

SUPREME COURT OF QUEENSLAND

CITATION: *ASIC v Goldsky Global Access Fund Pty Ltd & Ors* [2019] QSC 114

PARTIES: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**
(applicant)
v
GOLDSKY GLOBAL ACCESS FUND PTY LTD
(ACN 617 800 941)
(first respondent)
and
GOLDSKY ASSET MANAGEMENT AUSTRALIA PTY LTD (ACN 611 171 870)
(second respondent)
and
GOLDSKY INVESTMENTS PTY LTD
(ACN 090 512 851)
(third respondent)
and
KENNETH CHARLES GRACE
(fourth respondent)
and
JANE MARZIN GRACE
(fifth respondent)

FILE NO/S: No 11736/18

DIVISION: Trial

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 9 May 2019

DELIVERED AT: Brisbane

HEARING DATE: 8 April 2019; Further submissions received 18 April 2019

JUDGE: Flanagan J

ORDER: **The Court declares that:**

(a) **the first respondent has contravened s 911A of the *Corporations Act 2001* (Cth) (the Act) by carrying on a financial services business in this jurisdiction without holding an Australian financial services licence, namely by operating a custodial or depository service within the meaning of s 766E of the Act, between the**

period of 24 March 2017 and 29 October 2018;

- (b) the second respondent has contravened s 911A of the Act by carrying on a financial services business in this jurisdiction without holding an Australian financial services licence, namely by operating a custodial or depository service within the meaning of s 766E of the Act, between the period of 9 January 2018 and 29 October 2018; and
- (c) the third respondent has contravened s 911A of the Act by carrying on a financial services business in this jurisdiction without holding an Australian financial services licence, namely by operating a custodial or depository service within the meaning of s 766E of the Act, between the period of 27 March 2017 and 16 January 2018.

The Court further orders that:

- (a) the further amended originating application otherwise be dismissed;
- (b) the first, second and third respondents pay the costs of the applicant of this proceeding; and
- (c) the parties otherwise bear their own costs.

CATCHWORDS: CORPORATIONS – FINANCIAL SERVICES – FINANCIAL SERVICES PROVIDERS – LICENCE: WHEN REQUIRED – where s 911A of the *Corporations Act* 2001 (Cth) requires a person to hold an Australian financial services licence (AFSL) if a person carries on a financial services business in this jurisdiction – where a company incorporated in the United States of America, of which the fourth respondent was managing director, applied to the applicant for class order relief from the requirement to hold an AFSL – where the applicant accepted the fourth respondent’s reliance on class order relief – where the first, second and third respondents, which were also controlled by the fourth respondent, each operated a bank account – where third parties deposited funds into the first, second and third respondent’s bank accounts – where none of the first, second and third respondents held an AFSL – where the fourth respondent was subsequently the subject of an investigation by the United States Securities and Exchange Commission – where the fourth respondent initially did not notify the applicant of the investigation – whether the first, second and third respondents carried on a financial services business – whether the first, second and third respondents were

exempted from holding an AFSL

PROCEDURE – DECLARATIONS – APPROPRIATE FORM OF RELIEF - DISCRETION OF COURT – OTHER CASES – where the applicant requests the Court to make declarations that the first, second and third respondent have contravened s 911A of the *Corporations Act 2001* (Cth) – whether it is an appropriate exercise of the Court’s discretion to make the declarations sought by the applicant

Australian Securities and Investments Commission Act 2001 (Cth), s 30

Corporations Act 2001 (Cth), s 9, s 21, s 761A, s 761C, s 763A, s 766A, s 766E, s 910A, s 911A

Australian Securities and Investments Commission v Monarch FX Group Pty Ltd (2014) 103 ACSR 453, considered

Australian Securities and Investments Commission v Munro & Anor [2016] QSC 9, considered

Briginshaw v Briginshaw (1938) 60 CLR 336, considered

Investment and Merchant Finance Corp Ltd v Federal Commissioner of Taxation (1971) 125 CLR 249, cited

COUNSEL: M Steele for the applicant
L Copley for the first, second and third respondents
N M Cooke for the fourth and fifth respondents

SOLICITORS: Australian Securities and Investments Commission for the applicant
Thynne & Macartney for the first, second and third respondents
Salerno Law for the fourth and fifth respondents

- [1] The applicant, ASIC, seeks declarations that each of the first, second and third respondents have contravened s 911A of the *Corporations Act 2001* (Cth) (**the Act**) by carrying on a financial services business without holding an Australian financial services licence (**AFSL**).
- [2] The first to third respondents are all companies in liquidation.
- [3] The liquidator, Mr Baskerville, does not oppose the declaratory relief sought by ASIC.
- [4] At the time of the relevant conduct alleged to constitute the carrying on of a financial services business, none of the respondents held an AFSL. The issues are whether each of the first, second and third respondents by their conduct carried on a financial services business in Australia and, if so, whether any of them were exempt from the requirement

to hold an AFSL. A further issue is whether, as a matter of discretion, the declaratory relief should be granted.

