clear that this annual return was ever submitted to the ATO, or if so, when. Mrs Frigger pointed to a tax refund received on 31 July 2018 (KAT 4 p 533) but that amount does not correspond to the refund amount in the return (KAT 4 p 159) which suggests that this version of the return was never lodged. It *was*provided to the Federal Circuit Court, in an affidavit dated 3 August 2018, in proceedings shortly after the sequestration order in support of an application for an injunction against the Official Trustee (ts 228; ACTF 14 p 107). In cross‑examination in this proceeding, Mrs Frigger confirmed that this version of the annual return was true and correct as at the time of the affidavit (ts 229‑231). But then she acknowledged that it was not the only version of the 2017 annual return that had been prepared and that it could have been wrong (ts 230‑232). She sought to explain that she had not provided this copy of the 2017 annual return to the Federal Circuit Court for the purpose of establishing the balance of assets held, but solely to persuade it that BOQ1 should be unfrozen (ts 233, 258). She acknowledged that the 2017 annual return did not include the proceeds of the sale of the Armadale land and BP Business in which the FSF (she said) had an interest, and she said that the figure in the annual return for listed shares, $344,939, was not a true and accurate reflection of the value of the FSF's shares (ts 237‑238; ts 285; cf. KAT 4 p 941). In closing submissions Mrs Frigger said that this version of the annual return was 'an incomplete copy' (ts 934), even though she had submitted it to the Official Trustee to persuade it to remove the freeze on the bank accounts.

[254] Also, the 2017 annual return says that the audit of the FSF had been completed on 25 August 2017 when, as has already been indicated, in fact the audit for that year was completed in March 2019 (see [62] above).

429 The appellants sought to rely on another version of the 2017 tax return. That version was an exhibit to Mrs Frigger’s affidavit of 17 September 2020. The primary judge refused the appellants leave to re-open to tender that document in evidence. The appellants applied to have it received as further evidence in the appeal. We have already explained that the document is not received in the appeal as further evidence on grounds 2, 3, 4 or 5 of the re-amended notice of appeal.

430 In any event, the document does not assist the appellants’ case, even when read with the ATO accounts transaction report. While the ATO accounts transaction report provides an explanation for the amount of the refund received on 31 July 2018 ($3,253.34), the amount recorded for the refund for the 2017 financial year ($18,591.00) is not the same as the amount claimed as the refund in the alternative version of the 2017 tax return ($16,766). Therefore an inference does not arise that the alternative version of the 2017 tax return was the tax return that was lodged with the ATO on 26 July 2018. Accordingly, while the ATO accounts transaction report may demonstrate that *a* tax return for the FSF for the 2017 financial year was lodged on 26 July 2018, an inference does not arise that *the* tax return lodged on that date was the version that the appellants sought to tender at trial and sought to rely on as further evidence in the appeal.

431 Additionally, the amounts recorded for unfranked and franked dividends and for franking credits in the alternative version of the 2017 tax return are not the same as the amounts recorded in the CommSec 2017 financial year summary for the Main Portfolio, which were all substantially less than the amount claimed in the tax return. Likewise, the amounts recorded for these items in the 2017 tax return that was in evidence were not the same and substantially less than the amounts recorded in the CommSec financial year summary. There was no explanation in the evidence for the difference.

432 Therefore, none of these documents reveal any error in the primary judge’ conclusion that the 2017 tax return that was in evidence was not the document lodged with the ATO on 26 July 2018. These documents also do not demonstrate that the alternative 2017 tax return, that was not in evidence, was lodged with the ATO on 26 July 2018 and that return was consistent with the appellants’ case.

433 There were two versions of the tax return for the 2018 financial year in evidence: a handwritten version and digital version. The primary judge placed no weight on either document. The primary judge summarised the evidence and gave his reasons as follows (Liability Judgment at [245]–[251]):

[245] The applicants relied on an annual return for the FSF for the year 2018, which appears to have been submitted to the ATO (ACTF 1 p 187). This is a form with handwritten entries although, oddly, there is also one typewritten entry that appears to have been added to the pdf version of the return that appears in the affidavit (p 189). The document contains figures which, for some asset categories, are approximately equivalent in value to the assets in the balance sheet for that year which also appears in ACTF 1, but are otherwise unparticularised (ACTF 1 p 186). The total value of assets shown is $8,758,779 (ACTF 1 p 202). Cash and term deposits of $2,900,683 are shown, which is very approximately similar to the $2,979,708.24 total shown in the balance sheet for BW1, the BOQ account and a St George term deposit of $80,000. Listed shares are valued in this 2018 annual return at $2,521,581, significantly more than the $344,939 in the apparent annual return for the previous year (see below).

[246] But apart from those discrepancies, the balance sheet for June 2018 in the same affidavit shows total assets of $12,493,388. An apparently audited balance sheet in Mrs Frigger's affidavit ACTF 18 sworn 17 June 2020 shows a similar figure of $12,452,614.11. In both cases, the figure shown is more than $3.5 million greater than the figure in the annual return. These wide variations cast doubt on the reliability of the annual return and the balance sheets alike.

[247] There are other numbers for the value of the assets of the FSF in evidence which vary widely and do not enhance the reliability of the applicants' evidence. In a letter dated 17 August 2018 sent to the Official Trustee the applicants claimed that the assets of the FSF were worth $25 million (KAT 1 p 90). In cross‑examination Mrs Frigger admitted that this amount as given to the Official Trustee was 'obviously wrong' (ts 279 ln 44). Later, however, she sought to explain it as a 'rule of thumb' calculation which included a figure of between $12 million and $13 million for the Hobart property based on a figure the applicants received from the real estate professionals CBRE (not a formal valuation) (ts 463, 472, 474). And yet, in a trustee declaration of the market value of the Hobart property as at 30 June 2018, which appears to have been given to the auditor in March 2019, the applicants said that it was worth $2,725,725 (KAT 4 p 429). Also, one of the alleged balance sheets for that year values the Hobart property at $1,362,537.50 (ACTF 1 p 186).

[248] The first respondent points to yet more reasons why the annual return for 2018 is unreliable. The handwritten version of that document that I have been discussing names a Maria Olivotto as the auditor (ACTF 1 p 188). In cross‑examination, Mrs Frigger said that in fact that person never conducted an audit of the FSF and had not been engaged to do so (ts 257). She claimed, without any convincing explanation or rationale, that a different auditor had asked her to put Maria Olivotto's name on the annual return (ts 257). Also, significantly, there is another document in evidence purporting to be the annual return for 2018, but this one is comprised of entries in a computerised form, not handwritten entries on a paper form, and shows a different name for the FSF's auditor (KAT 4 p 401). The total value of the assets of the FSF shown in this annual return is $12,493,386, about $3.7 million more than the amount shown in the handwritten version and closer to the balance sheets I have considered above (KAT 4 p 407). Furthermore, the account details provided in this version of the annual return are not those of BW1; the account number matches a Citibank account that will be discussed further below in connection with the Edward Street property. But the document itself appears to show that it was prepared on 12 September 2018 (see KAT 4 p 401). That means that it was likely to have been prepared at a time after the sequestration order was made and so any weight to be put on it is diminished by the likelihood that it was self-serving.

[249] Mrs Frigger sought to explain the different versions of the 2018 annual return that are in evidence by saying that when she prepared the handwritten version she was not sure whether to include certain assets but when she spoke to the auditor she was told she did need to include them (ts 463). This is vague and given my findings about Mrs Frigger's credibility I give it no weight. If anything, it only confirms that she was willing to change records as the occasion suited and to put potentially unreliable records before the court.

[250] Also, the date on the handwritten 2018 annual return is shown as 18 July 2018, just before the sequestration order. But there is an email from Mrs Frigger to the Official Trustee dated 27 July 2018 in which she says she is 'currently working on the 2018 annual return' (KAT 1 p 40). Mrs Frigger had no good explanation for this in cross-examination and conceded that this version of the 2018 annual return may not have been the one she was going to lodge with the ATO (ts 272‑274). That it was not tends to be confirmed by a submission that Mrs Frigger made in closing: that the different, typewritten version of the annual return in KAT 4 at p 401 *had* been submitted to the ATO because a refund in the amount shown on the annual return had been received before 27 September 2018 (which was the opening date of an ATO statement in evidence, Ex 40). But she was unable to produce evidence of the amount of the refund; while there are some bank statements for that Citibank account in evidence, none of them show any tax refund. So there is no way of knowing whether it corresponded to this version of the annual return. I do not accept Mrs Frigger's implicit assertion (in submissions and not under oath) that it did (see ts 930 and Ex 40).

[251] For these reasons, and in the context of my view that Mrs Frigger is not a witness of truth, I place no weight on either the handwritten 2018 annual return, or the digital version.

434 As with the 2017 tax return, the ATO accounts transaction document does not assist the appellants. The amount of the refund ($33,625.00) is the same as the amount claimed for a refund in the digital version of the 2018 tax return. However, while it may be inferred that the digital version of the 2018 tax return was lodged with the ATO on 26 September 2018, no inference arises that the tax return was prepared any earlier than 12 September 2018 (the date of that document). Therefore, the document does not reveal any error in the primary judge’s conclusions about the date upon which the tax return for the 2018 financial year was prepared.

435 Again, the unfranked dividends and franking credits recorded in the 2018 tax returns are not the same and are substantially higher than the amounts recorded for unfranked dividends and franking credits in the CommSec financial year summary for 2018 for the Main Portfolio. Again, there was no explanation for the difference in these amounts in the evidence. Therefore, there was an unexplained inconsistency between the amounts claimed in the 2018 tax return and the amounts recorded in the CommSec financial year summary for dividends and franking credits concerning the Main Portfolio.

436 As to the tax return for the 2019 financial year, the primary judge accepted that it was lodged with the ATO on 12 August 2020. However, his Honour placed no weight on that annual return because he considered it to be self-serving as it was prepared two years after the sequestration orders were made and during the proceedings. His Honour considered that the ATO’s acceptance of the tax return was not evidence that the ATO had any regard to the list of assets when determining whether to pay the income tax refund claimed (and paid) in the return or that the ATO in some way verified the list (Liability Judgment at [244]).

#### 2016 tax return

437 As noted above, the primary judge accepted that the tax return for the FSF for the 2016 financial year was lodged before 6 April 2017 (Liability Judgment at [257]). That is, it is a document that his Honour found came into existence before 20 July 2018.

438 The 2016 tax return is of significance because the figures recorded in it for the value of commercial property, securities and residential property correspond to the values in some versions of the 2016 balance sheets that were in evidence. For the reasons which follow, if that document is the correct version of the tax return lodged before 6 April 2017, then that document, taken with other documents in evidence provides *some* evidence that the trustees of the FSF treated the Main Portfolio and Residential Properties as assets of the FSF as of 6 April 2017.

439 However, the respondent submitted during the appeal that the tax return in evidence was not the tax return lodged with ATO. That is, the primary judge’s conclusion (Liability Judgment at [257]) was wrong. In our view, while the primary judge was correct to conclude that *a* tax return had been lodged before 6 April 2017, for reasons that follow, there is good reason to doubt that it was the version of the 2016 tax return in evidence. Accordingly, in our view, the primary judge was not wrong to disregard the document or for considering it to be unreliable because figures for the assets recorded in that document are incorrect and do not correspond completely with any balance sheet that was in evidence.

440 There are a number of observations to be made about the contents of the 2016 tax return document.

441 Section H records assets and liabilities. The figure for item A of the 2016 tax return (listed trust) is $104,542. As the primary judge observed (Liability Judgment at [256]), item E (cash and term deposits) is recorded as $3,177,000 and “curiously” in a different font to all other amounts listed in the document. The figure for item H (listed shares) is $931,114. The figure for item K (non-residential real property) is $9,268,000. The figure for item L of the 2016 tax return (residential real property) is $625,000. The figure for item U of the 2016 tax return (total Australian and overseas assets) is $14,105,656. The figure for item Z (total liabilities) is $10,928,656.

442 Section F - G records member information. The 2016 tax return records four members of the FSF. The closing account balances for each of the members (liabilities) is recorded as:

Jessica Frigger $94,179;

Michael Frigger $67,986;

Angela Frigger $5,633,399; and

Hartmut Frigger $5,133,152.

The total of these amounts is $10,928,656. That figure corresponds with the total liability figure in Section H. (We also note that the font is different for the figures recording Mr and Mrs Friggers’ contributions in this section.)

443 The difference between total assets and total liabilities is, again curiously, $3,177,000 ($14,105,656 minus $10,928,656). In all other tax returns for the FSF in evidence, total assets are equal to total liabilities. Further, total liabilities in all tax returns are comprised of the closing account balances for the members of the FSF.

444 There were three versions of the balance sheet for the FSF as of 30 June 2016 in evidence. In one version, figures for total assets and total liabilities of the FSF are both recorded as $13,910,583.02. That is not the amount as that recorded in the 2016 tax return. In a second version, the figures for total assets and total liabilities are both recorded as $10,928,656. Therefore, the figure for total liabilities in the second version of the balance sheet corresponds to the total liabilities in the 2016 tax return. However, the balance sheet figure for total assets is not the same as the 2016 tax return figure. It is $3,177,000 less than the amount recorded in the 2016 tax return.

445 The second version of the 2016 balance sheet identifies the Platinum Trust as an asset of the FSF in the amount of $104,542. That amount corresponds with Section H item A (listed trusts) of the 2016 tax return.

446 The second version of the 2016 balance sheet, records two figures, both in the amount of $465,557 for ‘CommSec share portfolio’. The sum of these amounts is $931,114 which corresponds with Section H item H (listed shares) of the 2016 tax return. A CommSec financial year summary for the Commsec account 270815 generated on 15 May 2018 identifying the value as of 30 June 2016 was in evidence. That document identified the value of the securities in that account as of 30 June 2016 as $931,113.01. The CommSec share portfolio is the Main Portfolio.

447 The second version of the 2016 balance sheet, identifies real property at Edward Street, Perth ($859,524); Campbell Street, Hobart ($3,925,000); South West Highway, Armadale ($558,476); and another amount for Campbell Street, Hobart ($3,925,000) as assets of the FSF. The total of the sums for each of those real properties is $9,268,000. That amount corresponds with Section H item K (non-residential real property) of the 2016 tax return.

448 The second version of the 2016 balance sheet identifies two other real properties, Union Street, Bayswater ($312,500) and Cale Street, Como ($312,500) as assets of the FSF. The sum of those amounts is $625,000 and corresponds with Section H item L (residential real property) of the 2016 tax return. These are the Bayswater and Como properties and the Residential Properties.

449 The amounts recorded in the second version of the 2016 balance sheet for assets that could be categorised as cash or term deposits do not correspond with the amount recorded in Section H item E (cash and term deposits) of the 2016 tax returns. That is, it is not possible to identify in what way, if at all, the figure in item E of the 2016 tax return is comprised based on the cash and term deposits recorded in the 2016 balance sheet.

450 The second version of the 2016 balance sheet contains figures for liabilities to the members of the FSF that correspond with the member closing account balances recorded in the 2016 tax return for those members.

451 As noted above, the second version of the 2016 balance sheet records the property at South West Highway, Armadale as an asset of the FSF with a value of $558,476. The trustees of the FSF sold that property during the 2016 financial year. The balance of the proceeds from the sale of that property were paid into the BW1 account on 11 February 2016. That is, before 30 June 2016.

452 In the first version of the balance sheet, the Armadale property is not recorded as an asset of the FSF. However, it records other assets identified as Computer Accounting and Tax Pty Ltd in the amounts of $1,178,403.21 allocated to pension phase for Mr Frigger and $1,543,000 allocated to the accumulation phase assets of the FSF. The sum of these amounts is $2,721,403.02. It identifies as assets and records the same amounts for the other items of non-residential real property and for listed trusts, listed shares and residential property as is recorded in the 2016 tax return. The amounts for cash and term deposits are the same as for the second version of the 2016 balance sheet. Again, it is not possible to identify an amount for cash and term deposits that corresponds with Section H item E of the 2016 annual return in the second version of the 2016 balance sheet.

453 There was a third version of the 2016 balance sheet in evidence. The third version is contained in a comparison between the 30 June 2017 and 30 June 2016 positions. In that document, there is another and different breakdown of the assets of the FSF. In the third version, total assets and liabilities are recorded as $14,963,430.69.

454 The third version of the balance sheet records the same items and values for the CommSec share portfolio, Edward Street, Perth, Campbell Street, Hobart, Union Street, Bayswater and Cale Street, Como as are contained in the other two versions of the 2016 balance sheet. The difference between the other balance sheets and the third balance sheet is that various amounts of cash are identified by reference to specific bank accounts. These are:

(1) St George Bank term deposit $80,000;

(2) BankWest T/D 0938897 $1,178,403.02;

(3) BankWest T/D 0938897 $1,204,084;

(4) BankWest 0914936 $341,275.47; and

(5) BankWest 4767174 (BW1) $1,779,488.20.

These amounts total $4,583,250.69. Again, the figures for cash and term deposits do not correspond with Section H item E of the 2016 tax return.

455 Section B of the 2016 tax return records income. The figure for item J (unfranked dividends) is $6,111. The figure for item K (franked dividends) is $59,958. The figure for item M (gross trust distributions) is $8,361. Section D records the income tax calculation statement. The figure for item E (refundable tax offsets) is $25,688, the same figure as franking credits. The amount due or refundable, here refundable, is $25,429. These income figures correspond with the amounts recorded for unfranked and frank dividends, franking credits and trust distributions recorded in the FSF balance sheet for the 2016 financial year. However, the figures recorded in the CommSec financial year summary for 2016 are substantially different. These are: $24,512.37 for franked dividends; $6,110.68 for unfranked dividends; and $10,505.31 for franking credits.

456 The bank statements for the BW1 account record that the ATO paid a refund into that account in the amount of $26,300.50 on 6 April 2017. Given the small difference ($871.50) between the refund recorded in the 2016 tax return ($25,429.00) and the refund paid ($26,300.50) and that there was evidence that the difference ($871.50) was settled later, the primary judge was prepared to accept that the 2016 tax return in evidence was lodged with the ATO before 6 April 2017 (Liability Judgment at [257]).

457 However, the document recording the settlement of the difference is a copy of an ATO income tax account statement for the FSF. It records that a client initiated amended tax return for the 2016 financial year was processed on 5 March 2019. As a consequence, the trustees of the FSF became indebted to the ATO for $871.50 which was paid on 27 September 2019. That is, the trustees of the FSF were required to repay part of the refund received on April 2017 as a result of lodging an amended 2016 tax return. Given that the FSF financial statements were audited in January 2019, we infer that an amended 2016 tax return was lodged after that audit. Further, the figures in the 2016 tax return recorded for franked and unfranked dividends and franking credits are not the same and are substantially less than the figures recorded for dividends and franking credits in the CommSec financial year summary for 2016. In the appeal the appellant was not able to point to any evidence before the primary judge that explained the differences.

