SUPREME COURT OF QUEENSLAND

CITATION:	*RE Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192
PARTIES:	**RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE** (Applicants) **v** **LM INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED) ACN 077 208 461 IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND** (First Respondent) **and** **THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288** (Second Respondent) **and** **ROGER SHOTTON** (Third Respondent) **and** **AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** (Intervener)
FILE NO/S:	BS 3383 of 2013
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	15, 16, 17 and 30 July 2013
JUDGE:	Dalton J
ORDER:	**1. Application filed 15 April 2013 dismissed** **2. Order that the first respondent wind up the LM First Mortgage Income Fund.** **3. Order that Mr David Whyte, liquidator, is appointed to take responsibility for the winding-up of the LM First Mortgage Income Fund.**

4. **Order that Mr David Whyte, liquidator, be appointed receiver of the property of the LM First Mortgage Income Fund.**

5. **Consequential Orders and directions.**

CATCHWORDS:

Corporations Act 2001 (Cth)
Corporations Regulations 2001 (Cth)

ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor [2002] NSWSC 310
ASIC v Wellington Investment Management Limited & Anor [2008] QSC 243
Capelli v Shephard (2010) 77 ACSR 35
Everest Capital Limited v Trust Company Ltd [2010] NSWSC 231
Handberg v Cant [2006] FCA 17
In Re Gordon [2005] FCA 950
Re Giant Resources Limited [1991] 1 Qd R 106, 117
Re Orchard Aginvest Ltd [2008] QSC 2
Re Stacks Managed Investments Ltd [2005] NSWSC 753
Re Stewden Nominees No 4 Pty Ltd [1975] 1 ACLR 185, 187
Shanahan v Scott (1957) 96 CLR 245, 250
Shephard v Downey [2009] VSC 33

CORPORATIONS – MANAGED INVESTMENT SCHEME – RESPONSIBLE ENTITY – where the applicants applied to have a temporary responsible entity appointed pursuant to ss 601FN and 601FP or reg 5C.2.02 – whether the application ought to be granted

CORPORATIONS – MANAGED INVESTMENT SCHEME – WINDING-UP – APPLICATIONS FOR WINDING-UP BY THE COURT – where a member of the fund and ASIC applied for orders pursuant to ss 601ND and 601NF – whether the first respondent should be directed to wind up the fund – whether it was necessary for an appointment pursuant to s 601FN(1) – appointment of receiver pursuant to s 601FN(2)

COUNSEL:

PH Morrison QC, with P Ahern, for the applicants
JC Sheahan QC, with S Cooper, for the first respondent
P Hastie for a member of the second respondent
DR Tucker (Solicitor) for the third respondent
RM Lilley QC, with SJ Forrest, for the intervener

SOLICITORS:

Piper Alderman for the applicants
Russells for the first respondent
Synkronos Legal for a member of the second respondent
Tucker & Cowen for the third respondent
Australian Securities and Investments Commission for the intervener

[1] This matter was commenced by originating application, adjourned twice, and came on in the civil list. By the time of the hearing two further applications had been made, one by ASIC, intervening, and one by a unit holder, Shotton. All applications were heard together over three days.

[2] The originating application was directed to the first respondent, a company in voluntary administration, which is the responsible entity of a managed investment scheme under the *Corporations Act* 2001 (Cth) (the Act), First Mortgage Income Fund, (FMIF or the fund). FMIF invested by lending on the security of mortgages to borrowers who developed real property. There are three associated feeder funds to FMIF, one is controlled by Trilogy Funds Management Limited (Trilogy) as responsible entity. Two are controlled by the first respondent as responsible entity, one of these is named Currency Protected Australian Income Fund (CPAIF). As well, there is a service company to the funds, LM Administration Pty Ltd (Administration). The same voluntary administrators were appointed to Administration as the first respondent. In a coda to the principal hearing the matter was mentioned again on 30 July 2013 and new material showed that at the second meeting of creditors of Administration, held on 26 July 2013, liquidators unconnected with the current administrators of the first respondent were appointed to Administration.

[3] The fund was established in 1999, it was successful in attracting investment – in February 2008 it was said to be worth over $700 million. It was adversely affected by the GFC. By June 2011 it had assets of $450 million; by June 2012 this had declined further to around $340 million, and again to $320 million by 31 December 2012. The only assets of the scheme are loans made to borrowers and all of those are in default. The net loss attributable to unit holders in 2011 was $77 million, and in 2012, $88 million.