The relevant conduct

- [5] The fourth respondent, Kenneth Charles Grace, is the sole director and a shareholder of each of the first to third respondents.
- [6] Each of the first to third respondents held a bank account. The first respondent held an account with National Australia Bank, which is referred to as the “Goldsky Global Account”. The second and third respondents each held an account with Westpac that are referred to as the “Goldsky Asset Account” and the “Goldsky Investments Account” respectively. Mr Grace was a signatory to these three bank accounts (**the Goldsky Bank Accounts**).
- [7] Anne Elizabeth Gubbins is an investigator with ASIC. Ms Gubbins has undertaken an investigation of the Goldsky Bank Accounts. She has reviewed the relevant bank statements for the period of 24 March 2017 to 25 October 2018. She has identified multiple deposits into and withdrawals out of the Goldsky Bank Accounts that she believes to be deposits of investment capital by investors and returns on those investments paid to the investors. Ms Gubbins’ belief is based upon the following:¹

- “(a) the deposits are large value, lump sum amounts and the description in the accounts identifies an individual or entity name; and
- (b) the description for the withdrawals identifies an individual or entity name which correlates with a prior large value, lump sum deposit.”

The total deposits for the period of 24 March 2017 to 25 October 2018 were \$16,391,264.24, with investor returns of \$8,868,038.69. These deposits and withdrawals for the three separate accounts were as follows:²

Account	Investor Deposit	Investor Returns
Goldsky Global Account	\$12,841,264.24	\$250,035.00
Goldsky Asset Account	\$945,000.00	\$4,913,859.60
Goldsky Investments Account	\$2,605,000.00	\$3,704,144.09
Total	\$16,391,264.24	\$8,868,038.69

- [8] From Ms Gubbins’ review of the Goldsky Bank Accounts, she has observed the following general pattern of transactions between the accounts:³

¹ Affidavit of Anne Elizabeth Gubbins, filed 29 October 2018, paragraphs 12-14.

² Affidavit of Anne Elizabeth Gubbins, filed 29 October 2018, paragraph 14.

³ Affidavit of Anne Elizabeth Gubbins, filed 29 October 2018, paragraph 10.

- “(a) The majority of investor funds ... (approximately \$16 million) were received into the Goldsky Global Account.
- (b) These funds were then transferred as follows:
- (i) between the period 27 September 2017 to 22 December 2017, to the Goldsky Investments Account (approximately \$3.4 million) by way of multiple transfers; and
 - (ii) between the period 29 January 2018 to 25 October 2018, to the Goldsky Asset Account (approximately \$13.3 million) by way of multiple transfers.
- (c) The Goldsky Investments Account was used as the primary transaction account until January 2018 when the account was closed, whereupon the Goldsky Asset Account was opened, and all transactions were made then through this account instead. These transactions included personal purchases [which are outlined below] and payments to investors.”

- [9] Ms Gubbins identifies the names of approximately 56 investors who have contributed funds into the Goldsky Bank Accounts.⁴
- [10] Ms Gubbins also identifies that since 1 May 2018 investment funds totalling \$7,500,292.44 have been received into the Goldsky Bank Accounts notwithstanding Mr Grace’s assertions in his correspondence to ASIC dated 20 April 2018 to the following effect:⁵

“Goldsky’s related overseas entities made a decision on the 28 February 2018 to close the fund on 30th April 2018.

Since the 28th February the company has not accepted any applications from Australian clients (including wholesale clients) in relation to the Goldsky Fund.

Given that the fund has closed and all Australian investors will be paid by the 30th April 2018 I am confident that no similar breaches will occur in the future. There will not be any Australian wholesale investors (or retail) in the fund going forward.”

- [11] Ms Gubbins has identified 16 transfers of large amounts of money from the Goldsky Bank Accounts to unknown accounts occurring in September and October 2018.⁶ She has also identified approximately \$1 million in suspicious transactions whereby funds were paid from the Goldsky Bank Accounts, comprising of payments to family members of Mr Grace (\$747,646.98), purchases of jewellery and accessories (\$106,214.41), purchases of groceries (\$92,887.64), payments for cosmetic procedures

⁴ Affidavit of Anne Elizabeth Gubbins, filed 29 October 2018, paragraph 15.

⁵ Affidavit of Anne Elizabeth Gubbins, filed 29 October 2018, paragraph 16; exhibit DAM-16 to the affidavit of David Andrew McArthur, filed 29 October 2018.

⁶ Affidavit of Anne Elizabeth Gubbins, filed 29 October 2018, paragraph 18.

(\$58,868.80), payments for beauty treatments and services (\$47,337.50), payments at restaurants (\$36,712.92) and purchases of clothing (\$31,113.59).⁷

- [12] David Andrew McArthur is also employed as an investigator with ASIC. In his affidavit filed 29 October 2018, Mr McArthur identifies that on 28 September 2016 a company called “Goldsky Asset Management LLC” (**Goldsky LLC**), of which Mr Grace was managing director, sought and obtained registration as an investment advisor in the United States of America.⁸ Subsequent to Goldsky LLC’s registration, the United States Securities and Exchange Commission (**SEC**) became aware that the application lodged by Goldsky LLC may have contained false statements.⁹ Accordingly, on 22 August 2018, the SEC cancelled Goldsky LLC’s investment advisors licence and on 27 September 2018 commenced proceedings in the United States against Goldsky LLC and Mr Grace.¹⁰
- [13] Relying on Goldsky LLC’s registration in the United States as an investment advisor, lawyers on behalf of Goldsky LLC applied to ASIC for class order relief under ASIC Class Order 03/1100 “US SEC regulated financial service providers”.¹¹ This application was made on 16 March 2017.¹² Put broadly, ASIC Class Order 03/1100 provided exemptions to advisors registered by the SEC from the need to hold an AFSL for certain financial services provided to Australian wholesale clients.
- [14] On 5 April 2017 ASIC wrote to the lawyers for Goldsky LLC acknowledging the company’s reliance on ASIC Class Order 03/1100.¹³ Subsequently, on 5 June 2018, ASIC wrote to Goldsky LLC stating that ASIC considered that the company had failed to comply with the conditions of relief under ASIC Class Order 03/1100.¹⁴ I consider this and additional correspondence in more detail below for the purposes of considering whether any of the first to third respondents were exempt from the requirement to hold an AFSL.
- [15] According to Mr McArthur, on 1 July 2017, Goldsky LLC commenced operating an unregistered managed investment scheme in Australia, called the “Goldsky Global Access Fund”.¹⁵ Goldsky LLC was trustee of this fund.¹⁶ The Goldsky Global Access Fund appears to have commenced on or about 1 July 2017 by the issue to proposed investors of an information memorandum.¹⁷ The information memorandum is styled “for Australian investors, confidential information memorandum, Goldsky Global Access Fund”.¹⁸