458 In our view, it is not open to infer that the 2016 tax return that was in evidence was lodged with the ATO before 6 April 2017. It is more likely that it or a version of it was lodged in March 2019 or it is not the version that was lodged with the ATO.

459 Our conclusion that the 2016 tax return that was in evidence was not lodged before 6 April 2017 does not assist the appellants’ case on appeal. Moreover, it does not reveal that the primary judge was wrong to reject the 2016 tax return on the ground that it provided *no clear* evidence as to what were the assets of the FSF as at 30 June 2016 (Liability Judgment at [256]–[257]).

460 Again, the ATO accounts transaction document does not assist the appellants. The document confirms the facts that may be inferred from the documents that were in evidence. A tax return for the 2016 financial year was lodged on 31 March 2017. A refund of $26,300.50 was paid on 6 April 2017. An amended tax return was lodged on 5 March 2019. As a consequence, an amount of $871.50 was debited to the FSF account. That amount was paid on 27 September 2019. None of these facts give rise to an inference that the 2016 tax return that was in evidence was prepared and lodged with the ATO before the sequestration order was made.

461 Further, and in any event, aside from the evidence relating to the lodgement of two tax returns for the 2016 financial year, there are other good reasons to doubt that the 2016 tax return that was in evidence is an accurate copy of the document as lodged in 2017 or that, if so, it is accurate and correctly reflected the assets and liabilities of the FSF as at 30 June 2016. The reasons to doubt the accuracy of the assets listed in the 2016 tax return are:

(1) the matter of the different font for Section H item E suggesting that the figure at item E was completed at a different time to the balance of the document;

(2) the matter of the total assets not equalling total liabilities and the difference being the same as the amount recorded in a different font at item E or cash and term deposits; and

(3) the matter of the figure recorded for item K (non-residential real property) evidently including as an asset the Armadale property which was not an asset of the FSF as of 30 June 2016.

462 Further, the only audit report in evidence for the FSF for the 2016 financial year was a report dated 11 January 2019. The balance sheet that corresponded to that audit was the first, not the second, or third versions of the 2016 balance sheet. There was no direct evidence as to the time at which the first version of the 2016 balance sheet was prepared. The primary judge concluded that it was prepared a short time before 11 January 2019. As a consequence, there was no reliable evidence of the FSF assets and liabilities as correctly recorded in its books and records before 20 July 2018.

463 In short, the primary judge made no error of law or fact in affording little or no weight to such facts as are stated in or may be inferred from the 2016 tax return.

#### PPSR Registrations

464 The appellants contend that the PPSR registrations concerning the BW1 account and Main Portfolio that were in evidence before the primary judge are objective manifestations of an intention to hold the funds in the BW1 account and securities in the Main Portfolio as assets of the FSF. The PPSR registrations in evidence were apparently made on 10 October 2017. Accordingly, these documents pre-date the sequestration orders and could not be considered ‘self-serving’ in any relevant sense for the purposes of the proceedings below.

465 The primary judge observed that the nature of the ‘security interest’ in the property the subject of the BW1 registration is not identified and, if anything, registration of a security interest is adverse to the appellants case because it suggests that the asset itself is not an asset of the FSF, but merely property in which the FSF has a ‘security interest’. Nonetheless, the primary judge accepted that it may be inferred from the documents that, as at 10 October 2017, the appellants “had a wish to record some connection between BW1 and the FSF”. However, his Honour was of the view that it fell “short of any manifestation of an intention that BW1 be held by the applicants subject to the trusts established by the FSF Deed. … Whatever the applicants thought they were going to achieve by lodging the registration, viewed objectively it simply does not have the meaning they now seek to ascribed to it” (Liability Judgment at [281]). For similar reasons, the primary judge was of the view that the PPSR registration relating to the Main Portfolio was of no assistance to the appellants’ case (Liability Judgment at [373(4)]).

466 There was no error in the primary judge's reasons.

#### Tax File Number notifications

467 An email from Mr Frigger, apparently sent from Mrs Frigger’s email account, to the Bank of Queensland dated 13 July 2018 was in evidence. The effect of the email was to notify the Bank of Queensland that the tax file number for the BOQ1 account was that of the FSF.

468 The BOQ1 account was opened on 2 July 2018. A deposit of $2,519,597.42 was made into that account on the same day. The primary judge did not accept that the notification of the TFN after the account was opened was evidence of an intention to hold the funds in that account on the trusts of the FSF formed before the account was opened on 2 July 2018. As to the question of whether notification of the TFN could be taken to be an objective manifestation of an intention to hold the funds on trust for the FSF after notification of the TFN, the primary judge after considering the applicable provisions of the FSF Trust Deed and legal principles, said (Liability Judgment at [360]–[368]):

[360] Clause 33 also provides, however, that a contribution to the FSF 'may be made in cash, or by the transfer of assets in accordance with superannuation law'. While the use of the word 'may' suggests permission, that sentence is preceded by two sentences saying how contributions 'must' be made (see [163] above), so the provision as a whole is laying down mandatory requirements. So to contribute the funds in BOQ1, the contribution would need to be made in cash (say, by the transfer of the funds from BOQ1 into an existing FSF bank account) or by transfer of the asset, that is the account, in accordance with superannuation law. The FSF Deed does not permit a member to make a contribution simply by declaring himself trustee of an asset, even if he is already a trustee of the FSF.

[361] It follows that for BOQ1 to be contributed to the FSF, all the trustees of the FSF must have an ownership interest in it. Otherwise the asset would not be part of the fund of which they are acting as trustees. It would not have been transferred to them as contemplated in cl 33. Any intention to contribute an asset to the fund, viewed objectively in the context of the FSF Deed, must incorporate an intention for that transfer to occur.

[362] Viewed objectively, there were several ways in which Mr Frigger could have intended to give effect to the requirement that BOQ1 be transferred. He could have declared himself alone as trustee over BOQ1 with immediate effect, with one of the terms of the trust being an obligation to assign BOQ1 to himself along with all the other trustees to be held on the terms of the FSF. Or he could have effected the assignment immediately and simultaneously with the declaration of trust. Or he could have intended to make the necessary assignment at some later time.

[363] Of course, raising that many possibilities involves reading a lot into a simple email which notified a TFN against an account. That is the problem. While the email may well express an intention in broad terms that BOQ1 is to be an asset of the FSF, it is too broad for the objective observer to understand how that was to be achieved, consistently with the FSF Deed and the complex web of laws surrounding the FSF as a regulated superannuation fund with multiple trustees. That being so, the email does not manifest with the clarity required by the authorities any intention which had the immediate effect of contributing BOQ1 to the FSF.

[364] The uncertainty does not end there. I have described provisions of the FSF Deed which govern the amount that a member may withdraw on relevant events such as retirement. That depends on the amount standing to the credit of the member's accumulation account: cl 104. That in turn depends on the extent to which contributions have been made in respect of the member: cl 20.3. It was open to Mr Frigger to make a contribution of BOQ1 not just in respect of himself, but also in respect of other members of the FSF, his wife and children: cl 38. The email of 13 July 2018, of course, says nothing about the members for whom the 'contribution' is made. That uncertainty is fundamental. It means that even if there was an expressed intention for BOQ1 to become subject to the trusts of the FSF Deed, it would be unclear for whose benefit it is to be applied, by way of credit to members' accumulation accounts. That is uncertainty of objects, one of the 'three certainties' required for the creation of any trust. For reasons I have explained, that uncertainty would also be fatal to a contention that there was a contribution to an existing trust.

[365] Further, in view of the uncertainty about the necessary transfer to the trustees, there would be no transfer, even in equity. BOQ1 is a debt owed by, or a chose in action held against, the Bank of Queensland: see *Russell v Scott* (1936) 55 CLR 440 at 450‑451. If there was an immediate intention to assign BOQ1 to all the trustees of the FSF, Mr Frigger would have needed to give it effect to it by complying with the requirements for statutory assignment of such an asset that are found in s 199(1) of the *Property Law Act 1974* (Qld) or s 20(1) of the *Property Law Act 1969* (WA) (the proper law of the bank account is unknown, but nothing turns on that because the statutory provisions are in substance the same). Assuming that the bank's terms and conditions permitted such assignment (which is also unknown), that would require an absolute assignment by writing under the hand of Mr Frigger, of which express notice in writing has been given to the bank. Even if legislation about electronic transactions can help supply the requirement for signature (see *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 at 42, but see further *Electronic Transactions Act 2011* (WA) s 10 and *Electronic Transactions (Queensland) Act 2001* (Qld) s 14), the ambiguity of the email means both that the requirement for an expression of an intention to assign, and the requirement for express notice to the debtor (the bank), are missing: see *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] 2 AC 454 at 462.

[366] So Mr Frigger had not done everything that was necessary for him to have done to transfer the legal title to BOQ1: *Corin v Patton* (1990) 169 CLR 540 at 559, 582. As the first respondent submitted, if a voluntary transfer is intended to create a trust, the transfer must have occurred for the trust to be constituted. To the extent that any contribution of BOQ1 here was a voluntary gift (that is, for no consideration) it was ineffective to pass an interest to the assignees, even in equity: *Olsson v Dyson* (1969) 120 CLR 365 at 368, 375‑376, 380, 386, 394; cf. *T Choithram International SA v Pagarani* [2001] 1 WLR 1, a case where the necessary intention was expressed much more clearly than Mr Frigger's email of 13 July 2018, and which in any event in this jurisdiction cannot supplant the authority of the two High Court cases just cited (see *Cook v Cook* (1986) 162 CLR 376 at 390). Being apparently voluntary, any purported contribution by Mr Frigger was revocable prior to the time when the requirements for the gift were satisfied: *Harding v Harding* (1886) 17 QBD 442 at 444. It would have been open to the first respondent to revoke it upon Mr Frigger's legal and equitable interests in BOQ1 vesting in her as trustee in bankruptcy on 20 July 2018. The email of 13 July 2018 was ineffective in equity to contribute BOQ1 to the FSF.

[367] In summary, any case which the applicants might have sought to articulate based on the email of 13 July 2018 having effect as a contribution of BOQ1 to the fund would have foundered at several points. It was unclear whether the contribution was to be effected by transfer to the trustees of the FSF apart from Mr Frigger, and if so how that was to occur. Any such transfer would not have taken effect in equity. And, all that aside, the email could not have resulted in the creation of a trust on the terms of the FSF in respect of BOQ1, because there was no certainty as to who the beneficiaries in respect of that particular property were. So it did not have the result that BOQ1 became part of the conglomeration of property to which those trust obligations were annexed: see *Commercial Nominees*. On the principles I have articulated, each of these problems meant that BOQ1 would not have become part of the FSF.

[368] As I have indicated, the applicants did not articulate any submissions in relation to any of these matters. I have considered them for the purpose of seeking to discern the possible legal content of a case that has been put to the court by non-legally qualified, self-represented litigants. No coherent case can be discerned. The email of 13 July 2018 does not advance the applicants' position.

469 The appellants objected to the admissibility of an email chain between Mrs Frigger and staff of the Bank of Queensland and, as a consequence, that correspondence was only admitted for the limited purpose of establishing the respondent’s state of mind and not to the truth of the matters stated in the emails. Therefore, the primary judge did not consider the extent to which notification of the TFN of the FSF to the Bank of Queensland in respect of BOQ2 was to be considered an objective manifestation of an intention to hold the funds in that account on trust for the FSF (Liability Judgment at [350], [369]).

470 The appellants also contended that the correspondence with the share registries that was in evidence before the primary judge demonstrated that the share registries were informed of the tax file number of the FSF in respect of the securities held in the Main Portfolio before the sequestration orders were made. The appellants contended that the notification of the TFN is an objective manifestation of an intention to hold the securities as assets of the FSF. As the primary judge observed, the respondent made her own enquiries of the share registries and tendered those communications.

471 Regarding communications with Advanced Share Registry, the primary judge concluded that the evidence did not establish when the TFN for the FSF was provided to the share registry (Liability Judgment at [418]–[422]). Regarding communications with Automic Group, the evidence suggested the TFN was provided on 12 September 2019 for many securities and for others on an unknown date (Liability Judgment at [423]–[428]). Regarding communications with Boardroom Pty Ltd, the evidence was inconclusive (Liability Judgment at [429]). Regarding communications with Computershare Investor Services Pty Ltd, the evidence did not establish when the TFN for the FSF were notified to the registry and otherwise suggested it was after the sequestration date (Liability Judgment at [430]–[434]). Regarding communications with Link Market Services Ltd, except for four securities for which the TFN was notified on 19 February 2018, the evidence did not establish when the TFN for the FSF was provided to that share registry (Liability Judgment at [435]–[437]).

472 The primary judge was also not satisfied that the treatment of franking credits on dividends recorded in tax returns established that the TFN for the FSF had been provided to the share registries before the sequestration orders. As the primary judge had not accepted that the tax returns for the 2017 and 2018 financial years had been lodged with the ATO, the submission based on those tax returns could not succeed. The tax return for the 2019 financial year did not establish that the TFN had been notified to the share registries before the sequestration order. While the primary judge accepted that the tax return for the 2016 financial year had been lodged, there was no evidence to establish that the dividends the subject of that return were for the same securities as those in the Main Portfolio as of the sequestration date (Liability Judgment at [438]–[445]).

473 We see no error in the primary judge’s conclusions in this respect. Further, as we have noted earlier in these reasons, none of the unfranked and franked dividends and franking credits recorded in the CommSec financial year summaries corresponded with the amounts recorded for those items in the tax returns that were in evidence. Accordingly, that franking credits were claimed and tax refunds were paid by the ATO, does not give rise to an inference that the franking credits claimed and refunds paid were in respect of securities held in the Main Portfolio.

474 Ultimately, the primary judge expressed his conclusions about the TFN notifications as follows (Liability Judgment at [452]–[454]):

[452] Where there is no evidence that the FSF TFN for a security was ever notified to the registry, the applicants have failed to discharge their onus of proof in relation to that matter. Where the evidence is that it was notified after the making of the sequestration order, the notification provides no support for the contention that the ownership register recorded that the security was held for the FSF at any time before the date of the sequestration order. Further, it cannot support any case to the effect that there was an objective manifestation of the necessary intention before that date, whether evidenced by some notation in the ownership registry or otherwise. By the time of the sequestration order, the notifications were plainly self-serving, and not reliable evidence that there had been any manifestation of intention held before the bankruptcy. And as I have explained above, any such manifestation of intention occurring after the sequestration order could have no effect.

[453] As for the handful of FSF TFN notifications which do appear to have occurred before the date of the sequestration order, there is no evidence as to when the securities against which the TFN was notified were acquired, so the applicants have not established that the notifications were contemporaneous with the acquisitions. So those notifications do not support the applicants' case that the necessary intention was expressed to the share registries on acquisition. Nor do they show that the share registries recorded the trustee capacity in which the shares were allegedly held, at any time. The evidence summarised above indicates that the share registries did not know that the TFN given to them was the TFN for the FSF in particular, or for any superannuation fund. The applicants have not made out their case that notifications of the FSF TFN establishes that the share registries did record that the securities were held by the applicants in their capacities as trustees of the FSF.

[454] The applicants articulated no case that notifications of the FSF TFN subsequent to acquisition of the securities (but before the date of the sequestration orders) were manifestations of intention that were themselves effective to make the securities part of the FSF as declarations of trust or contributions. After all, their case was that this happened on acquisition. As with BOQ1, the whole tenor of the case was that the securities had been part of the FSF from acquisition. So it would be unfair to the first respondent to resolve the case on any different basis.

475 In this appeal, the appellants submitted that notification of the TFN of the FSF to the Bank of Queensland and share registries of the securities held in the Main Portfolio was evidence of an intention of the appellants, as trustees, to exercise the power to accumulate income in the FSF Trust Deed. For the reasons given earlier, framing the factual question in that manner does not affect the essential factual enquiry or the primary judge’s conclusions that the notification of the TFN to the Bank of Queensland was not persuasive evidence of an objective manifestation of an intention to ‘hold’ the funds in the account or securities in the Main Portfolio on trust under the terms of the FSF Trust Deed. There was no error in the primary judge’s approach or conclusions regarding the evidence concerning notifications of TFN to Bank of Queensland and share registries. In particular, we see no error in the primary judge’s conclusion concerning the notification of TFN to Link Market Services he found were made before the sequestration orders recorded in paras [453]–[454] of the Liability Judgment quoted above. Further, on no view, is it evidence of a unanimous decision of all co-trustees to hold funds on securities on trust for members of the FSF.

#### BW1 account reconciliation

476 We have already noted that a key issue before the primary judge concerned identification (tracing) of inflows and outflows of funds from the BW1 account. The primary judge accepted that the Armadale property was an asset of the FSF (Liability Judgment at [292]). Further, based on the bank statements for the BW1 account in evidence and other evidence, the primary judge said (Liability Judgment at [293]):

… In summary, on the basis of those statements and the matters I have just described:

(1) I proceed on the basis that both the Hobart property and the Edward Street property were assets of the FSF.

(2) Much of the rent for the Edward Street property was paid into an account with Citibank which may or may not have been an asset of the FSF. But there is no evidence of where the funds went from there.

(3) Some rent from the Edward Street property was paid into BW1.

(4) Most of the rent from the Hobart property was paid into BW1.

477 While not the subject of evidence before the primary judge, he accepted certain facts concerning a BP Service Station business operated from the Armadale property not to be in dispute in the proceeding. As to these facts, the primary judge said (at [297]):

From 15 September 2008 until 30 June 2009 the applicants operated the BP Business from the Armadale property. At that time, they say, the business was in CAT's name. From 30 June 2009, it was no longer permissible under the SIS Act for the superannuation trustee to operate the business from the trust property. So from that time the applicants operated the business in their personal capacities, and executed a lease with CAT and (they say) paid rent to CAT as trustee. That was the position until 11 February 2016, when the sale of the property and business to a third party was completed. The business sale agreement for that transaction, which appears to be genuine, has a recital to the effect that Mr and Mrs Frigger are the legal and beneficial owners of the business (KAT 1 p 114).

478 After discussing the context of the BP Service Station business, the primary judge returned to a consideration of the BW1 account statements and made the following observations (Liability Judgment at [298]–[303]):

[298] To return to the bank statements for BW1, the statements for the period January 2016 to September 2019 are annexed to affidavit KAT 4 (p 492). A summary of the transactions they reveal follows, including my comment on the significance of the transactions for the purposes of this proceeding. The summary is not comprehensive, but it is indicative of the nature of most transactions.