[4] From 2009 the scheme had greatly reduced activities: in March it declined new applications to buy units; in October it suspended redemptions from the fund, the applicant concedes this was apparently on the basis that the fund was illiquid. Its unit value in November 2012 was said to be 59 cents; each unit had been worth one dollar on issue. In December 2012, before administrators were appointed, the responsible entity of the fund implemented a "go forward" strategy. The name was Orwellian in that this strategy involved an orderly sale of all remaining fund assets and a pro rata distribution of the proceeds (after repaying debt) to unit holders with the aim of returning investors' capital investment to them as quickly as commercially possible. In announcing this new strategy the responsible entity said that it had determined that the fund was not liquid for the purpose of the withdrawal provisions under the Act.

[5] Voluntary administrators were appointed to the first respondent, responsible entity of the fund, on 19 March 2013, on the basis of a board resolution that the company was insolvent or likely to become insolvent. I accept that the administrators are independent of the previous directors – Court Document 46, paragraphs 35-36.

[6] The administrators held a first meeting of creditors on 2 April 2013. No deed of company arrangement has been proposed and there is little likelihood of one being proposed. The second meeting has not yet been held. The likelihood appears that

the first respondent company will be put into liquidation within a month. It is expected that the current administrators will act as its liquidators.

[7] On 11 July 2013 Deutsche Bank AG appointed receivers over the assets and undertakings of the scheme. Deutsche Bank is owed around $30 million. There are sufficient assets in the scheme to found an expectation that Deutsche Bank will recover all amounts owing and depart, leaving significant assets still in the scheme. The current administrators of the first respondent have resolved to wind up FMIF, but are restrained from doing so until this proceeding is determined.

Trilogy Originating Application

[8] The originating application was filed on 15 April 2013. It sought, pursuant to ss 601FN and 601FP of the Act or alternatively reg 5C.2.02 of the *Corporations Regulations* 2001 (Cth), that Trilogy be appointed as temporary responsible entity of the FMIF.[1] It was common ground at the hearing of the application that Trilogy had indemnified the named applicants to this proceeding. The named applicants are small unit holders of the scheme (0.029 per cent of the issued units). Counsel appearing for the applicants expressly said that he was providing the view of Trilogy to the Court.[2] I will refer to the originating application as the Trilogy application.

Competence

[9] Section 601FN of the Act provides:

> "ASIC or a member of the registered scheme may apply to the Court for the appointment of a temporary responsible entity of the scheme under section 601FP if the scheme does not have a responsible entity that meets the requirements of section 601FA."

[10] Section 601FA of the Act provides:

> "The responsible entity of a registered scheme must be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme."

[11] The applicant said the first respondent no longer held an Australian financial services licence which authorised it to operate a managed investment scheme. This was said to be due to ASIC's having issued a notice to the first respondent:

> "TAKE NOTICE that under s 915B(3)(b) of the Corporations Act 2001 (**Act**), the Australian Securities and Investments Commission (**ASIC**) hereby suspends Australian financial services licence number 220281 held by LM Investment Management Limited ... (**Licensee**) until 9 April 2015.
>
> Under s 915H of the Act, ASIC specifies that the licence continues in effect as though the suspension had not happened for the purposes of the provisions of the Act specified in schedule B regarding the matters specified in Schedule A.
>
> **Schedule A**

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1 The application sought alternative relief under the *Trusts Act* 1973 which was not pursued before me.

2 t 3-25.

> The provision by the Licensee of financial services which are reasonably necessary for, or incidental, to the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or winding up of ... LM First Mortgage Income Fund ..."

[12] The word "operate" is not defined in the Act. It was considered by Davies AJ in *ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor.*[3] In that case ASIC brought proceedings against the defendant which had duped investors into paying large amounts of money purportedly as investments in something which was held to be a managed investment scheme within the meaning of s 9 of the Act. An issue in the case was whether or not the sole director of Pegasus had contravened the Act by operating the unregistered managed investment scheme. Davies AJ noted that the word "operate" should be given its ordinary English meaning; referred to the Oxford English Dictionary, and remarked that, "The term is not used to refer to ownership or proprietorship but rather to the acts which constitute the management of or the carrying out of the activities which constitute the managed investment scheme."[4] The conclusion that the sole director and directing mind of Pegasus, the person who formulated and directed the scheme and the sole person involved in its day-to-day operations, was the person who operated it was unremarkable.