⁷ Affidavit of Anne Elizabeth Gubbins, filed 29 October 2018, paragraph 19.

⁸ Affidavit of David Andrew McArthur, filed 29 October 2018, paragraph 12.

⁹ Affidavit of David Andrew McArthur, filed 29 October 2018, paragraph 12.

¹⁰ Affidavit of David Andrew McArthur, filed 29 October 2018, paragraphs 13-16.

¹¹ Affidavit of David Andrew McArthur, filed 29 October 2018, paragraphs 13-16; exhibit DAM-6.

¹² Affidavit of David Andrew McArthur, filed 29 October 2018, paragraph 17.

¹³ Affidavit of David Andrew McArthur, filed 29 October 2018, paragraph 19; exhibit DAM-8.

¹⁴ Affidavit of David Andrew McArthur, filed 29 October 2018, paragraph 20; exhibit DAM-9.

¹⁵ Affidavit of David Andrew McArthur, filed 29 October 2018, paragraph 21.

¹⁶ Affidavit of David Andrew McArthur, filed 29 October 2018, paragraph 22.

¹⁷ Affidavit of David Andrew McArthur, filed 29 October 2018, paragraph 23.

¹⁸ Exhibit DAM-10 to the affidavit of David Andrew McArthur, filed 29 October 2018.

- [16] On 29 October 2018 I made interim orders, which were later extended, pursuant to ss 1323 and 1324 of the Act freezing the assets of the first to fourth respondents and appointing Mr Anthony Castley as receiver for the first to fourth respondents. These orders were made on the basis of concerns that the respondents were breaching provisions of the Act, including carrying on a financial services business without an AFSL.
- [17] Subsequent to the making of these interim orders, further bank accounts relevant to the respondents were identified. These included an ANZ bank account in the names of Mr Grace and the fifth respondent, Mrs Grace, referred to in Ms Gubbins' affidavit filed 7 November 2018 as the "Grace Personal Account".¹⁹ Ms Gubbins' review of the Grace Personal Account identified numerous transfers of large sums of money to and from both the Goldsky Asset Account and the Goldsky Investments Account.²⁰ These transfers, which occurred during the period of 1 March 2017 to 29 October 2018, included \$435,000 from the Grace Personal Account to the Goldsky Investments Account and \$250,000 from the Goldsky Investments Account to the Grace Personal Account.²¹ They also included \$2,950,028 from the Grace Personal Account to the Goldsky Asset Account and \$5,533,000 from the Goldsky Asset Account to the Grace Personal Account.²²
- [18] On 10 December 2018, Mr Castley provided his report.²³ He identified investor funds paid into the Goldsky Bank Accounts of \$23,440,264.24 with repayments of only \$14,876,797.03 and relatively small amounts in the bank accounts of the first to fourth respondents.²⁴ Mr Castley noted that the estimated shortfall is \$12,547,904.²⁵ At paragraph 3.7 of his report Mr Castley noted that the following amounts were paid by investors into accounts of each of the first to third respondents:²⁶
- (a) \$16,031,264.24 into the Goldsky Global Account;
 - (b) \$4,257,000 into the Goldsky Asset Account; and
 - (c) \$3,152,000 into the Goldsky Investments Account.
- [19] In paragraphs 3.1 and 3.2 of his report Mr Castley stated as follows:²⁷
- "It is my understanding that initially investors deposited funds into the [Goldsky Investments Account]. Subsequently, when the [Goldsky Global Account] was established in March 2017, the majority of investors would deposit into this account. Some investors continued to use the [Goldsky Investments Account].
- The funds received in the [Goldsky Global Account] would at first be transferred to the [Goldsky Investments Account]. When the [Goldsky

¹⁹ Affidavit of Anne Elizabeth Gubbins, filed 7 November 2018, paragraph 3.

²⁰ Affidavit of Anne Elizabeth Gubbins, filed 7 November 2018, paragraph 5.

²¹ Affidavit of Anne Elizabeth Gubbins, filed 7 November 2018, paragraph 5.

²² Affidavit of Anne Elizabeth Gubbins, filed 7 November 2018, paragraph 5.

²³ Exhibit AMC-1 to the affidavit of Anthony Michael Castley, filed 10 December 2018.

²⁴ Exhibit AMC-1 to the affidavit of Anthony Michael Castley, filed 10 December 2018, page 2.

²⁵ Exhibit AMC-1 to the affidavit of Anthony Michael Castley, filed 10 December 2018, page 2.

²⁶ Exhibit AMC-1 to the affidavit of Anthony Michael Castley, filed 10 December 2018, page 10.