[299] The following categories of transactions appear to be related to the BP Business:

(1) Payments from American Express - these are likely to be receipts of the BP Business.

(2) Payments to E-Pay Australia and various other merchant fees - I infer that these are expenses of the BP Business.

(3) Large payments to and from BP Australia, which are evidently connected with the BP Business.

(4) Numerous payments from 'Business Fuel … Fleet Card', Motorpass, Motorcharge and 'FI Card Merchant Settlement' - I infer that these are receipts of the BP Business.

(5) Payments for 'Wages' - I infer that these are payments to staff of the BP Business as there is no suggestion in the evidence that at the relevant time the applicants operated any other business employing staff.

(6) Payments made for consumer items such as soft drinks, ice, milk and newspapers or magazines - the amounts involved are greater than would be required for household use, so I infer that these were items sold in the BP Business.

(7) A payment labelled 'Synergy BP'.

[300] As one would expect, transactions of the kind summarised above cease at around February 2016, when the sale of the BP Business apparently settled. Other categories of transaction not obviously related to the BP Business which can be observed throughout the period January 2016 to September 2019 are as follows:

(1) Payments from Officeworks, which I infer are rent for the Hobart property.

(2) Payments for land tax and, apparently, rates, on the Hobart property.

(3) A very large receipt on 29 May 2019 labelled 'Hobart' - I infer that this is the proceeds of sale of the Hobart property.

(4) Payments out to Mastercard or labelled 'Mastercard top up' - whether these are of a personal nature depends on the purpose for which the Mastercard was used. It does appear to have been used to pay land tax on the Hobart property, although as has been mentioned, Mrs Frigger also said in evidence that it was for personal expenses.

(5) Rent from the Edward Street property - as I have indicated, I proceed on the basis that these were receipts from an asset of the FSF.

(6) Payments apparently received for rent from various individuals, not otherwise explained.

(7) Large receipts and payments that can be explained as part of the flow of funds which ultimately end up in BOQ1 (e.g. 10 October 2017 and 12 October 2017; cf. KAT 4 p 894) - see the exercise depicted in Schedule 2 to these reasons.

(8) Numerous payments to and from CommSec, some of which are very large. Some of these may be share purchases or the crediting of sale proceeds respectively. But there was no evidence to match them to particular share transactions. The applicants provided a table which did seek to match them, but Mrs Frigger conceded that this had been prepared by Mr Frigger, who did not go into evidence, and that there was no evidence permitting the CommSec withdrawals and payments to be matched to particular securities (ts 184 185, 302 303). I therefore do not take account of that table.

(9) Payments, apparently to purchase securities, which are not labelled as payments to CommSec (e.g. $4,540.80 on 9 December 2016 for 'Boral share purchase options').

(10) Numerous receipts for share dividends.

(11) Payments and receipts apparently personal in nature, for example:

(a) $139.00 to Proud Appliances Subiaco on 1 September 2016;

(b) $158.26 to Aldi on 19 September 2016;

(c) $49.00 from Medicare on 19 September 2016;

(d) $40.00 to the Rhein Donau Club on 18 April 2017, labelled 'Hartmut Frigger'; and (e) $535.00 to WA Eye Specialists on 22 November 2018.

(12) Payments to utilities. Some appear to be for properties in Western Australia (e.g. payments to Synergy and Alinta). Some are for internet, and so not apparently related to the role of lessor of any rental property. Others, for example those labelled 'Taswater' or 'Water Como', do appear to be related to the position of Mrs Frigger, or Mr and Mrs Frigger, as lessors.

(13) Payments for 'Melville rates' - these appear to be of a personal nature.

(14) Payments to Michael Frigger and Jessica Frigger. These appear to be of a personal nature, and occasionally they are labelled 'Gift' or 'Loan'. Mrs Frigger appeared to say in cross examination that at least some of the payments to Michael were gifts but she could not remember what all the payments were for (ts 299-300). She said in closing submissions that payments to Michael were drawings of her pension (ts 926) but this was a mere assertion, unsupported by evidence. Jessica Frigger appears to have made loan repayments from time to time. There are also unexplained receipts which appear to be from Michael Frigger.

(15) Interest on the funds in BW1.

(16) Payments labelled 'FSF BAS' and 'FSF GST', which would appear to be tax instalments paid on behalf of the FSF.

(17) Receipts from the Australian Taxation Office - presumably these are tax refunds. As I have said, the annual returns list BW1 as the destination account for FSF tax refunds and I have referred above to evidence that the amounts for some of these receipts roughly correspond to refund amounts shown in some of the annual returns. So I accept that some of these receipts were FSF tax refunds, although it is neither possible nor necessary to say which ones.

(18) Legal fees to law firms and barristers.

(19) A payment of $39,000 on 15 January 2018 labelled 'Security for costs'.

(20) A payment on 11 June 2018 for transcript in matter WAD 607 of 2015 in this court.

(21) Payments from Angela Frigger.

(22) A debit for rent for a property at Kearns Crescent, Applecross - the purpose of this payment does not appear from the evidence.

(23) A debit of $733.07 on 17 August 2016 labelled 'Frigger Super Fund'. It is not clear where those funds went.

(24) Payments apparently to or from other individuals, whose connection with the applicants does not appear from the evidence.

(25) Unexplained cash and cheque deposits and withdrawals.

[301] The following broad observations can be made about these categories of transaction. *First*, BW1 was plainly the operating account for the BP Business until that business was sold in February 2016. It is common ground that the business was not an FSF asset. The applicants did not adduce any evidence of any outward manifestation of an intention to change the character of BW1 as a personal (non‑trust) account after the BP Business was sold, for example a declaration that henceforth it would be held on trust for the FSF. *Second*, at all times BW1 was used to receive income of an investment nature, for example share dividends and rent from various properties. I have accepted that at least some of those properties were FSF assets. *Third*, BW1 was the destination and source of substantial payments which appear to have been part of the flow of funds between investment bank accounts, including BOQ1, which is depicted in Schedule 2 to these reasons. *Fourth*, there are some payments in the nature of tax instalments which, when they were made, were apparently labelled by the person who made them (presumably Mrs Frigger) as being for the FSF. And some FSF tax refunds were paid into the account. *Fifth*, BW1 was also used for personal expenses which on their face could not be expenses of the FSF. That use was not, however, so frequent as to suggest that the account was the main personal transaction account of Mrs Frigger or anyone else. The account appears to have been used to pay personal expenses only on an ad hoc basis. *Sixth*, there are large payments to and from CommSec which obviously relate to shares or other financial products but are otherwise unexplained. *Seventh*, there are payments by way of loan or gift to the applicants' children, which are not readily explicable as being for the purposes of the FSF. *Eighth*, there are many payments and receipts, including cash and cheques, the purpose, origin or destination of which are simply unexplained.

[302] I conclude that BW1 was used as an account for the receipt of income of the FSF and tax refunds of the FSF and payment of expenses and other outgoings attributable to the FSF. But it was also used as the account for numerous other receipts and payments which were not connected to the FSF, or are simply unexplained.

[303] I do not consider that this mixing of funds and purposes is necessarily fatal to the applicants' claim. While trustees generally are obliged not to engage in such mixing, a breach of that obligation by a trustee does not by itself cause the fund to lose its character as a trust fund. And, as I have said, the transactions of a personal nature are not so frequent as to compel the characterisation of BW1 as a wholly personal and not a FSF trust account. In the end, it is a question of fact arising from the applicants' case as to following the funds into BOQ1: does the nature of the transactions in BW1 mean that the account should be characterised as an asset of the FSF, so as to support a conclusion that the funds which were paid out of it and which found their way into BOQ1 were FSF funds? Before answering that question, though, it is necessary to consider an exercise purporting to trace FSF rental income which the applicants presented to the court.

479 Before the primary judge the appellants made a submission (in the form of four reconciliations of the flows of funds into and out of the BW1 account) by which they sought to explain and demonstrate that *all* transactions on the BW1 account were transactions of the FSF. The primary judge rejected the reconciliations and the submission for four principal reasons (Liability Judgment at [304]–[319]).

480 First, the primary judge observed that the bank statements covered 20 months and contained thousands of transactions that on the face of them varied greatly in character, source and (or) destination. The reconciliations were not apparently verified on oath and there was no direct evidence to explain each transaction that was not self-evidently related to the FSF or one of the accepted or disputed assets. The primary judge concluded that it “is impossible for the court to go through that many transactions to satisfy itself that the summary provided in the reconciliations is accurate” (Liability Judgment at [308]). Further, the ‘evidence’ (electronic files downloaded from BankWest) from which the reconciliations was actually prepared was not in evidence. In short, the reconciliations and submission were opaque.

481 Second, the respondent provided calculations (by way of submissions) that sought to demonstrate that the appellants’ reconciliations were not reliable. The primary judge accepted that the respondent’s submissions identified unexplained aspects of the appellants’ reconciliations (submissions).

482 Third, the primary judge rejected the appellants’ assertion that while the BW1 account was operated for the BP Service Station business, and that was obviously not an asset of the FSF, the net receipts into the BW1 account were payments by way of rent to the trustees of the FSF and owners of the Armadale property. Mrs Frigger gave evidence during her cross-examination to the effect that when she prepared the reconciliations she set-off the net receipts against the rent owed. The primary judge concluded that he had no way of knowing if the set-off was done and he would not rely on Mrs Frigger for the veracity of the evidence or set-off.

483 Fourth, the appellants submitted that the reconciliations were based on the ‘last in first out’ rule of thumb. The primary judge observed that rules of thumb or presumptions of that nature have been criticised in certain Australian authorities and was inapposite outside undertaking a true ‘tracing’ exercise as part of a claim for a proprietary remedy. A ‘last in first out’ rule was not a legal principle. Further, the evidence did not explain how the rule was applied to the BW1 account.

484 In this appeal, the appellants submitted, in effect, that the primary judge was wrong not to conclude that the reconciliation submission that they made at the trial demonstrated that *all* funds passing through the BW1 account were accounted for as transactions of the FSF. In support of that submission the appellants appended three schedules to their written submissions of 28 June 2022 made pursuant to the Courts orders of 18 May 2022.

(1) The appellants submit that Schedule 1 demonstrates that *all* payments into the BW1 account were income from assets of the FSF.

(2) The appellants submit that Schedule 2 demonstrates *all* transactions in the period between 31 December 2014 and 30 June 2015 were transactions of or allocated to the FSF. In particular, that certain debts and credit on the BW1 account constituted rent paid by Mr and Mrs Frigger, in their personal capacities as proprietors of the BP Service Station business, to Mr and Mrs Frigger, in their capacities as trustees of the FSF.

(3) The appellants submit that Schedule 3 demonstrates that *all* purchases of securities in the Main Portfolio are traceable to funds in the BW1 account.

The entries in the Schedules are cross-referenced to exhibits tendered at the trial that formed part of the appeal book.

485 Schedule 1 contains cross-references to documents that were tendered at the trial. The appellants rely on bank statements for the BW1 account for the opening amount of funds available as at 30 June 2015 and to demonstrate various withdrawals alleged to comprise $2,900,000 deposited into the BOQ1 account. The appellants rely on FSF member statements, profit and loss statements and tax returns to demonstrate annual income for the 2016, 2017, 2018 and 2019 financial years. None of these documents is reliable as each was prepared after the sequestration orders were made. The appellants also rely on the ATO accounts transaction document that we have already indicated is not received as further evidence in the appeal. It follows that Schedule 1 takes the appellants’ submissions no further than their other submissions to the effect that primary judge was in error for failing to accept that the information contained in financial statements, tax returns and other records of the FSF was accurate.

486 Schedule 2 is a table of transactions amounts and descriptions on the BW1 account between 31 December 2014 and 30 June 2015. The appellants rely on the BW1 account bank statements tendered at trial as the source of the information produced in that table. At the end of the table the appellants summarise the transactions recorded in the table as: Opening Balance; Rent; BP Rent; Interest; Dividends; Share Trading; and FSF expenses. The closing balance is the same as the opening amount in Schedule 1. Therefore, it is an attempt to identify all transactions in the opening amount of Schedule 1 as transactions of the FSF.

487 It follows that the appellants have attempted to overcome the problem that the reconciliation upon which they relied in the proceedings below was based on electronic bank records that were not in evidence. However, the primary difficulty with the appellants’ reconciliation (whether before the primary judge or in the appeal) remains that the summaries of the transactions are opaque. Not all transaction descriptions drawn from the BW1 account bank statement are self-explanatory. Further, evidence from an independent source (i.e., a source other than Mrs Frigger) was not adduced at trial to explain the transactions and allocations in the reconciliation summaries.

(1) There are references to cheque withdrawals. These are asserted to be FSF expenses, but there is no evidence to which the appellants have referred to support the allocation of these withdrawal to FSF expenses.

(2) There are references to loan repayments by and gifts to “Jessica Frigger”. The appellants have not referred to any evidence to support the allocation of these transactions to any particular item in the summary.

(3) There are references to payments to “M Frigger”. Again, the appellants have not referred to any evidence to support the allocation of these transactions to any particular item in the summary.

(4) There are amounts allocated to Commsec (Share Trading) with no date and no transaction description.

(5) The amount allocated for BP Rent is the difference between deposits and withdrawal from the account excluding the transactions allocated to another item. Mrs Frigger gave evidence to the effect that this amount was allocated to the FSF for rent from the Armadale property. However, the primary judge did not accept that evidence because Mrs Frigger was not regarded as a witness of truth.

488 The transactions reproduced in Schedule 2 and the allocation of those transactions to various items was not supported by any evidence given at the trial to which the appellants referred in the appeal other than Mrs Frigger’s evidence during her cross-examination about the allocation of surplus revenue of the BP Service Station business to the FSF as rent for the Armadale property. Thus, the appellants have not identified any ‘independent’ evidence or provided any reason for considering that these allocations are consistent with the inherent probabilities.

489 Schedule 2 lacks transparency and evidence in support of the reconciliation in the same way that the schedules upon which the appellants relied at the trial lacked transparency and verification. The primary judge was not in error for refusing to accept that the appellants’ reconciliation was accurate and founded on ‘independent’ or otherwise reliable evidence. Therefore, Schedule 2 does not reveal that the primary judge made any error in refusing to accept the accuracy of the appellants’ reconciliation submission made at the trial or their submission that *all* transactions on the BW1 account were transactions of or relating to the FSF.

490 There was also no error in the primary judge’s conclusion that the respondent had identified unexplained aspects of the appellants’ reconciliation. The respondent’s submissions, which the primary judge accepted, demonstrated the following in respect of the period between 24 December 2014 and 6 September 2016.

(1) A net amount of $328,995.82 was withdrawn from the BW1 account in respect of security acquisitions. That is, there was a net decrease of funds in the BW1 account in respect of securities trading in that period. The appellants had submitted that there had been a net increase in funds in that account, based on their reconciliation, of $122,617.10.

(2) Dividends of $24,219.75 were paid into the BW1 account in respect of securities. The appellants had submitted that there had been $109,612.84 paid into the BW1 account in that period for dividends in their reconciliation.

(3) A net amount of $128,380.80 was withdrawn from the BW1 account and paid to Mr Michael Frigger. That amount is not accounted for, at all, in the appellants’ reconciliation.

(4) A total amount of $299,053.08 was withdrawn from the BW1 account in respect of Mastercard payments. The appellants’ reconciliation claimed an amount of $292,688.09 for FSF expenses, pensions and other investments.

(5) Unexplained amounts totalling $67,152.65 was withdrawn from the BW1 account.

491 The primary judge was not in error for accepting that the respondent’s submissions, based on simple addition of amounts and transaction descriptions referred to in the BW1 account bank statements, cast doubt on the accuracy of the appellants’ reconciliation. The appellants made no attempt to demonstrate that the respondent’s submissions (or calculations) based on the bank statements was incorrect arithmetically or by way of transaction grouping.

492 There was also no error in the primary judge’s rejection of Mrs Frigger’s contention that the funds had been allocated to the FSF on a ‘last in first out’ basis. There was no evidence that a reconciliation adopting that methodology had been undertaken. Further, there was no evidence that the trustees of the FSF had made a unanimous decision to allocate funds in the BW1 account to a particular asset as an asset of the FSF before the acquisition of that asset or at any time before the sequestration order was made. That is, there was no evidence of application of funds on a ‘last in first out’ basis, in fact, or upon any other basis.

493 Schedule 3 is a list of securities identified by their stock code, date of purchase, the unit price, number of units purchased, total purchase price and brokerage. These are cross-referenced to CommSec financial year summaries that were tendered during the trial. None of these transactions is cross-referenced to the BW1 account bank statements. However, the appellants submit that Schedule 3 demonstrates that all securities in the Main Portfolio are traceable to funds in the BW1 account.

494 We have not undertaken the task of trawling through the numerous entries in the BW1 account bank statements to identify if there were transactions on the dates identified corresponding with each entry in Schedule 3. We have undertaken a review of a random sample of items in Schedule 3 and found that these correspond with the transactions recorded in the CommSec financial year summaries and BW1 account bank statements. Accordingly, we accept that the securities referred to in Schedule 3 are traceable to funds in the BW1 account. However, that does not mean that the securities were purchased with income derived from FSF assets. It does not demonstrate that the primary judge was in error for not concluding that all transactions on the BW1 account were transactions of or relating to the FSF. The appellants made no submission that there was evidence to establish a causal or transactional line between payments into the BW1 account and the acquisition of particular securities in the Main Portfolio.

495 It follows that the appellants have not demonstrated that the primary judge was wrong to reject the appellants’ reconciliations (submissions) to the effect that the evidence tendered at trial established that *all* transactions on the BW1 account were traceable to deposits or withdrawals relating to the Armadale property, Hobart property, Edward Street property, Como Property, Bayswater property and Main Portfolio. We agree that the reconciliations (as originally submitted) and the Schedules (as submitted on appeal) are opaque and leave many transactions recorded in the bank statements that are not self-explanatory unexplained or not explained by evidence from a witness whose evidence the primary judge regarded as credible. Also causal and transactional links between deposits and withdrawals and disputed assets have not been explained by evidence.

#### Declaration of trust

496 Regarding the Residential Properties, there were declarations of trust of Mrs Frigger in respect of the Como property and Bayswater property in evidence.

497 The primary judge concluded that, on the proper construction of these instruments, there was not an intention to create a trust by which Mrs Frigger was to hold each of the Residential Properties on trust, in effect, for the trustee of the FSF for the benefit of the members of that fund (Liability Judgment at [500]–[503]).