[13] The applicant relied upon the definition of "managed investment scheme" in s 9 of the Act; the constitution of the first respondent company, and various other provisions, including various of the s 601 provisions of the Act to show that a very wide range of matters could be comprehended by, or included in, the concept of operating a managed investment scheme. No doubt that is so. It does not follow that, because under the terms of ASIC's suspension of 9 April 2013, the first respondent was limited in the activities it could perform, that it did not operate the managed investment scheme after 9 April 2013. Its operation of the scheme after 9 April 2013 was limited, but continuing. The word "operate" is a word of wide import and it must take its meaning in any particular case from all the relevant circumstances, including the nature of the fund, and the financial position of the fund. From 2009 there had been significant limits on the operation of the fund as financial circumstances excluded more and more of the potential activities open to an operator of the fund. No doubt the ASIC notice of 9 April 2013 further limited what could be done by way of operation of the fund, but as a matter of ordinary English and practical reality that notice did not bring the first respondent's operation of the fund to an end. What it has done since then no doubt falls within the concept of operation of a managed investment scheme, and the first respondent no doubt continues to bear the obligations and duties associated with such operation. It follows that the applicant is not able to rely upon s 601FN to bring this application.

[14] The alternative basis relied upon by the applicant was reg 5C.2.02 of the *Corporations Regulations* which provides:

> "ASIC, or a member of a registered scheme, may apply to the Court for the appointment of a temporary responsible entity of the scheme if ASIC or member reasonably believes that the appointment is necessary to protect scheme property or the interests of members of the scheme."

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3 [2002] NSWSC 310.

4 Above, [55].

[15] The structure of the regulations is such that Part 5C.2, headed "The responsible entity" corresponds, on its face, with Part 5C.2, Division 2 of the Act headed "Changing the responsible entity", ss 601FJ-601FQ. The only provision of the Act allowing ASIC or a member to apply for the appointment of a temporary responsible entity is s 601FN, just discussed. It would seem therefore that reg 5C.2.02 goes beyond the Act in that it purports to give rights greater than, or inconsistent with, those provided for in s 601FN – see s 1364 of the Act, and *Shanahan v Scott*.[5] This point is reinforced by the fact that the regulation provides only that a member may apply to the Court, and s 601FP of the Act gives the Court power to appoint a temporary responsible entity only on application under s 601FL (not relevant to this part of the argument) or s 601FN.

[16] The position is somewhat complicated by the last section in Chapter 5C of the Act, s 601QB, which provides that:

> "The regulations may modify the operation of this Chapter or any other provisions of this Act relating to securities in relation to:
> (a) a managed investment scheme; or
> (b) all managed investment schemes of a specified class."

[17] Regulations 5C.1.03 and 5C.11.02 both expressly purport to modify the operation of Chapter 5C of the Act in accordance with s 601QB of the Act. However, there is no requirement in s 601QB that any regulation made pursuant to it expressly state that it is modifying the operation of the chapter pursuant to the section. Having regard to the plain terms of s 601QB, I do not think it is necessary that a regulation expressly do this before it can be valid.

[18] Nonetheless s 601QB is not a plenary power to modify, but only a power to modify provisions, "relating to securities". Securities is defined at s 92(1)(c) to include "interests in a managed investment scheme". Other securities, as defined by s 92 include debentures, stocks, bonds, shares or units. At s 9 a managed investment scheme is defined as having (inter alia) the feature that "people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme ...". While the word "interest" or "interests" is not strictly defined, this part of the definition of managed investment scheme, together with the other types of securities defined by s 92 of the Act, shed some light on how the word "interests" in s 92(1)(c) is to be understood. An interest in a managed investment scheme is something analogous to (if less defined than) a share in a company.