²⁷ Exhibit AMC-1 to the affidavit of Anthony Michael Castley, filed 10 December 2018, page 9.

Investments Account] was closed in January 2018, the [Goldsky Asset Account] was established at that time. Subsequently the investor funds held in the [Goldsky Global Account] would be periodically transferred to the new [Goldsky Asset Account].”

- [20] Mr Castley identified numerous transfers from the Goldsky Global Account and the Goldsky Asset Account to a joint account of Mr and Mrs Grace for the period of March 2017 to October 2018.²⁸ In reviewing the entries in the available bank statements, Mr Castley noted that there were a number of transactions where the narrations did not allow for the identification as to their purpose. In tables set out at pages 11 to 14 of his report, Mr Castley did, however, identify a number of purchases or payments which could be considered personal in nature. These identified payments fall within the categories identified by Ms Gubbins.²⁹
- [21] The tables on pages 15 to 16 of Mr Castley’s report show what appear to be significant intermingling of funds between the Goldsky Bank Accounts and the personal accounts of the fourth and fifth respondents.
- [22] At paragraph 4.6 of his report, Mr Castley identified the trading platform accounts in the names of Mr Grace and Mr and Mrs Grace for undertaking trading activities.³⁰ In section 5 of his report Mr Castley also identified a number of transactions where investor funds appear to have been used to purchase motor vehicles or real property.³¹
- [23] In the conclusion to his report, while noting that the narration on the bank statements did not permit identification as to the purpose of a number of transactions, Mr Castley was of the view that the available funds and assets were not sufficient to satisfy the claims by investors for the return of each of their respective account balances.³² As previously observed, the estimated shortfall is \$12,547,904.³³

Relevant Legislative Provisions

- [24] Section 911A(1) of the Act provides that “a person who carries on a financial services business in this jurisdiction” (that is, Australia³⁴) must hold an AFSL. None of the respondents hold an AFSL. Section 911A(2) provides, however, that a person is exempt from the requirement to hold an AFSL in the following relevant circumstances:
- “(a) the person provides the service as representative of a second person who carries on a financial services business and who:
- (i) holds an Australian financial services licence that covers the provision of the service; or

²⁸ Exhibit AMC-1 to the affidavit of Anthony Michael Castley, filed 10 December 2018, page 11.

²⁹ See above at [11].

³⁰ Exhibit AMC-1 to the affidavit of Anthony Michael Castley, filed 10 December 2018, page 17.

³¹ Exhibit AMC-1 to the affidavit of Anthony Michael Castley, filed 10 December 2018, pages 17-18.

³² Exhibit AMC-1 to the affidavit of Anthony Michael Castley, filed 10 December 2018, page 19.

³³ Exhibit AMC-1 to the affidavit of Anthony Michael Castley, filed 10 December 2018, page 19.

³⁴ Act s 9.

- (ii) is exempt under this subsection from the requirement to hold an Australian financial services licence that covers the provision of the service;

...

- (h) all of the following apply:
 - (i) the person is regulated by an overseas regulatory authority;
 - (ii) the provision of the service by the person is covered by an exemption specified by ASIC in writing under this subparagraph and published in the *Gazette*; and
 - (iii) the service is provided only to wholesale clients;

...

- (l) the provision of the service is covered by an exemption specified by ASIC in writing and published in the *Gazette*.”

[25] The term “financial services business” is defined in s 761A to mean “a business of providing financial services”. Section 761C provides that in determining whether someone carries on a financial services business, “Division 3 of Part 1.2 needs to be taken into account”. Relevantly, s 18, which falls within Division 3, provides that a reference to carrying on a business of a body corporate includes a business carried on otherwise than for profit of the members. Section 21(3)(c), which also falls within Division 3, provides that a body corporate does not carry on business in Australia merely because it maintains a bank account.

[26] The term “financial services” is defined in Division 4 of Chapter 7 of the Act. Section 766A(1) provides:³⁵

“766A When does a person provides a *financial service*?”

General

- (1) For the purposes of this Chapter, subject to paragraph (2)(b), a person provides a ***financial service*** if they:
 - (a) provide financial product advice (see section 766B); or
 - (b) deal in a financial product (see section 766C); or
 - (c) make a market for a financial product (see section 766D); or
 - (d) operate a registered scheme; or
 - (e) provide a custodial or depository service (see section 766E); or
 - (ea) provide a crowd-funding service (see section 766F); or
 - (f) engage in conduct of a kind prescribed by regulations made for the purposes of this paragraph.”

³⁵ It should be noted that both ss 766A and 766E have been amended since the period of the relevant conduct, however, those amendments are not material to the present application.

[27] Section 766E states the meaning of providing “a custodial or depository service”:

“766E Meaning of provide a custodial or depository service

- (1) A person (the *provider*) provides a *custodial or depository service* to another person (the *client*) if, under an arrangement between the provider and the client, or between the provider and another person with whom the client has an arrangement, (whether or not there are also other parties to any such arrangement), a financial product, or a beneficial interest in a financial product, is held by the provider in trust for, or on behalf of, the client or another person nominated by the client.
- (2) The following provisions apply in relation to a custodial or depository service:
 - (a) subject to paragraph (b), the time at which a custodial or depository service is provided is the time when the financial product or beneficial interest concerned is first held by the provider as mentioned in subsection (1);
 - (b) for the purposes of Part 7.6, and of any other provisions of this Act prescribed by regulations made for the purposes of this paragraph, the continued holding of the financial product or beneficial interest concerned by the provider as mentioned in subsection (1) also constitutes the provision of a custodial or depository service.
- (3) However, the following conduct does not constitute providing a *custodial or depository service*:
 - (a) the operation of a clearing and settlement facility;
 - (b) the operation of a registered scheme, or the holding of the assets of a registered scheme;
 - (ba) the operation of a notified foreign passport fund;
 - (bb) the holding of the assets of a notified foreign passport fund;
 - (c) the operation of a regulated superannuation fund, an approved deposit fund or a pooled superannuation trust (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) by the trustees of that fund or trust;
 - (ca) the operation of a statutory fund by a life company (within the meaning of the *Life Insurance Act 1995*);
 - (d) the provision of services to a related body corporate;
 - (e) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph.”