498 The appellants have challenged the primary judge’s conclusions in ground 5 of the re-amended notice of appeal. For the reasons given later, the primary judge made no error in concluding that Mrs Frigger holds the Residential Properties on trust for the benefit of Mr Frigger and herself and that the beneficial interests of Mr and Mrs Frigger in those properties has vested in the respondent under s 58 of the *Bankruptcy Act*.

#### Asset valuations

499 There were in evidence market valuations for the Residential Properties and other assets now accepted to be assets of the FSF. These were market value declarations as of 30 June 2016, 30 June 2017 and 30 June 2018.

500 The primary judge found that the valuation as of 30 June 2018 was signed on 29 March 2019. The valuations as of 30 June 2016 and 30 June 2017 were likely to have been provided to the auditor after the sequestration orders were made even though they are dated 30 June 2016 and 1 June 2017. The primary judge concluded that as all market valuations were likely to have post-dated the sequestration orders none of them was reliable as evidence of an objective manifestation of an intention to hold the properties as assets of the FSF (Liability Judgment at [476]–[479]).

501 The primary judge’s conclusions and reasoning concerning the asset valuations are not challenged on appeal.

#### Account ‘nicknames’

502 Aside from the altered account names on the St George Bank statement and CommSec financial year summary, the appellants submitted that another objective manifestation of an intention to allocate the funds transferred into the BOQ1 and BOQ2 accounts to the FSF was the use of the ‘nickname’ “Frigger Super Fund” on the Bank of Queensland’s online banking platform. The appellants submitted that the primary judge was in error for concluding that the use of the nickname was self-serving because the nickname was utilised before 20 July 2018. The appellants submit that the primary judge “overlooked manifest evidence that the secondary account name was made prior to bankruptcy” and rely on a document that is a printout from a Bank of Queensland website evidently dated 7 June 2018 for the BOQ1 account that includes as the account name “Frigger Super Fund”.

503 The account number for that account is 2269 6479. The account number for BOQ1 is 2281 1228. The account number for BOQ2 is 2281 0932. The primary judge found that each of the BOQ1 and BOQ2 accounts was opened on 2 July 2018: Liability Judgment at [335]. A similar printout was in evidence for the BOQ1 account. It is dated 27 July 2018 and also records the nickname “Frigger Super Fund”. It follows that we do not accept that the document upon which the appellants rely or the similar document relating to BOQ1 demonstrates the primary judge made the asserted error.

504 With the above analysis and principles in mind, we now turn to consider grounds of appeal 2 to 5.

### Ground 2: BW1

505 The primary judge considered it relevant to determine whether the BW1 account was an asset of the FSF because the appellants claimed that it was the main operating account of the FSF. Further, the appellants claimed (and the respondent accepted) that funds in the BOQ1 account could be ‘traced’ back to the BW1 account and the appellants claimed that securities in the Main Portfolio were purchased using funds in BW1. So, as his Honour observed, “the question whether BW1 was an asset of the FSF bears on whether assets which are the subject of the claimed declarations are assets of the FSF”: Liability Judgment at [211].

506 The primary judge then considered the evidence in support of the appellants’ case. He considered evidence relating to the details of the BW1 account, the balance sheets and tax returns of the FSF, the effect of the PPSR registration, transactions recorded in the bank statements, the appellants’ submissions as to the manner in which the funds in the BOQ1 account and securities in the Main Portfolio were to be ‘traced’ and the respondent’s submissions as to other possible explanations for the transfer of funds from the BW1 account to, ultimately, the BOQ1 account (Liability Judgment at [211]–[328]). The primary judge expressed his conclusions regarding the question of whether the BW1 account was an asset of the FSF as follows (Liability Judgment at [329]–[331]):

[329] To return to the question I posed above, as to whether the nature of the transactions in BW1 mean that the account should be characterised as an asset of the FSF, the answer to that question is 'no'. While BW1 was used for many FSF transactions, it was also used for many transactions which were not related to the FSF or are unexplained. Assessed objectively, it was an account that was used for mixed FSF and non-FSF purposes. That assessment provides no substantial support for a contention that payments out of BW1 into other accounts are likely to be payments for the purposes of further trust investments. Given the way BW1 has been used, they could be for anything.

[330] The upshot is that it is not possible to make a finding in a binary way as to whether BW1 was or was not an asset of the FSF. Although the applicants have not established that the account as a whole is an FSF asset, it does appear that it contains funds that are FSF funds. They are FSF funds in the sense that if, say, a new trustee of the FSF were to make a claim on the account as the repository for funds improperly mixed with non-FSF funds, it appears likely that the claim would be successful for some of the money in BW1. But it is impossible on the current state of the evidence and analysis to say what proportion of the funds would be recoverable by the trustee of the FSF in that hypothetical claim.

[331] It is not necessary to make a binary finding, however, because the applicants seek no declaration that BW1 was an FSF asset. In substance, their case about BW1 is that it is so closely associated with the FSF that the payments out of it are to be characterised as payments of FSF funds. For the reasons I have given, they have not made that out. In summary:

(1) BW1 was in Mrs Frigger's name alone. Although she was a trustee of the FSF for most of the relevant period, at no time was she the sole trustee, so at no time did the account name correspond to the identity of the trustees of the FSF. She confirmed in cross examination that she was aware of the need for trust assets to be held in the name of the trustee (ts 217). So the fact that BW1 is in her name speaks against any actual intention on her part that it was an FSF asset, let alone any objectively manifested intention to that effect.

(2) The alleged status of BW1 as a trust asset was never stated in the account name as shown on bank statements. 'Frigger Super Fund' was used as an account 'nickname' from an indefinite point of time, so, as I have said, I place no weight on that. No communications with Bankwest informing it of the account's alleged trust status were put into evidence. Nor was there any evidence of such communications with any other person. There is no reliable evidence of any written or oral statement predating this proceeding to the effect that BW1 was part of the FSF.

(3) The balance sheets and annual returns relied on are wholly unreliable and can be given no weight. The audit reports do not enhance the reliability of the balance sheets.

(4) The PPSR registration does not assist the applicants.

(5) BW1 has been used for a variety of purposes, which does not support any inference that money paid out of it retained its character as trust money. The account has been open since at least 2005 and there is no evidence that it was used for FSF purposes from that time. Until February 2016, it was used as the operating account for a business that was not an asset of the FSF, namely the BP Business. There is no evidence of any specific event or circumstance which changed its character to a trust account after that time.

(6) While BW1 did receive rental income which I take to be FSF income, it received income from many other sources and was used as the paying account for a variety of purposes. As I have explained in detail, that rental income has not been persuasively traced to any particular funds that found their way to BOQ1.

(7) Large payments out of BW1 could be transfers of FSF funds but, assessed objectively, they could equally be lum sum payments of benefits to the individual applicants in their personal capacities.

507 These conclusions are challenged in ground 2 of the re-amended notice of appeal in the following terms:

3. The learned trial judge fell into jurisdictional error within the meaning of section 22 *Federal Court of Australia Act* by finding that BW1 is not a trust asset of the Frigger Super Fund (FSF) in circumstances where the applicants did not make a legal or equitable claim over BW1 and:

(a) The Official Receiver in its role as bankruptcy trustee determined on 27 July 2018 that BW1 is a trust asset of FSF (**the BW1 Determination**);

(b) The respondent did not reverse the BW1 Determination and specifically requested BankWest to unfreeze BW1 in September 2019 after BankWest had inadvertently frozen it a few days earlier;

(c) The appellants, as trustees of FSF, were provided with reports from FSF approved SMSF auditor, within the meaning of section 35C *Superannuation Industry (Supervision) Act 1993* (**SIS Act**)*,* that FSF accounts, financial statements and annual returns complied with prescribed standards of that Act, which accounts, financial statements and annual returns included BW1 during the period commencing 1 January 2015 until the purported sequestration orders on 20 July 2018 (**the Relevant Period**) and after the purported bankruptcy of the appellants.

508 The *chapeau* to para 3 of the re-amended notice of appeal pleads that the primary judge “fell into jurisdictional error … by finding that BW1 is not a trust asset of the [FSF]”. The primary judge made no such finding. The primary judge’s conclusion was that it was not necessary to make a binary finding. The primary judge’s key conclusion was that the appellants had not made out their case that BW1 was so closely associated with the FSF that payments out it are to be characterised as payments of FSF funds. Nonetheless, we are content to deal with the ground on the basis that the true nature of the complaint is that the primary judge fell into error for *failing to find* that BW1 is a trust asset or for failing to find that all funds paid out of it into, ultimately, BOQ1 and to acquire securities in the Main Portfolio were funds of the FSF.

509 In the course of the appellants’ written and oral submissions a number of strands to the contention that the primary judge fell into ‘jurisdictional error’ emerged.

510 The appellants submitted that the primary judge had no jurisdiction to determine the issue of whether the BW1 account was, in fact, an asset of the FSF because that was not a matter in question in the proceedings. That submission is not accepted for the same reasons that we do not accept that the appellants were taken by surprise regarding that issue at the trial.

511 The appellants submitted that the primary judge was in error for requiring the appellants to prove that there was a declaration of trust over the BW1 account. That submission is not accepted for the reasons we have already given.

512 The appellants submitted that the primary judge was in error for considering the issue of whether the funds in the BW1 account were held on trust for the benefit of the members of the FSF because these funds had ‘vested’ in the appellants as part of allocated pensions or retirement phase assets. That submission is not accepted for the reasons we have given above for rejecting the appellants’ ‘vesting’ submissions.

513 The appellants submitted that the primary judge was in error because the Official Trustee had determined on 27 July 2018 that the BW1 account was an asset of the FSF. Further, the respondent did not direct BankWest to freeze the account after she was appointed and specifically requested BankWest to remove a stop that was inadvertently placed on the account in September 2019. Although unclear, it appears that the appellants contend that the actions of the Official Trustee and respondent comprise admissions of fact binding on the respondent in the proceedings.

514 The appellants did not take the Court to any submission the appellants had made to the primary judge to the effect that the Official Trustee had made an admission and no such submission is referred to in the primary judge’s reasons. It appears to be a *new* point taken in the appeal. Although the respondent made no objection to the appellants raising the point in the appeal, we are not inclined to grant the appellants leave to raise it because the question of whether an admission was made is quite obviously a matter that could have been met by evidence at the trial. It is not in the interests of justice to allow the point to be raised in the appeal: *O’Brien v Komesaroff* [1982] HCA 33; 150 CLR 310 at 319; ***Coulton v Holcombe*** (1986) 162 CLR 1 at 7–8; *Metwally v University of Wollongong* [1985] HCA 28; 60 ALR 68 at 71.

515 Further, and in any event, in our view, the correspondence between the Official Trustee and BankWest to which we have made reference earlier in these reasons and the internal file notes of the Official Trustee do not establish that the Official Trustee made any such ‘determination’ or had ‘accepted’ that the BW1 account was an asset of the FSF. The Official Trustee instructed BankWest to lift the stop on the account on the basis of information that Mrs Frigger had provided to its staff. The respondent gave an explanation for actions during her cross-examination to the effect that no stop was placed on the BW1 account after her appointment because, by that time, the account balance was less than $5,000 (Transcript 2020-08-31 T.580–T.581). The primary judge accepted that explanation (Liability Judgment at [618]).

516 Assuming, without deciding, that there is sufficient privity between the Official Trustee and the respondent for an admission by the Official Trustee to be admissible against the interests of the respondent and even if the Official Trustee’s conduct could be considered an admission, such an ‘admission’ (that BW1 is an asset of the FSF) is a conclusion involving a mixed question of fact and law. The extent to which admissions of mixed fact and law are admissible (as opposed to admissions that involve the application of a legal standard which are not admissible) is open to debate: *Dovuro Pty Ltd v Wilkins*[2003] HCA 51; 215 CLR 317 at [40], [70]–[71], [177]. Assuming an admission of a mixed question of fact and law is admissible, in this case, it still begs the question: what facts are taken to have been admitted?

517 The appellants have not identified what, if any, facts it is contended were admitted by the Official Trustee. In any event, even if taken as an admission of whatever facts might be said to have been necessary to be proved to support that conclusion, the conclusion may be contradicted by other evidence and the trier of fact is entitled to give such weight, if any, as may be considered appropriate to the admission: see, e.g., *Allen v Roughley* (1955) 94 CLR 98 at 142 (per Kitto J). As McLelland J (as his Honour then was) observed in *Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd* (1979) 1 BPR 9251 (at 9256): “[a]dmissions by a party of the existence or non-existence of a contract, or of a fact relevant to that issue, will usually vary inversely with the strength of the available direct evidence on the matters in question”. Put slightly differently, to the extent the evidence reveals an opinion as to a question of law rather than fact, the admission may be irrelevant or valueless: *Johnston v Brightstars Holding Company Pty Ltd* [2014] NSWCA 150 at [121].

518 Here, any admission to the effect that the funds in the BW1 account were an ‘asset of the FSF’ is of dubious value since it was evidently extracted after Mrs Frigger made representations to the Official Trustee. Thus, even if the conduct of the Official Trustee could be considered an admission against the interests of the respondent in the proceedings, we would give that admission no weight. Thus, the appellants have not demonstrated the primary judge made any error for failing to conclude that the BW1 account was an asset of the FSF on the basis of any admission of the Official Trustee.

519 The appellants submitted, in effect, that the primary judge was in error for not accepting that the BW1 account was an asset of the FSF because it is recorded as such an asset in the audited balance sheets of the FSF and reflected in the asset valuations in tax returns lodged with the ATO. The appellants submit that the evidence establishes that the trustees of the FSF have complied with the prescribed standards of the *SIS Act* and *SIS Regulations*and the requirements of the *ITAA 1997*. As we have already said, that auditors and regulators have apparently accepted representations made to them by the appellants (in particular Mrs Frigger) for the purposes of the superannuation and taxation legislation is not evidence that the hearsay statements contained in those documents are true and correct. Further, that regulators have apparently accepted that the trustees of the FSF have complied with the requirements of the *SIS Act* and *SIS Regulations*and *ITAA 1997* does not mean that the trustees have, in fact, so complied.

520 It follows that the primary judge made no error of the kinds pleaded in para 3 of the re-amended notice of appeal and (or) articulated in the appellants’ written and oral submission in considering for himself if the appellants had proven, on the balance of probabilities, that the BW1 account was an asset of the FSF or if *all* the funds passing through that account were funds of the FSF. That was an issue that was properly before the primary judge that he had to determine as a necessary integer of the appellants’ claims that the BOQ1 and BOQ2 accounts and Main Portfolio were assets of the FSF.

521 In the appellants’ written and oral submissions they also asserted that the primary judge made numerous errors of fact in reaching his conclusion that the evidence had not demonstrated that the BW1 account (or all the funds passing through it) was an asset of the FSF. These asserted errors are not pleaded as part of the errors asserted in ground 2 of the re-amended notice of appeal and otherwise overlap with the appellants’ submissions concerning the errors of fact asserted in grounds 3 and 4. We consider these asserted errors when addressing grounds 3 and 4, which, for the reasons given below, have no merit.

522 Ground 2 of the re-amended notice of appeal fails.

### Grounds 3 and 4: BOQ1 and BOQ2 and the Main Portfolio

#### Overview

523 The appellants largely made submissions regarding grounds 3 and 4 (and to some extent ground 2) together. Therefore, it is convenient to deal with grounds 3 and 4 together.

524 Ground 3 is in the following terms:

**Ground Three – BOQ1 and BOQ2**

4. The learned trial judge erred in mixed fact and law by deciding @ [533] that BOQ1 and BOQ2 vested in the respondent in circumstances where:

(a) The respondent failed to identify which funds deposited to BOQ1 and BOQ2 were funds that belonged to the appellants ~~beneficially~~ personally in circumstances where it is manifest from trial exhibits that rental, interest and dividend income earned by FSF ~~trust estate~~ had been accrued in BW1 and deposited to various high interest websaver accounts in several banks during the Relevant Period;

(b) The trial exhibits manifestly contradict the learned trial judge’s findings of fact:

(i) 30/6/15 – BW1 balance of $667,270.39 included in FSF financial statements and annual return prepared and lodged on 13/11/15 with the Regulator;

(ii) 30/6/2016 – BW1 balance of $1,779,488.20 included in FSF financial statements and annual return prepared and lodged on 31/3/2017 with the Regulator;

(iii) 30/6/2017 – additional FSF income of $220,511.80 was added to BW1 balance at (ii) above and deposited in Citibank term deposit, which account was included in FSF financial statements and annual return prepared and lodged on 2/7/2018 with the Regulator;

(iv) 30/6/2018 – additional FSF income of $519,647.42 was added to the amount in the Citibank term deposit and deposited to BOQ account No 22810932 (BOQ3), which account was included in FSF financial statements and annual return prepared and lodged on 7/9/2018 with the Regulator;

(v) 30/6/2019 – additional FSF income of $349,233.00 was added to the amount in the BOQ3 and transferred to BOQ1 on 2 July 2018, which account was included in FSF financial statements and annual return prepared and lodged on 28/2/2020 with the Regulator;

(vi) The appellants notified FSF-TFN to each respective bank in (i) – (v) above (**the Relevant Bank Accounts**), who reported that TFN to the Regulator;

(vii) Each of the FSF accounts, financial statements and annual returns (**FSF Financial Records**) during the Relevant Period were audited by FSF approved SMSF auditor who provided a report that the appellants, as trustees, had complied with SIS Act Sections: 17A, 35AE, 35B, 35C(2), 62, 65, 66, 67,67A, 67B, 82-85, 103, 104, 104A, 105, 109, 126K SIS Act, and SIS Regulations: 1.06(9A), 4.09, 4.09A, 5.03, 5.08, 6.17, 7.04, 8.02B, 13.12, 13.13, 13.14, 13.18AA

(viii) In none of the annual member’s statements of the FSF during the Relevant Period, were benefits or pensions paid that equated to the amounts held in the Relevant Bank Accounts;

(ix) An approved SMSF auditor retained by FSF during the Relevant Period provided a report to the FSF trustees pursuant to s 35C SIS Act which contained a statement that FSF Financial Records complied with prescribed standards pursuant to s 34 SIS Act and SIS Regulations, including the Relevant Bank Accounts;

(x) The approved SMSF auditor did not provide a contravention report to FSF trustees consequent on the inclusion of the Relevant Bank Accounts in the Financial Records and/or annual returns nor that the Financial Records did not meet prescribed standards;

(xi) No direction was given by the Regulator pursuant to s 34P SIS Act to the FSF trustees consequent on the inclusion of the Relevant Bank Accounts in the Financial Records;

(c) At no time did Mr Frigger allege that the funds in BOQ1 was a superannuation contribution;

(d) Pursuant to clause 126 FSF Trust Deed, each FSF trustee delegated the power to legally hold BOQ1 to Mr Frigger and the power to legally hold BOQ2 to Mrs Frigger;

(e) The learned trial judge’s adverse creditability finding against Mrs Frigger because she mistakenly typed her name on a St George Bank Account statement (being one of thousands of FSF Financial Records), does not affect or alter the legal and beneficial ownership of BOQ1 and BOQ2.

(f) Neither the respondent nor the learned trial judge had standing or jurisdiction pursuant to section 6 SIS Act to dispute and/or make findings contrary to approved SMSF auditor reports in circumstances where no direction was given by the Regulator to the FSF trustees regarding the Financial Records;

(g) In the above circumstances, the learned trial judge fell into jurisdictional error and his finding that BOQ1 and BOQ2 are not FSF ~~trust~~ assets is a nullity.

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525 Ground 4 is in the following terms:

**Ground Four - Main Portfolio**

5. The learned trial judge erred in mixed fact and law @ [533], by finding that the shares held by Commonwealth Securities Limited (**Commsec**) Share Trading Account Portfolio No 270815 (**Main Portfolio**) in its custodial service vested in the respondent in circumstances where:

(a) The trial exhibits manifestly contradict the learned trial judge’s finding:

(i) 30/6/15 – Main Portfolio market value of $613,345.51 evidenced by Financial Year Summary provided by Commsec, was included in the Financial Records prepared and lodged on 13/11/15 with the Regulator; the purchase price of Main Portfolio was withdrawn from BW1 pursuant to the appellants’ written instructions to Commsec;

(ii) 30/6/2016 – Main Portfolio increase in market value to $931,113.01 was included in the Financial Records prepared and lodged on 31/3/2017 with the Regulator; the increase resulted from a mix of new FSF income, ~~and~~ trading of existing shareholdings and unrealised capital gains evidenced by Financial Year Summary provided by Commsec;

(iii) 30/6/2017 – Main Portfolio increase in market value to $1,247,450.85 was included in the Financial Records lodged on 2/7/2018 with the Regulator; the increase resulted from a mix of new FSF income, ~~and~~ trading of existing shareholdings and unrealised capital gains evidenced by Financial Year Summary provided by Commsec;

(iv) 30/6/2018 – Main Portfolio increase in market value to $2,521,581,76, included in the Financial Records prepared and lodged on 7/9/2018 with the Regulator; the increase resulted from a mix of new FSF income, ~~and~~ trading of existing shareholdings and unrealised capital gains evidenced by Financial Year Summary provided by Commsec;

(v) 30/6/2019 – Main Portfolio increase in market value to $3,404,918.72, included in the Financial Records prepared and lodged on 28/2/2020 with the Regulator; the increase resulted from a mix of new FSF income, ~~and~~ trading of existing shareholdings and unrealised capital gains evidenced by Financial Year Summary provided by Commsec;

(vi) On or close to date of purchase the appellants notified each relevant company’s members’ share registry in writing FSF-TFN, which FSF-TFN was in turn notified to the Regulator when dividends were paid by each company;

(vii) On or close to date of purchase the appellants notified each relevant company’s members’ share registry in writing that the shares were held beneficially for a superannuation fund (**evidence to be adduced if leave is given for fresh evidence in the appeal**);

(viii) Each of the Financial Records were audited by FSF approved SMSF auditor who provided a report that the appellants, as trustees, had complied with SIS Act Sections: 17A, 35AE, 35B, 35C(2), 62, 65, 66, 67,67A, 67B, 82-85, 103, 104, 104A, 105, 109, 126K SIS Act, and SIS Regulations: 1.06(9A), 4.09, 4.09A, 5.03, 5.08, 6.17, 7.04, 8.02B, 13.12, 13.13, 13.14, 13.18AA

(ix) In none of the annual member’s statements of the FSF for the periods from 1 July 2014 until Main Portfolio was frozen on 28 August 2019, were benefits or pensions paid that equated to the market value of the Shareholdings listed in paragraphs (i) – (v) above;

(x) An approved SMSF auditor retained by FSF during the Relevant Period provided the FSF trustees a report pursuant to s 35C SIS Act which contained a statement that the Financial Records complied with prescribed standards pursuant to s 34 SIS Act and SIS Regulations, which accounts, financial statements and annual returns included the Main Portfolio;

(b) The approved SMSF auditor did not provide a contravention report to FSF trustees consequent on the inclusion of the Main Portfolio in the Financial Records nor that the Financial Records did not meet prescribed standards;

(c) No direction was given by the Regulator pursuant to s 34P SIS Act to FSF trustees consequent on the inclusion of the Main Portfolio in the Financial Records;

(d) The respondent failed to produce any evidence that the Main Portfolio is an asset held by the applicants personally;

(e) The learned trial judge’s adverse creditability finding against Mrs Frigger because she added the words “Frigger Super Fund” to Commsec Financial Year Summary for 2018 does not affect or alter the legal and beneficial ownership of the Main Portfolio;

(f) Neither the respondent nor the learned trial judge had standing or jurisdiction pursuant to section 6 SIS Act to dispute and/or make findings contrary to reports and approval by the Regulator regarding the Financial Records;

(g) In the above circumstances, the learned trial judge fell into jurisdictional error and his finding that Main Portfolio is not FSF trust asset is a nullity.

(Formatting in the original.)

526 Grounds 3 and 4 assert that the primary judge erred in finding that BOQ1 and BOQ2 vested in the respondent and that the Main Portfolio vested in the respondent. The principal conclusions of the primary judge were that the appellants failed to establish that any of BOQ1, BOQ2 or the Main Portfolio were held on the trusts of the FSF Deed, or had otherwise been contributed to the FSF as at 20 July 2018 (Liability Judgment at [370], [478]). Later, in summarising his conclusions, the primary judge concluded that the interests the appellants hold in the disputed assets are not part of their interests in any regulated superannuation fund for the purposes of s 116(2)(d)(iii)(A) and their interests in those assets had vested in the respondent pursuant to s 58(1)(a) of the *Bankruptcy Act*. As a consequence, the appellants were not entitled to the declarations or other relief sought in the originating application with respect to the disputed assets (Liability Judgment at [532]–[534]). While the primary judge concluded that the disputed assets vested in the respondent, that conclusion followed from his conclusion that the appellants had failed on onus and it was not necessary for him to dismiss the appellants’ claims for relief in the originating application. Again, we are content to deal with these grounds on the basis that the true nature of the complaint is that the primary judge erred in *failing to* find that all funds in BOQ1 and BOQ2 and all securities in the Main Portfolio are assets of the FSF.

527 The appellants contended that the primary judge erred, in effect, in requiring the appellants to prove that there had been an objective manifestation of an intention to create trusts over the funds in BOQ1 and BOQ2 and the securities in the Main Portfolio. The appellants contended that the primary judge misunderstood their case which was to the effect that the funds in BOQ1 and BOQ2 and securities in the Main Portfolio were derived from BW1 which, in turn, contained funds derived from income of assets of the FSF. The funds in the BOQ1 and BOQ2 accounts and securities in the Main Portfolio were derived from income or assets of the FSF. There was no need for there to be a separate ‘declaration of trust’ in respect of these assets as they formed part of the fund the subject of the FSF Trust Deed under the trustees’ power to accumulate the income of that trust. These contentions amount to an assertion that the primary judge asked himself the wrong question and, thereby, erred in law in dealing with the appellants’ claims. In our view, for the reasons given earlier, the primary judge did not make the asserted error.

528 The appellants also submitted that the primary judge had asked himself the wrong question because the assets of the FSF were fully vested in them. That submission is not accepted for reasons we have given above for rejecting the appellants’ vesting submission.

529 The appellants also contended that the primary judge erred, in effect, for failing to accept that certain documentary and other evidence demonstrated that BOQ1 and BOQ2 and the Main Portfolio were intended to be held as assets of the FSF. The appellants evidently contended that the primary judge erred because his failure to make the relevant findings was inconsistent with facts incontrovertibly established.

530 As we have said earlier in these reasons, the primary judge made no error in finding that Mrs Frigger was not a credible witness and, therefore, it was necessary for the appellants to establish through documentary evidence the facts upon which they need to rely for the declarations and other orders sought in their originating application. We must be satisfied not only that any inferences arising from the documents upon which the appellants relied are more probable than alternative available inferences, but that the primary judge was ‘wrong’ in failing to draw that inference.

531 The primary judge identified the evidence from which inferences were plainly available that:

(1) the BW1 account was a personal account of Mrs Frigger into which personal and FSF funds were mixed in unknown proportions (Liability Judgment at [329]–[332]);

(2) the BOQ1 and BOQ2 accounts were personal accounts of each of Mr Frigger and Mrs Frigger (Liability Judgment at [333]–[347]); and

(3) the CommSec trading account (Main Portfolio) was a personal joint account of Mr and Mrs Frigger (Liability Judgment at [449]–[458]).

532 The appellants have not contended in this appeal that none of these ultimate inferences was available on the evidence. In any case, the primary judge made no error in considering that such inferences were available on the evidence.

533 We have already indicated that we have not identified any error in the primary judge’s reasons for attributing little or no weight to the audited balance sheets, tax returns and audit reports tendered in evidence. That we have not identified any error in the primary judge’s reasons for attributing little or no weight to the appellants’ apparent conduct in assigning ‘nicknames’ to the BOQ1 and BOQ2 online bank accounts or providing the TFN of the FSF to the Bank of Queensland and various share registries. Likewise, we have not identified any error in the primary judge’s rejection of the PPSR registrations as manifestations of an intention to hold the BW1 account and Main Portfolio on trust as an asset of the FSF. We have also explained the reasons that we do not consider the primary judge made any error in not accepting the appellants’ reconciliation of the flow of funds passing through the BW1 account.

534 In this appeal, the appellants attempted to frame the nature of the factual inquiry concerning identification of the funds of the FSF that passed through the BW1 account, in effect, as a question of whether there was evidence of an objective manifestation of an intention of the appellants, as trustees of the FSF, to withdraw funds from a mixed fund (accepted to contain some funds of the FSF) and use those funds to acquire property (assets) for the benefit of the members of the FSF (the funds BOQ1 and BOQ2 accounts and securities in the Main Portfolio). That acts of withdrawing the funds from the BW1 account were asserted to be attributable to the appellants, as trustees, in the exercise of the trustees’ power to accumulate income under the terms of the FSF Trust Deed.

535 The appellants contended, in substance, that the exercise of that trust power and the allocation of the funds out of the BW1 account (even if it were mixed) is evidenced by the balance sheets, tax returns and audit reports as well as the notifications of TFN of the FSF to the Bank of Queensland and share registries. Part of the appellants’ submission concerning the BW1 account was to the effect that funds in that account (even if mixed) were sufficient to cover the funds deposited into the BOQ1 and BOQ2 accounts and to acquire the securities in the Main Portfolio. In substance, the appellants submitted that the primary judge made an error for not finding that the funds were so allocated based on the inferences to be drawn from the business records tendered in evidence.

536 However, framing the factual question in the above manner does not overcome the need for the appellants to prove that a payment out of the BW1 account (as a mixed fund) was intended by all the trustees of the FSF to be a payment out of FSF funds and used to acquire an asset of the FSF. That is, the framing of the factual question does not avoid the need to prove an objective manifestation of an intention to hold the disputed asset as an asset of the FSF. Further, the appellants must prove that the intention was formed *before* the act of payment out of the BW1 account took place or, at least, that the intention was formed *before* 20 July 2018. As we have already explained, the primary judge made no error in considering that the appellants had failed to discharge their onus of proving such an objective manifestation of intention.

537 For the reasons which follow, the appellants’ framing of the factual question does not overcome the fundamental absence of evidence of a manifest intention to utilise the BW1 account funds for FSF purposes.

#### Audit reports, balance sheets and tax returns

538 In the case of the BOQ1 and BOQ2 accounts, these were opened after 30 June 2018. The balance sheets, audit reports and the balance sheets for the 2019 financial year were not prepared until after 20 July 2018. Therefore, these documents are not evidence of the trustees forming an intention to allocate the funds to the FSF before 20 July 2018.

539 In the case of the BW1 account and the Main Portfolio, the primary judge found that the audit reports and balance sheets for the 2016, 2017 and 2018 financial years were likely prepared after 20 July 2018. Again, these documents are not evidence of the trustees forming an intention to allocate the funds used to acquire the securities in the Main Portfolio to the FSF before 20 July 2018 or to allocate *all* of the funds in the BW1 account in those years to the FSF.

540 In paras 4(b)(i) and 5(a)(i) of the re-amended notice of appeal, the appellants contended that the BW1 account balance and Main Portfolio market value were included in a balance sheet of the FSF for the 2015 financial year and tax return prepared and lodged on 13 November 2015. We were directed to no evidence in the appeal books capable of proving those facts. Further, the appellants made a submission to the effect that no financial statements for the 2015 financial year were tendered because those financial statements did not contain the disputed assets. Accordingly, there is no apparent merit in that sub-ground.

541 In paras 4(b)(ii) and 4(b)(iii) and 5(a)(ii) and 5(a)(iii) of the re-amended notice of appeal the appellants contended that the BW1 account balances and Main Portfolio market values were included in balance sheets of the FSF for the 2016 and 2017 financial years and tax returns prepared and lodged for those years on 31 March 2017 and 2 July 2018. The appellants also made submissions to the effect that “all financial statements and annual returns were prepared and lodge prior to the sequestration date”. In support of that submission, the appellants referred to the ATO accounts transaction record. As we have said earlier in these reasons, that document is not received as further evidence in the appeal on grounds 2, 3, 4 or 5 of the re-amended notice of appeal. Part of the reason for rejecting that document is that it is unlikely to have affected the outcome because it is not possible to determine from that document which, if any, of the balance sheets and tax returns in evidence were the subject of the lodgements. Therefore, it was not evidence capable of proving that any of those balance sheets was prepared before 20 July 2018.

542 The appellants also sought to rely on another version of a tax return for the 2017 financial year. For the reasons previously given, that document is not received in the appeal as further evidence in the appeal on grounds 2, 3, 4 or 5. In any event, it does not assist the appellants.

543 As noted earlier in these reasons, an audit report for the 2021 financial year was received as further evidence in the appeal without objection. However, for the reasons previously given, it is not relevant to the issues raised in grounds 2, 3, 4 or 5.

544 The appellants have not demonstrated that the primary judge was in error for failing to conclude that the audited balance sheets and tax returns provided evidence of an objective manifestation of an intention of the appellants, as trustees of the FSF, to ‘allocate’ funds in the BW1 account to the FSF and (or) to acquire securities in the Main Portfolio before 20 July 2018.

#### Other financial records

545 The appellants submitted that the assets referred to in the balance sheets and tax returns corresponded with the values of the Main Portfolio contained in CommSec financial year statements. Also, that the franking credits referred to in the tax returns corresponded to franking credit refunds paid from the ATO into the BW1 account.

546 Additionally, the financial year ending balances of the BOQ1 and BOQ2 accounts corresponded to the amounts referred to in the tax returns and balance sheets. Also, that the Como and Bayswater properties were listed as assets of the FSF in the balance sheets and the amounts in those balance sheets corresponded to amounts for ‘residential real property’ referred to in the tax returns.

547 The effect of these submissions, which we accept, is that the evidence established that the disputed assets were recorded in the balance sheets and tax returns the subject of the audit reports of 2019 and 2020. However, that fact is not sufficient for an inference to arise that the appellants, as trustees of the FSF, formed an intention to allocate funds and assets to the FSF before the sequestration order for the reasons we have already given.

#### TFN notifications

548 The appellants submitted that notification of the TFN of the FSF to the Bank of Queensland and share registries of the securities held in the Main Portfolio was evidence of an intention of the appellants, as trustees, to exercise the power to accumulate income in the FSF Trust Deed. As we have said, framing the question as an exercise of a specific trust power does not affect the essential factual enquiry which is to determine if the evidence establishes that the appellants, as trustees, formed an intention and acted upon that intention to allocate funds in the BW1 account to assets of the FSF before 20 July 2018.

549 We have explained the nature of the correspondence involving notification of TFN of the FSF to the Bank of Queensland and of securities in the Main Portfolio to the applicable share registries earlier in these reasons. We have also explained the primary judge’s reasons for considering that these documents were not persuasive evidence of objective manifestations of intention to hold the funds in the account or securities on trust under the terms of FSF Trust Deed. As also noted above, the grounds of appeal do not identify any asserted error in the primary judge’s conclusions and reasoning regarding those documents.

550 We do not consider the primary judge’s conclusion – that the appellants failed to discharge their onus of proof – is manifestly inconsistent with evidence that Mr Frigger provided the Bank of Queensland with notification of the TFN of the FSF for BOQ1 shortly after that account was opened and shortly before the sequestration order was made. Nor is the conclusion manifestly inconsistent with evidence that a share registry was provided with the TFN of the FSF in respect of four securities held in the Main Portfolio as of 30 June 2016 when there was no evidence that such securities continued to be held as of 20 July 2018 or that the share registries were provided with the TFN for the FSF in respect of all securities held in the Main Portfolio before 20 July 2018.

551 The appellants also submitted that the primary judge was in error for receiving the respondent’s communications with share registries into evidence. They submitted that these should have been excluded from evidence under s 138 of the *Evidence Act* on the ground that the respondent contravened the *Corporations Regulations*when she obtained information from the share registries for a prescribed purpose.

552 The appellants have not identified the manner in which it is alleged that the respondent breached the *Corporations Regulations*. However, in Mrs Frigger’s affidavit of 18 March 2022 in support of the appellants application for further evidence in the appeal, she deposed that the appellants believe that the letters from the share registries permit an inference that the respondent, her staff and her solicitor contravened s 173(3A)(b) of the *Corporations Act 2001* (Cth) (***Corporations Act***) and reg 2C.1.03 of the *Corporations Regulations* by obtaining information from the members share registry regarding the appellants’ wealth.

553 Section 173(1) of the *Corporations Act* provides that a company must allow anyone to inspect a register kept under Chapter 2C. Section 173(3A) provides that an application is made in accordance with that subsection if the application states each purpose for which the person is accessing the copy, none of the purposes is a prescribed purpose and the application is in the prescribed form. Regulation 2C.1.03(c) provides that “gathering information about the personal wealth of a member of a company” is a prescribed purpose.

554 The respondent’s communications with the share registries were not applications made under s 173(3A) of the *Corporations Act*. In any event, the requests for information were not for the applicable prescribed purpose. The purpose was to ascertain if and when the TFN for the FSF was provided to the share registry. That is not information maintained on a register kept under Chapter 2C.