[28] The general definition of “financial product” is relevantly set out in s 763A(1). That section provides:

“763A General definition of financial product

- (1) For the purposes of this Chapter, a *financial product* is a facility through which, or through the acquisition of which, a person does one or more of the following:
- (a) makes a financial investment (see section 763B);
 - (b) manages financial risk (see section 763C);
 - (c) makes non-cash payments (see section 763D).

This has effect subject to section 763E.”

Did each of the first to third respondents carry on a financial services business in Australia?

- [29] On the premise that none of the first, second and third respondents held an AFSL when the relevant conduct occurred, the first issue is whether they have carried on a financial services business in Australia in contravention of s 911A. ASIC submits that the first to third respondents carried on a financial services business in the form of a custodial or depository service by holding investors’ funds. This service, according to ASIC, amounted to a business because it was provided with “system, repetition and continuity”.³⁶
- [30] As excerpted above, a custodial or depository service is an arrangement where “a financial product, or a beneficial interest in a financial product, is held by the provider in trust for, or on behalf of, the client or another person nominated by the client.”³⁷ The arrangement can be between the provider and the client or between the provider and a person with whom the client has an arrangement.
- [31] The precise nature of the investment structure and the relationship between investors, the respondents, and the related Goldsky entities is not altogether clear from the material. At a basic level, however, it is apparent that third parties deposited large sums of money into the Goldsky Bank Accounts held by the first to third respondents,³⁸ which coalesced into pools of third party funds intermingled with personal funds. Based upon the Goldsky entities’ investor material,³⁹ the comments made by the fourth respondent in his interview,⁴⁰ and the inherent improbability that the deposits were intended as out-and-out gifts, I am prepared to accept that the money was deposited with the expectation of a financial return. In each such case, there was a “financial investment” regardless of whether a return was in fact generated.⁴¹ The facilities through which the investors made their financial investments were the Goldsky Bank Accounts. The funds in the Goldsky Bank Accounts were in turn held on behalf of each

³⁶ ASIC’s Written Submissions, paragraphs 36-37, citing *Investment and Merchant Finance Corp Ltd v FCT* (1971) 125 CLR 249 at 255.

³⁷ Act s 766E(1).

³⁸ Exhibits AEG-1, AEG-2 and AEG-3 to the affidavit of Anne Elizabeth Gubbins, filed 29 October 2018.

³⁹ Exhibits DAM-10, DAM-18, DAM-21 to the affidavit of David Andrew McArthur, filed 29 October 2018.

⁴⁰ Exhibits DAM-10 and DAM-18 to the affidavit of David Andrew McArthur, filed 29 October 2018.

⁴¹ Act s 763B (definition of “financial investment”). However, that there were investor returns in the amount of \$8,868,038.69 in my view also demonstrates the making of a financial investment by each investor.

of the investors and/or their nominees proportionate to their contributions. On this analysis, I am satisfied that the first to third respondents provided financial services in the form of a custodial or depository service.

- [32] It may also be accepted that, given the number of investors involved (approximately 56) and the period over which those investments were made,⁴² the first, second and third respondents were carrying on a financial services business. The conduct went well beyond merely maintaining bank accounts.⁴³ Further, that business was carried out in this jurisdiction because the investors were ordinarily resident in this jurisdiction.⁴⁴
- [33] In summary, I find that each of the first, second and third respondents provided a custodial or depository service and that such provision constituted a financial services business.⁴⁵
- [34] As to the precise period during which the first, second and third respondents carried out their respective financial services businesses, I note the operation of s 766E(2)-(3), which provides that a custodial or depository service begins to be provided when the financial product or beneficial interest concerned is first held by the provider, and the service continues to be provided throughout the holding of that financial product or beneficial interest. As noted in ASIC's submissions, the statements for the Goldsky Bank Accounts show that the first, second and third respondents each received money from investors on the following dates:⁴⁶

Respondent	Bank account	Date of first investor deposit
First respondent	Goldsky Global Account	24 March 2017
Second respondent	Goldsky Asset Account	9 January 2018
Third respondent	Goldsky Investments Account	27 March 2017

- [35] I am prepared to accept that each of the first, second and third respondents began to provide a custodial or depository service amounting to a financial services business from these dates.
- [36] As for the concluding date of each of the first, second and third respondent's financial services businesses, I will deal with these in turn.

⁴² Affidavit of Anne Elizabeth Gubbins, filed 29 October 2018, paragraph 16.

⁴³ Act s 21(3)(c).

⁴⁴ ASIC's Written Submissions, paragraph 33.

⁴⁵ Act s 761A (definition of "financial services business").

⁴⁶ Supplementary Trial Submissions on behalf of the Applicant, dated 18 April 2019, paragraphs 61, 63 and 67.

- [37] ASIC submits that the first respondent provided a custodial or depository service until 22 October 2018.⁴⁷ It is unclear how that date has been arrived at. The statements for the Goldsky Global Account show that the first respondent held \$3,331.01 at that time.⁴⁸ It can safely be inferred that at least a portion of that money could be traced back to investors. In my opinion, the better view is that the first respondent's financial services business concluded when I made the interim freezing order on 29 October 2018, which was in respect of the Goldsky Bank Accounts.
- [38] The second respondent is alleged by ASIC to have provided a custodial or depository service until 16 October 2018. It appears that ASIC has chosen this date because it was apparently the last time that the second respondent returned money to its investors.⁴⁹ Again, it should be emphasised that the bank statements show that as late as 25 October 2018 the Goldsky Asset Account held \$1,021,453.66 from which it can be inferred that the second respondent continued to hold the Goldsky Asset Account on behalf of investors.⁵⁰ As with the first respondent, in my view the second respondent's financial services business concluded on 29 October 2018, being the date when I made the interim freezing order.
- [39] Turning to the third respondent, I agree with ASIC that the third respondent concluded providing a custodial or depository service on 16 January 2018. This is because the Goldsky Investments Account had a nil balance on that date and had been closed.⁵¹ Accordingly, no balance was held after this date on behalf of investors in this account. I therefore find that the third respondent's financial services business concluded on 16 January 2018.

Were any of the first to third respondents exempt from the requirement to hold an AFSL?

- [40] Having determined that each of the first, second and third respondents carried on a financial services business for a certain period of time, the next issue to consider is whether they were exempted under s 911A(2) from being required to hold an AFSL. Although the first, second and third respondents do not assert that they fall within any of the exemptions under s 911A(2), I consider below whether there were circumstances that exempted them from the requirement to hold an AFSL.
- [41] As mentioned above, on 28 September 2016, the SEC granted Goldsky LLC registration as an investment advisor.⁵² On that basis, on 16 March 2017, Goldsky LLC's solicitors wrote a letter to ASIC⁵³ (accompanied by supporting documents) applying on Goldsky LLC's behalf for relief under ASIC Class Order 03/1100, which was an exemption for the purposes of s 911A(2)(h) and (i). Under ASIC Class Order 03/1100, appropriately licensed foreign companies were entitled to provide prescribed financial services (including a custodial or depository service) to wholesale clients without holding an

⁴⁷ Supplementary Trial Submissions on behalf of the Applicant, dated 18 April 2019, paragraph 61.

⁴⁸ Exhibit AEG-1 to the affidavit of Elizabeth Anne Gubbins, filed 29 October 2018, page 44.

⁴⁹ Supplementary Trial Submissions on behalf of the Applicant, dated 18 April 2019, paragraphs 63 and 66.

⁵⁰ Exhibit AEG-2 to the affidavit of Elizabeth Anne Gubbins, filed 29 October 2018, page 269.

⁵¹ Exhibit AEG-3 to the affidavit of Elizabeth Anne Gubbins, filed 29 October 2018, page 559.

⁵² Affidavit of David Andrew McArthur, filed 29 October 2018, paragraph 12.

⁵³ Exhibit DAM-6 to the affidavit of David Andrew McArthur, filed 29 October 2018.

AFSL provided they complied with certain conditions, some of which required ongoing compliance.⁵⁴ One of those conditions was that Goldsky LLC disclose to ASIC any “significant investigation” undertaken by the SEC within 15 business days of becoming aware (or after it reasonably should have become aware) of such an investigation.⁵⁵

[42] On 5 April 2017, ASIC acknowledged Goldsky LLC’s reliance on ASIC Class Order 03/1100 and receipt of the documents attached to the letter of 16 March 2017 that were required by ASIC Class Order 03/1100.⁵⁶ It may be accepted that Goldsky LLC was exempted from the requirement to hold an AFSL from this date, that is, 5 April 2017.

[43] At this point, it should be emphasised that Goldsky LLC – and Goldsky LLC alone – was exempted from holding an AFSL. As for the first, second and third respondents, in order to take advantage of Goldsky LLC’s exemption for themselves, it had to be shown that:

- (a) first, during the period in which they carried on their respective financial services businesses, Goldsky LLC was exempted from being required to hold an AFSL by virtue of its ongoing compliance with ASIC Class Order 03/1100; and
- (b) second, during that same period, the first, second and third respondents each provided a custodial or depository service as representatives of Goldsky LLC so as to bring themselves within the exemption in s 911A(2)(a)(ii).

I will deal with these issues in turn.

a) *Was Goldsky LLC exempted under ASIC Class Order 03/1100 while the first, second and third respondents carried on their respective financial services businesses?*

[44] On or around 12 December 2017, Goldsky LLC received a letter from the SEC enclosing a subpoena to produce documents.⁵⁷ The letter stated as follows:

“The staff of the [SEC] is conducting an investigation in the matter identified above [‘In the Matter of Goldsky Asset Management, LLC (NY-9783)’]. The enclosed subpoena has been issued to you as part of this investigation. The subpoena requires you to give us documents.

Please read the subpoena and this letter carefully. This letter answers some questions you may have about the subpoena. You should also read the enclosed SEC Form 1662. You must comply with the subpoena. You may be subject to a fine and/or imprisonment if you do not.”

The accompanying subpoena was wide-ranging and comprehensive, requesting 26 categories of documents under the headings of “General”, “Investment Related” and “Financial Information”.