555 Further, and in any event, the appellants made no objection to the admissibility of the communications on the grounds that the documents were obtained in contravention of a provision of the *Corporations Act* or *Corporations Regulations*. The appellants initially objected to the admissibility of the documents on the grounds of hearsay and that the communications did not fall within an exception. The objection was withdrawn before the primary judge ruled on it and the documents were received into evidence without objection. No error has been demonstrated regarding the receipt of these documents into evidence.

#### PPSR Registrations

556 Although not pleaded in the re-amended notice of appeal, the appellants made a submission, in effect, that the primary judge was wrong to conclude that the PPSR registration in respect of the BW1 account was not an objective manifestation of an intention to create a trust over that account. For the reasons given earlier, we do not consider the primary judge made the asserted error.

#### Account nicknames

557 The appellants submitted that another objective manifestation of an intention to allocate the funds transferred into the BOQ1 and BOQ2 accounts to the FSF was the use of the ‘nickname’ “Frigger Super Fund” on the Bank of Queensland’s online banking platform. The appellants submitted that the primary judge was in error for concluding that the use of the nickname was self-serving because the nickname was utilised before 20 July 2018. For the reasons previously given we reject that submission.

#### Respondent’s failure to adduce evidence

558 Paragraph 5(d) of the re-amended notice of appeal pleads that the respondent failed to produce any evidence that the Main Portfolio is an asset held by the appellants personally. The appellants also made submissions to the effect that the respondent failed to provide any evidence that the funds in the BW1 account were personal funds of Mrs Frigger. Further, that the respondent failed to adduce evidence that the assets included in the balance sheets and tax returns of the FSF were acquired from income generated from non-FSF assets. Additionally, that the respondent had not adduced evidence that a separate trust was created by the declarations of trust over the Residential Properties.

559 As we have already observed earlier in these reasons, the appellants carried the onus of proof. The respondent put the appellants to proof and was under no obligation to put forward a positive case. If the appellants had adduced evidence sufficient to prove on the balance of probabilities that one or more of the disputed assets was an asset of the FSF, an evidential onus may have shifted to the respondent to adduce evidence to rebut that inference. To the extent that the respondent adduced evidence in the proceedings below it appears to have been of that character. The primary judge made no error in concluding that the appellants had failed to discharge their onus of proof notwithstanding that the respondent had not run a positive defence in the proceedings.

#### Other matters

560 In paragraphs 4(b)(viii) and 5(a)(ix) of the re-amended notice of appeal, the appellants plead that in none of the annual member statements of the FSF during the relevant period were benefits or pensions paid in the amounts held in the bank accounts claimed to be assets of the FSF including the BW1, BOQ1 and BOQ2 accounts or in the amounts that equated to the market value of the securities in the Main Portfolio. The appellants submitted that the primary judge’s acceptance of the respondent’s submission that, if the BW1 account was an account of the FSF as claimed, payments out of that account could equally be explained as payments of benefits or pensions to Mr and Mrs Frigger involving the vesting of the funds in them personally rather than transfers to further trust accounts (Liability Judgment at [328]), was in error. The appellants contend the primary judge was wrong because the member statements for the FSF are not consistent with such payments. However, the appellants have not demonstrated that the member statements were prepared earlier than the balance sheets and tax returns. Therefore, the member statements are not evidence that is inconsistent with the alternative inference the respondent identified and the primary judge accepted.

561 In paragraph 4(c) of the re-amended notice of appeal, the appellants plead that at no time did Mr Frigger allege that the funds in BOQ1 was a superannuation contribution. The appellants also submitted primary judge erred by finding that Mr Frigger needed to contribute BOQ1 to the FSF.

562 The primary judge found that the appellants had not established an objective intention to hold the funds in the BOQ1 account as of 2 July 2018 (when the account was opened). The primary judge then considered if the evidence revealed an intention to ‘contribute’ the funds to the FSF even though the appellants had not made submissions articulating the matters his Honour then considered. In this respect, the primary judge’s characterisation of the intention as one to ‘contribute’ the funds to the FSF is not as important as his reasoning as to the absence of evidence of any act on the part of Mr Frigger that had the legal effect of rendering the funds in the BOQ1 an asset of the FSF before 20 July 2018 (Liability Judgment at [360]–[368]) referred to in para [468] above. In this respect, the essence of the point the primary judge made was (Liability Judgment at [362]–[363]) that the provision of the FSF tax file number to a bank was no evidence of an underlying transaction by which the funds were or became an asset of the FSF. It is not a manifestation of a clear intention that identifies property of the FSF was the subject of a transaction that resulted in it remaining identifiable property of the FSF in the BOQ1 account.

563 We agree. The email does not manifest with clarity any intention (and does not give rise to an inference that Mr Frigger had taken the necessary steps consistent with such an intention) which had the immediate legal effect of rendering the funds in the BOQ1 account as an asset of the FSF. The primary judge made no error in considering if a clear intention to hold the funds in the BOQ1 account could be divined from Mr Frigger’s letter to the Bank of Queensland and concluding that it could not.

564 The appellants made numerous other submissions in which various errors of the primary judge were asserted. These consist largely of expressions of disagreement with the primary judge’s reasoning and conclusions. These we have considered, but none merit specific identification and explanation as none identifies any error or arguable error of the primary judge.

#### Compliance with superannuation and taxation legislation

565 Paragraphs 4(b)(vii), 4(b)(ix), 4(b)(x), 4(b)(xi), 4(f) and 4(g) and 5(a)(viii), 5(a)(x), 5(b), 5(c), 5(f) and 5(g) of the re-amended notice plead that the financial records of the FSF were audited and found to be compliant and accepted as compliant by the regulator in accordance with the provisions of the *SIS Act* and *SIS Regulations*. The appellants assert that the primary judge made a jurisdictional error for *not* finding that the BOQ1 and BOQ2 accounts and the Main Portfolio were assets of the FSF contrary to the ‘compliant’ financial records of the FSF. The appellants made submissions in support of these contentions. For the reasons previously given, the primary judge was not bound to accept the accuracy of the audited balance sheets and tax returns that were in evidence. The primary judge made no error of law, or fact, in according these documents little or no weight for the reasons he gave.

566 It follows that the appellants have not made out any of the asserted errors of fact pleaded or otherwise identified in their written and oral submissions relating to grounds 3 and 4 (or ground 2) of the re-amended notice of appeal.

567 Grounds 3 and 4 of the re-amended notice of appeal fail.

### Ground 5: the Residential Properties

#### Overview

568 Ground 5 is in the following terms:

6. The learned trial judge erred in law by deciding that the respondent has an absolute caveatable interest in real properties at…Union Street, Bayswater and …Cale Street, Como on the ground that *in specie* contributions of those properties by Mrs Frigger to FSF on 1 July 2014 constituted contraventions of s 66 SIS Act [532]:

(a) Neither the respondent nor the learned trial judge has standing and/or jurisdiction within the meaning of section 6 SIS Act to dispute and/or negative contributions made by Mrs Frigger;

(b) No contravention notice regarding the contributions was provided by FSF approved auditor in 2014 or at any time thereafter within the meaning of section 35C SIS Act;

(c) The contributions did not contravene s 66(1) SIS Act because they did not result in early access to superannuation benefits by Mrs Frigger;

(d) No direction was given by the Regulator within the meaning of section 35P SIS Act in relation to the contributions;

(e) The Declarations of Trust were notifications to the Commissioner of Titles pursuant to s 55(4) *Transfer of Land Act* (WA). ~~The notifications did not create a trust over the properties, but were simply notifications to the Commissioner that the properties were held on trust;~~

(f) The terms of the Declarations of Trust complied with the definition of ‘*declarations of trust*’ in section 9 *Duties Act 2008* (WA) and neither the respondent nor the learned trial judge had standing and/or jurisdiction under that legislation to make a contrary finding;

(g) Pursuant to s 116 *Duties Act 2008* (WA), the Declarations of Trust were accepted by the Office of State Revenue (WA) as valid notifications of a trust, and were assessed for nominal stamp duty after inspection of the FSF Trust Deed and trustees minute dated 1 July 2014;

(g) Mrs Frigger’s objective intention to contribute the properties to FSF is manifested by:

(i) Trustees’ resolution to accept the contributions in minutes dated 1 July 2014;

(ii) Balance sheets of FSF commencing 1 July 2014;

(iii) Annual return of FSF commencing 1 July 2014-30 June 2015 lodged with the Regulator on 21 November 2015;

(iv) Rental income declared as income of FSF during the Relevant Period;

(v) The creation of trust over the Residential Properties took effect by the above documents.

(vi) Pursuant to clause 126 Trust Deed, each FSF trustee delegated the power to legally hold the Residential Properties to Mrs Frigger.

(h) The learned trial judge erred at law by conflating a bankruptcy trustee’s right of exoneration and/or recoupment over trust assets held by the bankrupt to discharge ***trust debts***, which right ***does***vest in the trustee, with the trust asset itself, which does not vest and is not available to the bankruptcy trustee to pay provable debts in the administration.

(i) At no time after her appointment did the respondent claim Mrs Frigger’s contributions of Como and Bayswater are void within the meaning of s 128B *Bankruptcy Act* being the only power available to the respondent to impugn those contributions. It is to be inferred the respondent failed to make such a claim because Mrs Frigger was found to be solvent by Justice Colvin in *Kitay, in the matter of Frigger (No 2)* [2018] FCA 1032.

(j) The learned trial judge fell into jurisdictional error by deciding a controversy on a ground for which he lacked jurisdiction pursuant to *Duties Act 2008*(WA) and *SIS Act*.

(k) In the above circumstances, the learned trial judge’s finding that the Residential Properties were not validly contributed by Mrs Frigger to FSF on 1 July 2014 is a nullity.

(Omitting original coloured font, formatting in the original.)

569 Paragraphs 6(a), 6(b), 6(c), 6(d), 6(j) and 6(k) of the re-amended notice of appeal assert, as with grounds 2, 3 and 4, that the primary judge was not able to reach a conclusion that the Residential Properties were not assets of the FSF because to do so would be inconsistent with audited financial statements and tax returns that were accepted by the regulator as compliant with the *SIS Act* and *SIS Regulations*. For the reasons already given, there is no merit in these sub-grounds on that basis.

570 Paragraphs 6(f), 6(g)[first], 6(j) and 6(k) of the re-amended notice of appeal assert that as the declarations of trust were accepted and stamped for the purposes of the *Duties Act 2008* (WA) the primary judge lacked power or jurisdiction to reach a conclusion inconsistent with the Western Australian Office of State Revenue. There is equally no merit in those sub-grounds.

571 Paragraph 6(c) of the re-amended notice of appeal also pleads that the primary judge was in error because contributions of the Como property and Bayswater property, as residential real estate, were not contraventions of s 66(1) of the *SIS Act*. As we have reached the view that the primary judge made no error in the construction of the declarations of trust, it is not necessary to determine this particular ground of appeal.

572 Paragraph 6(g)[second] of the re-amended notice of appeal pleads, in effect, that Mrs Frigger’s objective intention to contribute the Residential Properties was manifested by:

(1) the trustees’ resolution to accept the contributions in minutes dated 1 July 2014;

(2) balance sheets of the FSF commencing from the 2015 financial year;

(3) tax return commencing from the 2015 financial year lodged with the regulator on 21 November 2015; and

(4) rental income declared as income of the FSF from 1 January 2015 to 20 July 2018.

The creation of a trust over the Residential Properties took effect by the above documents. Further, each trustee of the FSF delegated the power to legally hold the Residential Properties to Mrs Frigger under cl 116 of the FSF Trust Deed.

573 It follows that the grounds of appeal do not directly challenge the primary judge’s construction of the declaration of trust. However, the appellants submitted that the primary judge’s construction was erroneous because he did not take into account the documents referred to above as part of the context or surrounding circumstances in which to construe the trust declaration. We are content to treat ground 5 as asserting that the primary judge’s construction of the declarations of trust was erroneous and, further, irrespective of the proper construction of the declaration of trust, the primary judge was wrong to conclude that the incontrovertible facts had not established a manifest intention of Mrs Frigger to hold the Residential Properties on trust for the benefit of the members of the FSF on and from 1 July 2014.

#### Contextual evidence

574 For the reasons given earlier, the primary judge made no error in concluding that the trustees’ minutes of 1 July 2014 were fabricated. Therefore, that document may be ignored for the purposes of considering the factual context and surrounding circumstances asserted to give rise to the inference of manifest intention to contribute the properties *in specie* to the appellants, as trustees of the FSF.

575 Regarding the financial statements and tax returns for the 2015 financial year, the respondent submitted that there were no balance sheets or tax returns in evidence for that financial year. In response, the appellants submitted “it was unnecessary to adduce financial statements for FY2015 because none of the disputed assets appear in it”. That submission contradicts the pleaded ground of appeal. It also contradicts the assertion that the Como and Bayswater properties were contributed *in specie* to the assets of the FSF on 1 July 2014. Had they been so contributed, they would be recorded as assets of the FSF in the balance sheet as of 30 June 2015.

576 Otherwise, for the reasons previously given, none of the audited balance sheets, tax returns or audit reports provides reliable evidence that the Residential Properties were contributed *in specie* to the assets of the FSF. None of these documents provides evidence of manifest intention to hold the properties in trust for the members of the FSF.

577 It follows that none of the documents tendered in evidence demonstrates individually or collectively an intention to contribute the Residential Properties *in specie* to the FSF before January 2019 when the balance sheet for the 2016 financial statements was prepared and audited.

#### Proper construction of declarations of trust

578 The appellants submitted, in effect, that the primary judge was correct to conclude (Liability Judgment at [154]) that the terms of the declarations of trust were ambiguous, however, the primary judge was in error for failing to take into account surrounding circumstances as an aid to construction of the instruments. The surrounding circumstances were submitted to be the minutes of the trustees’ meeting of 1 July 2014 and the financial statements of the FSF. The appellants submitted that the primary judge was required by *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; 256 CLR 104 (***Mount Bruce Mining***) to take these circumstances into account.

579 We take the appellants reference to *Mount Bruce Mining* to be a reference to the following summary of the principles applicable to the construction of written contracts contained in the joint judgment of French CJ, Nettle and Gordon JJ (at [46]–[52] footnotes omitted):

[46] The rights and liabilities of parties under a provision of a contract are determined objectively (34), by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.

[47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.

[48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.

[49] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding “of the genesis of the transaction, the background, the context [and] the market in which the parties are operating”. It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.

[50] Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties’ statements and actions reflecting their actual intentions and expectations.

[51] Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption “that the parties … intended to produce a commercial result”. Put another way, a commercial contract should be construed so as to avoid it “making commercial nonsense or working commercial inconvenience”.

[52] These observations are not intended to state any departure from the law as set out in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* and *Electricity Generation Corporation v Woodside Energy Ltd*. We agree with the observations of Kiefel and Keane JJ with respect to *Western Export Services Inc v Jireh International Pty Ltd*.

580 The primary judge identified the principles applicable to the construction of the declarations of trust as follows (Liability Judgment at [484]–[487]):

[484] In construing the 2014 Declarations, the following passage from the judgment of Gummow and Hayne JJ in *Byrnes v Kendle* (at [49]) should be borne in mind (footnotes removed):

In *Bahr v Nicolay [No 2]* Mason CJ and Dawson J approved of the expression of the 'traditional attitude' by du Parcq LJ that 'unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention'. In the present case there was no degree of informality, the trust being manifested and proved by deed using the technical term 'upon trust'. Accordingly, to adopt what was said in *Associated Alloys*…

'This is not one of those cases where the language employed by the parties for the transaction is inexplicit so that the court is left to infer the relevant intention from other language used by them, from the nature of the transaction and from the circumstances attending the relationship between the parties.' (Footnote omitted.)

[485] At [17] French CJ agreed with a passage from Gummow and Hayne JJ's judgment that included these observations and quoted with approval the following passage from *The Law of Trusts*by G Thomas and A Hudson (2nd ed, 2010) at 1495 [58.04]:

In circumstances in which there has been an express trust declared over land, the terms of that trust will be decisive of the parties' equitable interests in land, in the absence of any fraud, undue influence, or duress. [Footnote omitted.]

[486] So the view of most of the judges in *Byrnes v Kendle* seems to be that where there is a formal trust document, the construction of that document depends entirely on its text. Heydon and Crennan JJ took what may have been a broader view, holding (at [102]) that the 'rules for the construction of contracts apply also to trusts'. It is possible, then, that their Honours took the view that contextual matters could be taken into account where the language of formal declarations of trust, though not 'inexplicit', is nevertheless ambiguous. But as explained below, even if contextual matters are taken into account here, the result is the same. So it is not necessary to decide whether their Honour's views were indeed different to those of French CJ, Gummow and Hayne JJ.

[487] Also relevant is *Korda* at [208] where Keane J said, relying on the passage of Gummow and Hayne JJ in *Byrnes v Kendle* quoted above, that the 'language of the relevant documents is not to be strained to discover an intention to create a trust of the broad scope for which [the respondent] contends'.

581 It appears that the appellants contend the primary judge was in error in considering that in the construction of the declarations of trust it was not permissible, even in the case of ambiguity, to have regard to extrinsic evidence. However, while the passage above suggests that the primary judge considered that the majority in *Byrnes v Kendle* confined the construction of a formal trust instrument to the text of that document, his Honour considered what he described as the ‘broader view’ of Heydon and Crennan JJ whereby regard may be had to extrinsic evidence in the construction of a trust instrument in the same circumstances that regard may be had to such evidence in the construction of a contract. When the primary judge considered the available extrinsic evidence, he was of the view that it had no bearing on the proper construction of the declarations of trust (Liability Judgment at [486], [494]). Therefore, even if the primary judge was wrong to consider the construction of the declarations of trust was necessarily confined to the text of those instruments, that error was not of any moment because he considered and applied the alternative view of the applicable legal principles.

582 We do not consider it is necessary to resolve the question of the extent to which the principles applicable to construction of contracts apply to the construction of instruments containing declarations of trust because, in this case, the primary judge considered the extent to which evidence of ‘surrounding circumstances’ was available and assisted as an aid to construction. However, for our part, we would not necessarily read the reasons of the majority in *Byrnes v Kendle* as intending to confine – in all cases – construction of a formal instrument of trust to the text of that document. As the majority observed, “while the origins of contract and trust are quite different, there is … no dichotomy between the two”. There is consistency between contract and trust with respect to matters of intention in contract formation and trust declaration: *Byrnes v Kendle* at [59] (per Gummow and Hayne JJ), [17] (French CJ agreeing). Heydon and Crennan JJ expressed the view directly that the “rules for construction of contracts apply also to trusts”: *Byrnes v Kendle* at [102]–[114].