⁵⁴ It should be noted that *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* repealed ASIC Class Order 03/1100 in 2016, however, there was a two-year transitional period, meaning that the exemption under ASIC Class Order 03/1100 was available to Goldsky Asset Management LLC until September 2018.

⁵⁵ ASIC Class Order 03/1100, Schedule C, paragraph 2(a)(iv).

⁵⁶ DAM-8 to the affidavit of David Andrew McArthur, filed 29 October 2018.

⁵⁷ DAM-31 to the affidavit of David Andrew McArthur, filed 18 April 2019, page 1.

- [45] ASIC submits that this letter and subpoena should have made it clear to Goldsky LLC that the SEC was undertaking a significant investigation for the purposes of ASIC Class Order 03/1100, and accordingly it was incumbent on Goldsky LLC to notify ASIC of this matter within 15 business days of receiving the SEC's letter. In this regard, ASIC's written submissions note that some guidance as to the meaning of "significant investigation" can be obtained from Regulatory Guide 176, which relevantly provides:⁵⁸
- "... In determining whether an investigation, enforcement or disciplinary action is significant, FFSPs should consider whether the investigation, enforcement or disciplinary action is serious enough that it may affect our assessment that the FFSP may continue to rely on relief from the licensing requirements in Australia."
- [46] In my view, the SEC's letter and the accompanying subpoena would have made Goldsky LLC aware – or at least should reasonably have made it aware – that it was the subject of a significant investigation. The letter expressly notified Goldsky LLC that the SEC was conducting an investigation into its affairs, and that the subpoena was a part of that investigation. The subpoena's request for documents was very broad, requiring – to name only a few of the requested documents – the production of service agreements and retainers, documents identifying investors, account balances, account statements, contracts concerning the fund(s) and cash receipts.
- [47] I note that the SEC's letter contained disclaimers to the effect that it had not yet concluded that Goldsky LLC or any related person had broken the law.⁵⁹ However, the fact remains that the SEC's letter notified Goldsky LLC that it had commenced an investigation into its affairs. The nature of the subpoena could not have left any doubt that the investigation went well beyond a routine audit and was significant. So much is confirmed by the fact that the SEC cancelled Goldsky LLC's investment advisors licence on 22 August 2018 and filed proceedings on 27 September 2018 in which it alleged that both Mr Grace and Goldsky LLC had made false and misleading statements.⁶⁰
- [48] Goldsky LLC should therefore have notified ASIC of the SEC's letter of 12 December 2017 within 15 business days, that is, by no later than 5 January 2018. Goldsky LLC failed to do so. As a result, by 6 January 2018, Goldsky LLC was no longer exempt from the requirement to hold an AFSL.
- [49] The consequence of this is that, even if the first, second and third respondents were representatives of Goldsky LLC, they were only exempted from holding an AFSL for the period 5 April 2017 to 6 January 2018. The first and third respondents carried on financial services businesses both before and after the period of Goldsky LLC's exemption. The second respondent's financial services business commenced after this period. Accordingly, putting aside the issue of whether they were representatives for the moment, the first, second and third respondents were in breach of s 911A(1) to the extent that they carried on their respective financial services businesses without holding an AFSL outside the period of Goldsky LLC's exemption.

⁵⁸ Supplementary Trial Submissions on behalf of the Applicant, dated 18 April 2019, paragraph 15.

⁵⁹ Exhibit DAM-31 to the affidavit of David Andrew McArthur, filed 18 April 2019, page 3.

⁶⁰ Affidavit of David Andrew McArthur filed 29 October 2018, paragraphs 14-15.

[50] For the sake of completeness, I note that, independent of the SEC’s letter, ASIC sent a series of notices to Goldsky LLC between 28 February and 13 April 2018 requesting books⁶¹ and a written statement.⁶² In a letter to ASIC dated 20 April 2018, Goldsky LLC admitted that four retail investors were participating in its fund in contravention of ASIC Class Order 03/1100. Further, on 4 May 2018, Goldsky LLC advised ASIC that it no longer relied on ASIC Class Order 03/1100.⁶³ In the event that the SEC’s letter of 12 December 2017 did not put Goldsky LLC on notice of a significant investigation, I would accept that Goldsky LLC’s relief under ASIC Class Order 03/1100 lapsed on one of these later dates.

b) *Were the first, second and third respondents representatives of Goldsky LLC?*

[51] Section 910A defines a “representative” to mean:

“*representative* of a person means:

- (a) if the person is a financial services licensee:
 - (i) an authorised representative of the licensee; or
 - (ii) an employee or director of the licensee; or
 - (iii) an employee or director of a related body corporate of the licensee; or
 - (iv) any other person acting on behalf of the licensee; or
- (b) in any other case:
 - (i) an employee or director of the person; or
 - (ii) an employee or director of a related body corporate of the person; or
 - (iii) any other person acting on behalf of the person.”

[52] Goldsky LLC is not a financial services licensee,⁶⁴ and the first, second and third respondents are neither employees nor directors of Goldsky LLC or a related body corporate. Consequently, only subsection (b)(iii) potentially arises on the present facts.

[53] As submitted by ASIC, the documentary evidence does not disclose the particular basis upon which investor funds were provided to the Goldsky Bank Accounts.⁶⁵ More specifically, there is no evidence of, for example:

- (a) Goldsky LLC instructing any of the first to third respondents to receive investors’ funds on its behalf;

⁶¹ ASIC gave this notice pursuant to s 30 of the *Australian Securities and Investments Commission Act 2001* (Cth).