583 Otherwise, the appellants’ submissions are based on a misunderstanding of the nature of surrounding circumstances that may be taken into account as an aid to construction. As is clear from the passage from *Mount Bruce Mining* cited above, evidence of the actual (subjective) intention of the parties to a contract is not admissible as an aid to construction. Likewise, evidence of the parties’ conduct after a contract is made is not admissible as an aid to construction of the text of a written contract: see, e.g., *Agricultural & Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; 238 CLR 570 at [35]. These are principles of the ‘objective theory’ of contract formation.

584 For the reasons we have already given, the minutes may be disregarded as evidence for any purpose and the financial statements, to the extent these supply evidence of conduct consistent with an intention to hold the Residential Properties on trust, are self-serving and are to be afforded little or no weight. However, even without those difficulties, these documents are not to be received as part of the context. To the extent the minutes record intention, it is the *subjective* characterisation or understanding of the effect of the declarations of trust by Mr and Mrs Frigger and Mr Michael Frigger and Ms Jessica Frigger as trustees of the FSF. That subjective state of mind cannot be used to aid construction of the declarations of trust. As for the financial statements, these are subsequent conduct, at most, consistent with the construction of the declarations of trust for which the appellants contend. That is not admissible as an aid to construction of the instruments.

585 The appellants pointed to no evidence of factual context that the primary judge erroneously failed to take into account in the construction of the declarations of trust. The primary judge concluded that there was no such evidence (Liability Judgment at [501]). There was no error in the primary judge’s approach to that issue.

586 Insofar as the construction of the declarations of trust are concerned, the primary judge concluded that the objective intention of the declarations was for Mrs Frigger to hold each of the Como property and Bayswater property on trust for Mr Frigger and herself. The re-amended grounds of appeal and the appellants’ submissions do not identify any error in the primary judge’s reasoning, but assert, in substance, that on the proper construction of the declarations of trust the instruments manifest an objective intention of Mrs Frigger to hold each property on trust for the trustees of the FSF and through the trustees, the members of the FSF.

587 The primary judge’s reasons for rejecting that construction were as follows (Liability Judgment at [482], [488]–[503]):

[482] In summary, the only reliable evidence potentially capable of establishing an objective manifestation of intention that the Residential Properties were to be held on trust as part of the FSF are the two written 2014 Declarations.

…

[488] In each of the declarations of trust here, the technical language of the creation of a trust is used, in self-described 'instruments' expressed in legal language and formally signed and witnessed. The intention of Mrs Frigger in executing them as settlor and trustee is to be found in the language in each of the declarations, albeit it will be seen that a reference in that language to the FSF Deed necessarily requires the provisions of that deed to be taken into account as well.

[489] The applicants appeared to submit that on the proper construction of the declarations, Mrs Frigger holds the properties as trustee for the FSF beneficiaries. But the first respondent submitted that the declarations should be construed to mean that the properties would be held by Mrs Frigger on trust for both her and Mr Frigger as beneficiaries, and that there is nothing in the language of the declarations to suggest that it was intended that the properties would be held by Mr and Mrs Frigger in their capacities as trustees of the FSF for the benefit of the beneficiaries of the FSF. What, then, is to be collected from that language (which can be found at [463] above)?

[490] *First*, there is a clear indication of intention to constitute Mrs Frigger as trustee of the properties, with herself and Mr Frigger as the beneficiaries of the trust(s). The first respondent did not suggest that the 2014 Declarations should be construed otherwise. As noted above, in *Saunders*, Kenneth Martin J said that where there is unambiguous use of language in a written instrument establishing a trust, the evidentiary onus will shift to a contradicting party. But while the language of the 2014 Declarations is unambiguous in expressing the intention to create a trust, it is ambiguous as to the terms of that trust. In any event the concept of a shifting evidentiary onus does not help much in the present context. The issue is a legal one of the construction of a written instrument.

[491] *Second*, the 2014 Declarations appoint Mrs Frigger, and no one else, as the trustee of the properties. There is no indication of any requirement or intention to transfer any legal title in the land to any other person who will also act as trustee. There is no requirement to transfer the properties into the names of any of the other trustees of the FSF, whether immediately by force of the instrument itself, or at some later time. Given that cl 33 of the FSF Deed requires a contribution to be made, relevantly here, by way of transfer, the absence of those requirements in a formal trust declaration is significant. That is so whether, at the time of the declarations, the additional trustee of the FSF was Mr Frigger only, or Jessica and Michael as well.

[492] *Third*, the beneficiaries are expressed to be Mrs Frigger and Mr Frigger and not Jessica and Michael as well. The first respondent sought to make much of this apparent disparity between the beneficiaries named in the 2014 Declarations and the membership of the FSF, especially in cross-examination (see ts 399ff). But with respect, that has no significance by itself; as has been explained, the FSF Deed contemplates that a particular member or members may take the benefit of the contribution of a given asset to the exclusion of other members. If Mrs Frigger was contributing the properties to the FSF for the benefit of herself and Mr Frigger, and not Jessica or Michael, that would be consistent with the FSF Deed.

[493] *Fourth*, in their terms and on their face, each of the 2014 Declarations purports to create a new trust. They do not speak in terms of contributing to or adding to any existing trust. They do not say that the properties are to be contributed to the FSF. They do not say that the properties are to be held by Mrs Frigger, or anyone else, in her capacity as trustee of the FSF. Subject to the point addressed in the next paragraph, they do not say that the properties are to be held on the terms of the FSF. They do not say that the beneficiaries take their interest(s) as members of the FSF. And they do not provide that the properties are to be held for the purposes of the FSF, in particular the purpose of providing pensions for members, which is essential for it to be a superannuation fund. Given that the 2014 Declarations are formal legal documents, these absences are significant.

[494] *Fifth*, the only place where the declarations mention the FSF or the FSF Deed is in the provision stating that the 'Powers of the Trustee over the Land is [sic] contained in the Trust Deed of the Frigger Super Fund dated 1 July 1997'. This does not say in terms that the property is to be held on the terms of the FSF Deed. It only refers to the powers contained in that deed, not the obligations. The distinction between the powers of trustees and the trusts imposed on them is a fundamental one, even if the dividing line is not always clear: see G Thomas, *Thomas on Powers*(2nd ed, 2012) at [1.40] and the authorities cited there. It is the annexation of trust obligations to a conglomeration of property which makes the conglomeration a 'fund' in the sense articulated in *Commercial Nominees*(see above at [124]). While referring to powers alone could be consistent with a broader intention that the properties be held on all the terms of the FSF, it is also consistent with an intention to use the provisions of the FSF which confer powers on the trustees as a convenient way to define the powers of Mrs Frigger alone as trustee of separate trusts.

[495] The reference to the FSF Deed in the declarations makes it necessary to consider the provisions of that deed at this point. What are the 'powers' to which the declarations refer? A power is an individual personal capacity of the donee of a power to do something: *Re Armstrong; Ex parte Gilchrist* (1886) 17 QBD 521 at 531. In the context of trust law, a power is an authority to take a step which affects rights and obligations. In the context of a trust this can include administrative powers such as powers of sale and investment and dispositive powers or powers of appointment: see *Jacobs' Law of Trusts*[16-10], [20-02]‑[20‑03].

[496] The most straightforward answer to the question 'what powers?' is that the 2014 Declarations refer to the powers conferred by the provisions of the FSF Deed collected under the heading of section L 'Trustee's powers' which I have summarised at [171] above. It could also include the powers of appointment I have described at [173] as these fall within the usual understanding of the powers of a trustee that are necessary to administer a trust. But that would be inconsistent with the use of the phrase 'Powers of the Trustee *over* the Land'. That phrase indicates that the powers conferred are those which permit dealings with 'the Land'. It is a narrower phrase than, say, 'powers in relation to the Land'. And it does not seem to include wider powers under the FSF Deed, such as powers of appointment.

[497] A broader answer to the question 'what powers?' would involve combing through the FSF Deed to identify each term which confers on the trustee a discretion or an ability to do something. An even broader answer would also include the powers that are implicit in obligations, in that a requirement to do something necessarily authorises that it be done. But I do not consider that either of those broader answers would be sensible ones. They are inconsistent with the wording just mentioned and they introduce too much uncertainty as to the content of the powers conferred, and start to stretch the natural meaning of the term 'powers' so as to encompass different things such as discretions and obligations. Subject to one qualification, the powers in the more confined list in section L of the FSF Deed are broad enough and easy enough to identify to supply the powers that a trustee of the Residential Properties would need to act effectively in that capacity.

[498] The qualification is that there are a few references in those powers to concepts specific to superannuation funds (see references to approved benefit arrangements in cl 136 and cl 139 and the reference to superannuation law and an eligible rollover fund in cl 137). But for the most part, the powers I have identified are capable of applying to a trust over real property that is not a superannuation fund. The uncertainty can be resolved by reading an intention that the powers be identified and applied *mutatis mutandis*when transferred from the context of the FSF Deed to the context of the 2014 Declarations.

[499] The first respondent submitted that far from assisting the applicants, the reference in the 2014 Declarations to the powers of the FSF Deed provided support for the first respondent's construction. That is because, were it intended that the properties form part of the FSF, there would have been no need to identify the powers of the trustee in relation to the properties because those powers would have been contained in the trust deed. I would not go as far as that, but I do consider that, if there had been an intention to make the assets part of the FSF, the 2014 Declarations could be expected to have said so in a less elliptical way.

[500] Taking all this into account, I consider that the preponderant intention manifested by the language of each declaration as a whole is to create a trust over the relevant property that is separate to the FSF. The reference in the declarations to the powers contained in the FSF Deed is not to be elevated to an expression of an intention that the properties be held for the purposes of the FSF, on the terms of the FSF Deed, so that, in some entirely unexpressed way, they will end up being held by the trustees of the FSF. That would be to strain the language to find a trust of a broader scope than the words of the declaration express.

[501] If, contrary to the principles I have stated above, the context of the making of the 2014 Declarations is to be taken into account, that would not assist the applicants' case here. There is no evidence of the circumstances in 2014 which led the applicants to execute the declarations. Mrs Frigger gave evidence in cross examination that she wanted to make in specie contributions of the properties on behalf of herself and her husband but that is general evidence of her subjective intention, which is irrelevant. Objectively it can be collected, of course, that at the time of the 2014 Declarations Mr and Mrs Frigger were husband and wife and members of the FSF. But those matters do not necessarily indicate that Mrs Frigger was likely to have wished to contribute the properties to the FSF. It is possible that one spouse would wish to declare a separate trust in favour of another spouse to acknowledge, for example, financial or other contributions the second spouse has made to the property or to the relationship. Also, a contribution as large as two residential properties may have exceeded the cap that applied to non-concessional contributions and so have been liable under the *Superannuation (Excess Non concessional Contributions Tax) Act 2007* (Cth) s 5 to taxation at the highest marginal tax rate: see ITAA 1997 s 292-85.

[502] An important matter of context is the first respondent's submission that the contribution of this property to the FSF was in breach of the SIS Act. For reasons it is convenient to express in the next section of this judgment, I accept that submission. That is a strong objective indication against any intention to contribute the properties to the FSF.

[503] I therefore conclude that each of the declarations of trust created a trust over the Residential Properties respectively, each with Mrs Frigger as trustee and Mr and Mrs Frigger as beneficiaries. But they were not trusts where Mrs Frigger held the properties in any capacity as trustee of the FSF, or for the purposes of the FSF, or otherwise on the terms of the FSF Deed save in so far as it defines the powers of Mrs Frigger to deal with the Residential Properties.

588 Given that the proper construction of the declarations of trust are questions of law, we have considered the proper construction of each instrument for ourselves. We have reached the conclusion that the primary judge’s construction was correct, essentially for the reasons given by the primary judge, except that we do not consider it necessary to decide if contribution of the Residential Properties *in specie* would have involved a contravention of the *SIS Act*. Therefore, we do not consider that contravention of the *SIS Act* is a yet further reason for considering that the declarations of trust were not objective manifestations of an intention to hold each property on trust for the members of the FSF. All of the other reasons the primary judge gave in support of his construction are ample grounds for preferring that construction of the instruments to the one the appellants advance.

589 Ground 5 of the re-amended notice of appeal fails.

## Ground 1: the status of the bankruptcy

590 Ground 1 of the re-amended notice of appeal is in the following terms:

1. The learned trial judge erred in law by deciding that certain assets vested in the respondent pursuant to s 58 *Bankruptcy Act 1966*, in circumstances where the learned trial judge was on notice of WAD66/2021 by the ~~(~~appellants’ interlocutory application to stay WAD141/2019 pending resolution of WAD66/2021, which the learned trial judge dismissed in June 2021, in which matter the appellants claim the bankruptcy notices were invalid, and the sequestration orders were a nullity.

(Formatting in the original.)

591 After completion of the trial, on 25 March 2021, the appellants filed an originating process in WAD 66 of 2021. In those proceedings, the appellants have sought orders setting aside or annulling the sequestration orders made on 20 July 20218. On 12 April 2021, after the trial, the appellants filed an interlocutory application in WAD 141 of 2018 in which they requested an order that the primary judge stay delivery of his judgment. On 14 June 2021, the primary judge dismissed that application: *Frigger v Trenfield (No 9)* [2021] FCA 652. On 30 November 2021, Jagot J dismissed an application for leave to appeal from the primary judge’s order dismissing that application.

592 The appellants submitted that the primary judge erred in failing to consider the consequences if the sequestration orders are set aside in WAD 66 of 2021. That is, proceedings WAD 141 of 2018 would be rendered otiose and the only remaining question would be whether the respondent is liable to pay compensation to the appellants arising from her conduct of the bankruptcy. The appellants relied on s 24(1E) of the *FCA Act* and we infer that the appellants contend that the primary judge was in error for dismissing the application to stay his judgment and that, in turn, resulted in the asserted error in his final judgment.

593 The central element of the appellants’ submissions on ground 1 is a contention that, for so long as the validity of the sequestration orders remains challenged and unresolved in WAD 66 of 2021, the primary judge’s judgment and this Court’s judgment in the appeal are ‘hypothetical’ within the meaning of that expression as used by the High Court in *Bass v Permanent Trustee Co Ltd* [1999] HCA 652; 198 CLR 334 at [47]. The appellants submit that there is no true controversy if there is no bankruptcy and that question cannot be finally answered in this appeal.

594 While the manner in which the error asserted in ground 1 falls within the scope of s 24(1E) of the *FCA Act* is not clear, we are prepared to assume, without deciding, that the appellants may advance ground 1 in this appeal under s 24(1E). We also leave to one side whether the appellants, as the applicants in the proceedings below, should be permitted to approbate and reprobate on the question of whether the proceedings they brought raise real issues. However, even assuming that the appellants should be permitted to advance ground 1 in this appeal, there is no merit in the ground or the appellants’ submissions or contentions.

595 The sequestration orders are orders of a superior court of record. The orders are valid until set aside. Third parties who have acted on statutory powers that depend on the ‘fact of’ an order, rather than the ‘legal validity’ of an order would arguably be protected from the consequences of acting on the face of the order: see, e.g., *New South Wales v Kable* [2013] HCA 26; 252 CLR 118 at [32]–[41], [51]–[61]. Therefore, even if the sequestration orders are ultimately set aside in in WAD 66 of 2021, the fact of the orders may be relied upon and, otherwise, the sequestration orders are valid and enforceable orders of this Court in the meantime.

596 In any event, the issue of whether the disputed assets were assets of the FSF is not an hypothetical question of the kind referred to in *Bass*at [47]. There is no sense in which that issue is academic. Further, the remaining issues in controversy concerning the respondent’s conduct of the bankruptcy are also not hypothetical and will not be affected by the outcome of WAD 66 of 2021. As matters stand, the question that is hypothetical (in the sense of a hypothesis yet to be tested) is whether the sequestration orders will be set aside or annulled.

597 Ground 1 of the re-amended notice of appeal fails.

## Ground 6: the payout of the security for costs funds

598 The appellants, by ground 6 of the re-amended notice of appeal, contend that the primary judge erred by finding at [549] of the Liability Judgment that the first respondent’s conduct, in consenting to a payout of security for costs in the Supreme Court of Western Australia proceedings: CACV45/2016, CACV62/2014 and CACV56/2014, did not breach s 82 of the *Bankruptcy Act*. In addition, the appellants raise 6 sub-grounds ((a) to (f)) which are as follows.

599 By sub-ground (a), the appellants submit that the first respondent should not have signed consent orders for the payment out of moneys paid into court as security for costs without calling for and adjudicating on proofs of debt pursuant to s 83 of the *Bankruptcy Act*.

600 By sub-ground (b), the appellants further submit that the first respondent failed to set off claims against:

(1) Mervyn Jonathan Kitay in the amount of $1,000,000 claimed in Federal Court of Australia proceeding WAD 674 of 2015 against the $25,000 paid out consequent on the first respondent’s consent in Supreme Court of Western Australia proceeding CACV45/2015;

(2) Law Mutual (WA) in the amount of $2,000,000 against $62,500 paid out to Law Mutual (WA) consequent on the first respondent’s consent in Supreme Court of Western Australia proceeding CACV62/2014 and CACV56/2014.

601 By sub-ground (c), the appellants contend that the primary judge erred by conflating a secured creditor’s claim with an asset secured for the secured creditor’s benefit.

602 By sub-ground (d), the appellants contend that the primary judge erred by finding that the costs judgments in the Western Australia Supreme Court proceedings were not proceedings relating to provable debts.

603 By sub-ground (e), the appellants contend that the primary judge erred by finding at [544] of the Liability Judgment that the appellants did not suffer loss caused by the first respondent’s conduct in not applying set-offs to the alleged costs judgments, contrary to s 86 of the *Bankruptcy Act*.

604 By sub-ground (f), the appellants submit that the first respondent’s duty pursuant to s 86 of the *Bankruptcy Act* is not abrogated by a secured creditor’s claim that has not been admitted by the first respondent.

605 Ground 6 and the sub-grounds (a) to (f) must be rejected for the reasons that follow.

606 Upon a court’s making of an order for security for costs, a defendant, although having no proprietary interest in the amount constituting the security, nonetheless has a right in the nature of an equitable charge allowing recourse to the fund to satisfy the terms of the judgment after a costs order has been made and the costs are assessed or agreed: G E Dal Pont, *The Law of Costs*(5th ed, LexisNexis, 2021); *Duncan (as trustee for the bankrupt Estate of Garret) v National Australia Bank Ltd* [2006] SASC 239; 95 SASR 208 at [41]; *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd (No 4)* [2014] WASC 405 (***Technomin***) at [23]–[24]; *Benjamin v GB Franchising Australia Pty Ltd* [2011] ACTCA 26 at [18] per Refshauge J.