⁶² Exhibits DAM-11, DAM-12, DAM-13, DAM-14 and DAM-15 to the affidavit of David Andrew McArthur, filed 29 October 2018.

⁶³ Exhibit DAM-19 to the affidavit of David Andrew McArthur, filed 29 October 2018.

⁶⁴ Act s 761A.

⁶⁵ Supplementary Trial Submissions on behalf of the Applicant, dated 18 April 2019, paragraph 47.

- (b) agreements authorising the first to third respondents to receive investors' funds on Goldsky LLC's behalf; or
- (c) a pattern of conduct from which it could be implied that the first to third respondents acted on Goldsky LLC's behalf in receiving investors' funds.

- [54] Goldsky LLC provided to ASIC a list of investors that included some of the investors who deposited funds into the Goldsky Bank Accounts.⁶⁶ This overlap might suggest that the first to third respondents acted as a representative of Goldsky LLC in receiving the funds of those investors included in Goldsky LLC's list. Without anything more, however, I do not consider this to be a sound evidentiary basis to conclude that the first to third respondents acted in a representative capacity in receiving these investors' funds. In any event, as ASIC's submissions point out, during the period of the relevant conduct, the first to third respondents also received money from investors whom Goldsky LLC did not include in its list of investors.⁶⁷
- [55] Ultimately, in the absence of cogent evidence to the contrary, in my view the first, second and third respondents did not accept funds from investors on behalf of Goldsky LLC. Put another way, they did not act as representatives of Goldsky LLC in providing a custodial or depository service
- [56] It follows that none of the first, second or third respondents were exempted under s 911A(2) from the requirement to hold an AFSL at any time during the period in which they provided a custodial or depository service.

Should the declaratory relief be granted?

- [57] In *Australian Securities and Investments Commission v Munro & Anor*,⁶⁸ which concerned an application similar to the present one before the Court, I observed the following:

“... the Court should pay close attention to the form of the proposed declaration, particularly of those “by consent”. As stated by Gordon J in *Australian Competition & Consumer Commission v Renegade Gas Pty Ltd*: [citations omitted]

‘[d]eclarations are not made as a matter of course. Where it is appropriate for a declaration to be made, attention must be given to the form of the declaration, so that it is at least informative as to the basis on which the court declares that a contravention has occurred. The declarations should contain appropriate and adequate particulars of how and why the impugned conduct is a contravention of the Act: *Rural Press Ltd v Australian Competition & Consumer Commission* (2003) 216 CLR 53 at [90]; *Australian Competition & Consumer Commission v Francis* (2004) 142 FCR 1 at [113] and *BMW Australia Ltd v*

⁶⁶ Supplementary Trial Submissions on behalf of the Applicant, dated 18 April 2019, paragraph 48; Exhibit DAM-19 to the affidavit of David Andrew McArthur filed 29 October 2018.

⁶⁷ Supplementary Trial Submissions on behalf of the Applicant dated 18 April 2019, paragraphs 55, 63 and 67.

⁶⁸ [2016] QSC 9, [80].

Australian Competition & Consumer Commission (2004) 207 ALR 452 at [35].’

...

The Court may make a declaration both within its inherent jurisdiction and pursuant to s 10(2) of the *Civil Proceedings Act* 2011 (Qld). The Court’s discretion to make a declaration is extremely wide. The applicant referred to the decision of Gordon J in *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd*, where her Honour considered the discretionary matters relevant to the making of a declaration including: [citations omitted]

‘... whether the declaration will have any utility, whether the proceeding involves a matter of public interest and whether the circumstances call for the marking of the court’s disapproval of the contravening conduct.’”

- [58] For the purposes of making declarations, I have identified above the nature of the first, second and third respondents’ financial services businesses and the time period in which they each carried on their financial services businesses in this jurisdiction. In doing so, I am satisfied that there is sufficient evidence to make the declarations to the standard identified in *Briginshaw v Briginshaw*.⁶⁹
- [59] The declarations sought by ASIC will have utility. Each of the first to third respondents, in the course of conducting a financial services business received large deposits from approximately 56 investors ordinarily resident in Australia. In such circumstances the public interest, and the marking of the Court’s disapproval of engaging in such conduct without holding an AFSL, makes it appropriate to grant the declaratory relief sought.

⁶⁹ (1938) 60 CLR 336, 361-362 (Dixon J); *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd* (2014) 103 ACSR 453, 467-468 [64] (Gordon J).

Disposition

[60] I declare that:

- (a) the first respondent has contravened s 911A of the Act by carrying on a financial services business in this jurisdiction without holding an AFSL, namely by operating a custodial or depository service within the meaning of s 766E of the Act, between the period of 24 March 2017 and 29 October 2018;
- (b) the second respondent has contravened s 911A of the Act by carrying on a financial services business in this jurisdiction without holding an AFSL, namely by operating a custodial or depository service within the meaning of s 766E of the Act, between the period of 9 January 2018 and 29 October 2018; and
- (c) the third respondent has contravened s 911A of the Act by carrying on a financial services business in this jurisdiction without holding an AFSL, namely by operating a custodial or depository service within the meaning of s 766E of the Act, between the period of 27 March 2017 and 16 January 2018.

[61] I further order that:

- (a) the further amended originating application otherwise be dismissed;
- (b) the first, second and third respondents pay the costs of the applicant of this proceeding; and
- (c) the parties otherwise bear their own costs.