607 If the defendant is successful at trial, the defendant is in effect a secured creditor. In *Jackson v Sterling Industries Ltd* (1986) 12 FCR 267 (***Jackson v Sterling Industries Ltd***), the Full Court of the Federal Court (Bowen CJ, Woodward and Jackson JJ) considered whether orders directing a respondent to “provide security in the sum of $3,000,000” ought to have been made. Justice Jackson (though in dissent on the primary issue of the Court’s power to order a Mareva injunction) considered the nature and effect of such an order in view of a detailed examination of the relevant authorities, including in the specific context of bankruptcy. His Honour said (at 295–297):

In such cases, however, where security is given or money is paid into court, either voluntarily (as an offer in satisfaction of a claim, with or without a denial of liability) or involuntarily (as a compliance with a condition of leave to defend) the effect of the provision of security is to make the party in whose favour it is given a secured creditor if the party ordered to provide the security later becomes bankrupt or, if a company goes into liquidation.

Thus in *Ex parte Banner; Re Keyworth* (1874) LR 9 Ch App 379 money had been paid into court as condition of leave to defend and to “abide the event.” It was held that the defendant’s trustee in bankruptcy was not entitled to the money on the bankruptcy but that the money belonged to the party who was successful in the litigation. *In Re Gordon; Ex parte Navalchand* [1897] 2 QB 516 is a leading case in the field and Vaughan Williams J there held that where money had been paid into court with a denial of liability the plaintiff became a secured creditor in the subsequent bankruptcy of the defendant, saying at pp 519–20:

As to the money paid into court with a denial of liability, I take it that the plaintiff, though out of time to accept in satisfaction the sum paid in, would, apart from bankruptcy, be entitled to get an order to withdraw his reply, and to give notice accepting the money paid in in satisfaction. I see nothing in the bankruptcy proceedings to prevent his so doing. But if he does this, he of course would not be entitled to prove for any balance of the debt. If, on the other hand, the plaintiff does not elect to take the money out of court in satisfaction, I think that his proper course is to tender a proof in bankruptcy for the full amount of his claim…*I am clearly of the opinion that if the proof is admitted, or to the extent to which it is admitted, the plaintiff is a secured creditor by reason of the payment into court*. The money paid into court, even with a plea denying liability, has become subject to the plaintiff’s claim by the act of the defendant, who thereby agrees that the sum paid in shall remain in court subject to the conditions of Order XXII, r 6. It is not a question of execution at all, but of the effect of a conventional charge. It is in effect a conditional payment to the plaintiff. The money is to be the money of the plaintiff if he succeeds in establishing his title to it: *Re Moojen* …

Those decisions were followed by Wright J in *Re Ford; Ex parte the Trustee* [1900] 2 QB 211; see, too, *Re a Debtor; Ex parte Petitioning Creditors*(1932) 101 LJ Ch 372; *Ex parte Bouchard; Re Moojen* (1879) 12 Ch D 26 and the decision of the Court of Appeal in *Dessau v Rowley* [1916] WN 238.

In Australia Harvey CJ in Eq followed *Re Gordon*, supra in *Re Lapstone Inn Ltd* (1931) WN (NSW) 237 and in Victoria the correctness of the decision to which I have referred was sought to be put in issue in *Commercial Banking Co of Sydney Ltd v Colonial Financiers of Australia Pty Ltd* (1972) 20 FLR 220. It is clear enough in the latter case that Lush J, the only member of the Full Court to deal with the question, preferred the view that a charge was created, although he did not find it necessary to arrive at a concluded view: see at pp 225–6.

…

There seems to me no reason to treat the principles referred to in these cases as not applicable to an order of the nature made by Sheppard J. The use of the term “security” to describe the obligation of the appellant tends in that direction, and the fact that the “security” so provided was not to be dealt with other than by the consent of the parties or in accordance with the order of the court leads to the same conclusion.

**I am thus of the view that the effect of the order, if complied with, was to make the respondent a secured creditor of the appellant in the amount of any damages which might be awarded to it at trial.**

(Emphasis added.)

608 In *Dwight v Federal Commissioner of Taxation* (1992) 37 FCR 178 (***Dwight***), Hill J considered the taxation liability in respect of interest earned on moneys paid by a plaintiff as security for costs into a bank account established in the name of solicitors for the parties. In holding that the liability was that of the plaintiff in the circumstances, Hill J said (at 186):

In whatever form it is ordered, the property, the subject of the security, will continue to be the general property of the party who has given the security, and **once an order for costs has been made in favour of, say, the defendant against the plaintiff, the defendant will become, in all respects, a secured creditor** … Pending the resolution of the dispute between the parties and the making of a cost order, the defendant would have no proprietary interest in the property forming the security, but at best would have a right, in the nature of an equitable charge, giving him, after a costs order has been made and the costs taxed or agreed, recourse to the fund to satisfy the terms of the judgment…

(Emphasis added.)

609 In *Pilmer v HIH Casualty & General Insurance Ltd (No 2)* [2004] SASC 389; 90 SASR 465 [62]–[115], Mullighan J also discussed the authorities referred to by Jackson J in *Jackson v Sterling Industries Ltd* and concluded at [70] that:

It may be seen from this line of cases that upon payment in, the other party becomes in the nature of a secured creditor and is entitled to the money, or part of it, upon his or her claim being established …

610 Justice Mullighan drew from a survey of those and more recent authorities this statement of principle (at [113(3)]):

In circumstances such as the present case, the moneys in court provide security to the party who is to benefit in accordance with the decision of the court as to payment out and that party is in the nature of a secured creditor.

611 It follows that the successful respondents in each of the three appeals in the Court of Appeal of Western Australia had a security interest by way of an equitable charge or lien over the amounts that had been paid in as security for their costs and as such were secured creditors. The appellants cannot rely on the fact of their bankruptcy to displace the effect of the order for security for costs and the entitlement of the successful respondents on those proceedings.

612 Contrary to the submission put to the primary judge by the appellants, s 58(3) of the *Bankruptcy Act* did not operate to stay whatever steps the successful respondents took to have the Court of Appeal of Western Australia quantify their entitlement to costs.

613 Section 58(3) of the *Bankruptcy Act* provides:

(3) Except as provided by [this Act](http://classic.austlii.edu.au/au/legis/cth/consol_act/ba1966142/s279.html#this_act), after a [debtor](http://classic.austlii.edu.au/au/legis/cth/consol_act/ba1966142/s187.html#debtor) has become a [bankrupt](http://classic.austlii.edu.au/au/legis/cth/consol_act/ba1966142/s139zj.html#bankrupt), it is not competent for a [creditor](http://classic.austlii.edu.au/au/legis/cth/consol_act/ba1966142/s5.html#creditor):

(a) to enforce any remedy against the person or [the property of the bankrupt](http://classic.austlii.edu.au/au/legis/cth/consol_act/ba1966142/s5.html#the_property_of_the_bankrupt) in respect of a [provable debt](http://classic.austlii.edu.au/au/legis/cth/consol_act/ba1966142/s185.html#provable_debt); or

(b) except with the leave of [the Court](http://classic.austlii.edu.au/au/legis/cth/consol_act/ba1966142/s5.html#the_court) and on such terms as [the Court](http://classic.austlii.edu.au/au/legis/cth/consol_act/ba1966142/s5.html#the_court) thinks fit, to commence any legal [proceeding](http://classic.austlii.edu.au/au/legis/cth/consol_act/ba1966142/s5.html#proceeding) in respect of a [provable debt](http://classic.austlii.edu.au/au/legis/cth/consol_act/ba1966142/s185.html#provable_debt) or take any fresh step in such a [proceeding](http://classic.austlii.edu.au/au/legis/cth/consol_act/ba1966142/s5.html#proceeding).

614 Section 58(5) of the *Bankruptcy Act* provides:

(5) Nothing in this section affects the right of a [secured creditor](http://classic.austlii.edu.au/au/legis/cth/consol_act/ba1966142/s5.html#secured_creditor) to realize or otherwise deal with his or her security.

615 Plainly on its terms, s 58(5) of the *Bankruptcy Act* operates such that the right of a secured creditor to realise or otherwise deal with their security is not affected by s 58(3) of the *Bankruptcy Act*. As such, the successful respondents in the Court of Appeal of Western Australia proceedings were entitled to realise, or otherwise deal with, the moneys which had been paid into the Court over which they had an equitable charge or lien. The primary judge was correct to reject the appellants’ contention that the costs liability or the security for costs should have been dealt with as a provable debt in the bankruptcies. The primary judge was also correct to find that the manner in which the parties and the Court of Appeal of Western Australia dealt with the costs orders and the security for costs was not “incompetent” for the purposes of s 58: Liability Judgment at [541].

616 The primary judge was correct to find, in the Liability Judgment at [544], that the appellants had advanced no persuasive evidence that the conduct of the first respondent had caused them loss or damage. The claimed losses are equal to the amounts of security for costs that were paid out to the successful respondents. Order 25 r 7 of the *Rules of the Supreme Court 1971* (WA) provides:

Where money has been paid into Court as security for costs and the action has been finally disposed of, the amount of the security shall be paid out to the party for whose security it was furnished to the extent *pro tanto* that costs are due from the securer to such party, and the Principal Registrar shall pay out the security accordingly unless the Court has otherwise ordered, and the balance (if any) shall be refunded to the securer without the necessity for any special order (emphasis added).

617 The operation of ord 25 r 7 means that the successful respondents were entitled to have the money paid out of court unless the appellants established that the Court of Appeal should have ordered otherwise: *Technomin* at [10].

618 The primary judge was correct to observe in the Liability Judgment at [545], that the only matters which the appellants advanced as a reason why any order otherwise should have been made are the offsetting claims they say they have or had against the successful respondents. The onus of proving loss or damage was, of course, on the appellants and the primary judge found that they provided no evidence which might lead the Court to conclude that there were, in fact, valuable offsetting claims, to establish that a loss had in fact been suffered. Furthermore, the primary judge was correct to hold that the Court below was not the venue to run an argument that the Court of Appeal of Western Australia should have made orders other than for the payment of money out of Court: Liability Judgment at [545].

619 The primary judge was correct to find that it was not enough for the appellants to say, as they did in the Court below, that they have claims which mean that the money should not have been paid out of Court until those claims had been established: Liability Judgment at [546].

620 The primary judge was correct to find that on the case advanced by the appellants below, that the appellants needed to establish as facts on the balance of probabilities, that the outcome would have been a judgment in the offsetting claims in their favour in sums sufficient to offset the costs liabilities in their entirety or at least reduced them below the amounts paid as security. As the primary judge correctly observed, unless that outcome was achieved, orders paying the security out to the successful respondents were inevitable. The primary judge correctly observed that the appellants would also have to establish that this outcome would have resulted in a surplus, or a larger surplus, payable to them personally after all the claims of creditors in their bankrupt estates were satisfied. The appellants made no attempt before the primary judge to do so: Liability Judgment [547].

621 We detect no error in the reasoning of the primary judge that the appellants are not entitled to the orders they seek declaring the consent orders and costs assessments in the Court of Appeal of Western Australia to be “incompetent” pursuant to s 58(3)(b) of the *Bankruptcy Act*, or the consequential orders requiring the first respondent to pay compensation and to apply for the costs orders to be set aside. It follows that ground 6 and its sub-grounds fails.

## Ground 7: the removal of the trustee in bankruptcy

622 The appellants, by ground 7 of the re-amended notice of appeal, contend that the primary judge erred by failing to remove the first respondent as trustee in bankruptcy. The particulars of the conduct warranting the removal of the first respondent, as identified in the re-amended notice of appeal, are as follows:

(1) The freezing of assets of the appellants and of the FSF worth more than $7.5 million which resulted in the loss of opportunity to earn dividends and capital gains on share trading of the main portfolio and the BOQ1 Fund.

(2) By freezing the main portfolio and the BOQ1 Fund, the first respondent breached the duties imposed upon a Trustee in Bankruptcy by s 19(1)(k) of the *Bankruptcy Act* to exercise powers and perform functions in a commercially sound way.

(3) The first respondent breached the duties imposed on a Trustee in Bankruptcy by s 19(1)(k) to act in a commercially sound way by failing early in her appointment in August 2018 to interview the appellants regarding set-offs and to adjudicate on alleged secured creditors.

623 The primary judge, in the Liability Judgment at [550]–[746], analysed the numerous complaints made by the appellants of the conduct of the first respondent as Trustee in Bankruptcy.

624 The primary judge identified, in the Liability Judgment at [604], that the appellants’ real complaint was that the first respondent should have investigated and adjudicated creditors’ claims, along with the appellants’ offsetting claims, and that, had the Trustee in Bankruptcy done that, she would have concluded that there were no net claims such that she or another Trustee in Bankruptcy, acting commercially, would not have frozen any of the appellants’ or FSF’s assets.

625 The primary judge accepted the first respondent’s evidence that all of the creditors’ claims were estimates because the likelihood of a dividend was unknown. The first respondent’s evidence, which the primary judge accepted, was that her usual practice was that she would not incur costs of formally calling for proofs of debt and adjudicating on them until there are funds in the bankrupt estates with which to pay a dividend. The primary judge found that this evidence of the first respondent accorded with common sense and was not undermined by cross-examination. The primary judge found that it is elementary that an insolvency administration is unlikely to expend substantial resources in investigating and adjudicating creditors’ claims if there are no assets with which to pay any dividends to creditors. That would be, as the primary judge found, a waste of resources. The first step, was to identify and secure assets and then to value them and otherwise assess how likely they are to be realised: Liability Judgment at [606]–[607].

626 The primary judge observed that there was an obvious time imperative for investigating assets and, if necessary, preventing their dissipation by a freezing order before investigating creditor claims. The primary judge reasoned that if an asset is identified and steps are not taken to secure it as soon as practicable, it may be lost forever. Creditors’ claims, in contrast, will not be lost if they are not adjudicated right away, and adjudicating may take some time, by which point the assets may be gone. The primary judge concluded that the appellants’ submissions that creditors’ claims should be adjudicated and then assets frozen reverses the usual and sensible order of events. We respectfully agree with the primary judge’s reasoning. We detect no error in the primary judge’s finding that the first respondent acted reasonably in identifying assets; securing those assets by a freezing order before taking any steps to investigate and adjudicate on creditors’ claims: Liability Judgment at [612].

627 The appellants, in this appeal, have not identified any evidence which would provide a basis to challenge the findings made by the primary judge in the Liability Judgment at [745], where his Honour stated:

It will be recalled that s 90-15(4) of the Insolvency Practice Schedule sets out a number of matters which the court may take into account when making orders under s 90-15, including any order for removal of the trustee in bankruptcy. Judged by reference to those matters:

(a) it has not been established that the first respondent had not faithfully performed her duties;

(b) no contravention of the Bankruptcy Act or the Bankruptcy Practice Rules has been established;

(c) there is no suggestion of any failure to comply with an order of the court;

(d) it has not been established that the bankrupt estates or any person has suffered, or is likely to suffer, loss or damage because of an action or failure to act by the first respondent; and

(e) the shortcomings I have identified have had no significant consequence, and could have no impact on public confidence in registered trustees as a group.

628 The primary judge concluded, in the Liability Judgment at [746], after an exhaustive analysis of the numerous complaints made by the appellants as to the conduct of the first respondent that:

In my view, while the first respondent's conduct of the administration has fallen short of the ideal, it has not fallen short nearly so far as to warrant her removal. It can be expected that close scrutiny of any insolvency administration of the complexity and difficulty of this one is likely to reveal shortcomings of at least similar magnitude and importance; a magnitude and importance which is insufficient to warrant the drastic step of removing the trustee in bankruptcy.

629 We detect no error in the primary judge’s reasoning nor do we in any way disagree with the conclusion at Liability Judgment at [746]. For these reasons, ground 7 fails.

## Ground 8: the refusal to assess the loss of opportunity to trade

630 Ground 8 of the re-amended notice of appeal pleads that the primary judge “erred at law when he refused to determine the appellants’ claims for losses caused by freezing of BOQ1 and Main Portfolio, within the meaning of section 22 *Federal Court Act* [sic], which requires the court to completely and finally determine all controversies between the parties”.

631 While the nature of the asserted error is not clear from the pleaded ground, the appellants contended that they had made a submission at the trial to the effect that even if the BOQ1 and Main Portfolio were personal assets of Mr and Mrs Frigger, the respondent was nonetheless liable to compensate Mr and Mrs Frigger for losses resulting from the freezing of those assets. It appears that the basis for the respondent’s asserted liability was, in effect, that it was a breach of her duty to act commercially under s 19(1)(k) of the *Bankruptcy Act* to freeze these assets before quantifying creditors’ proofs of debt because other assets in the control of the respondent were more than sufficient to satisfy Mr and Mrs Friggers’ creditors. The appellants written submissions also indicate that they rely on s 24(1E) of the *FCA Act*.

632 Taken together, the appellants’ contention is that the primary judge should not have dismissed Mr and Mrs Friggers’ personal claims for compensation arising from an alleged breach of duty on the part of the respondent. That is, as a consequence of the primary judge’s interlocutory order limiting the issues to be determined at the trial, the primary judge has not determined an issue that arises from the appellants’ originating application.

633 There is no merit in the appellants’ contentions. The primary judge’s orders of 5 June 2020 had the effect of excluding from the issues to be determined at the trial the orders sought in paragraphs 3 and 14 of the fourth amended originating application. In these paragraphs the appellants sought orders under s 30 of the *Bankruptcy Act* that the respondent “pay losses incurred by the Frigger Superannuation Fund”.

634 The appellants had not sought compensation in their personal capacity for alleged losses in connection with the freezes of the BOQ1 account and Main Portfolio. It was not an issue that was before the primary judge and he made no error in not considering it in his reasons for decision or for, in effect, dismissing the appellants’ claims for orders for compensation in paragraphs 3 and 14 of the amended originating application when he made orders dismissing the entire application as these claims for relief depended upon a finding that the funds in the BOQ1 account and securities in the Main Portfolio were assets of the FSF (Liability Judgment at [6]).

635 Further, and in any event, the primary judge dealt with the factual foundation for the alleged breach of the respondent’s duty in freezing the BOQ1 account and Main Portfolio before quantifying creditors’ proofs of debt in the course of dealing with the issues the appellants raised as grounds for removing the respondent as their trustee in bankruptcy. The primary judge found no fault in those actions of the respondent (Liability Judgment at [598]–[612], [644]–[645]). For the reasons given above when addressing ground 7 of the re-amended notice of appeal, the primary judge made no error in reaching that conclusion.

636 Ground 8 of the re-amended notice of appeal fails.

## Orders

637 For the above reasons the appeal should be dismissed with costs.

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| I certify that the preceding six hundred and thirty-seven (637) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop and Justices Anderson and Feutrill. |

Associate:

Dated: 24 March 2023

# SCHEDULE 1