[19] Turning again to the terms of s 601QB, I cannot see that reg 5C.2.02 is a regulation which purports to modify a provision of the Act relating to securities. I do not think that s 601FN could be characterised as a provision of the Act relating to securities, notwithstanding it gives rights to members of managed schemes, who no doubt have interests in them, which would amount to securities within the meaning of s 92(1)(c) of the Act. Again by way of analogy, were the provisions dealing with companies, I would not characterise a provision along the lines of s 601FN as a provision relating to shares in a company merely because it gave a remedy to shareholders (along with ASIC). My view therefore is that reg 5C.2.02 does not authorise the application brought by the Bruces.[6] The applicant relied upon a short report, *In Re Gordon*.[7]

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5 (1957) 96 CLR 245, 250.

6 See the doubts expressed by Applegarth J in *Re Equititrust Ltd* [2011] QSC 353 [7], correctly in my view.

7 [2005] FCA 950.

The report does not contain any of the reasoning processes of the judge who made the order and does not reveal whether or not the validity of reg 5C.2.02 was in issue before him. For these reasons, I do not regard the report as helpful.

[20] Having regard to my conclusions in relation to s 601FN and reg 5C.2.02, the application brought by the Bruces ought to be dismissed as incompetent.

Discretion

[21] Even had I power to do so I would not appoint Trilogy as temporary responsible entity. Section 601FP(1) allows the Court to appoint a company as temporary responsible entity if the Court is satisfied that the appointment is in the interests of members. If reg 5C.2.02 were valid, it would additionally direct my attention to whether or not it was necessary to protect scheme property.

[22] Section 601FQ(1) provides that a temporary responsible entity is just that. It must call a members' meeting for the purpose of the members choosing a company to be a new responsible entity. This meeting must be held "as soon as practicable" and in any event within three months of it becoming the temporary responsible entity. This will inevitably involve cost for the fund. Section 601FQ(2) provides the opportunity for more than one meeting and for applications to be made to Court. Independently, s 601FQ(5) provides that if the temporary responsible entity forms the view that the scheme ought to be wound up, it must apply to Court for such an order. There is a likelihood that any person objectively looking at this scheme would need to make such an application. Further, having regard to the way this litigation has been conducted and the history of the 13 June 2013 meeting (see below for both topics), in my view there is a distinct possibility that there would be contention and indeed litigation about any meeting held to appoint a new responsible entity.

[23] Trilogy hoped that it would be appointed as a permanent responsible entity by the meeting required by s 601FQ(1). However, I cannot see it is in the interests of the members of the FMIF to become caught up in a process which provides an interim solution which will inevitably involve more expense by way of meeting (s 601FQ(1)), and may involve further expense by way of Court action, with the inevitable disclocation, uncertainty and expense which any interim solution must involve.

[24] There are other reasons why I do not regard the appointment of Trilogy as responsible entity as being in the interests of the members of this fund. One very practical one is that the current administrators swear that there is a considerable overlap between the staff of the first respondent and the company Administration which would make it difficult, and I infer, expensive, to hand over to a new responsible entity – Court Document 46, paragraph 63. It seems to me that prima facie those staff who have long knowledge of the business of the fund ought to be working for or with the responsible entity as much as possible in order to preserve corporate memory, competence and save cost.[8] Employees of the first respondent will have a good background knowledge of the loans which are its primary assets,

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[8] I note that this is a different argument conceptually from that advanced by the administrators of the first respondent to the effect that if this fund is to be wound up, they ought wind it up because otherwise the time they have spent as administrators since March will, in some part, be lost to the first respondent and this will involve waste of costs. I deal with that argument below at [128].

the properties which provide the first respondent its mortgage securities, and the history of the first respondent's dealing with the borrowers who are currently in default. Further, these employees will have knowledge of the documents and systems of the first respondent. From a practical point of view, it seems to me that this is all very valuable. I accept that uncertainty as to the longevity of this arrangement results from the decision to place Administration into liquidation, and thus to some extent diminishes the weight of this consideration.

[25] Trilogy puts itself forward as having an advantage over other persons proposed to take control of the fund by reason of the fact that it is not staffed by insolvency practitioners, but is a fund manager, with particular experience of distressed funds. I deal with these matters in detail at [37] below. In the end I do not see that there is any great advantage provided by the slightly different perspective which Trilogy's control would provide to the responsible entity. In fact, given that my view is that this fund ought to be wound up – [34]-[43] – it seems to me there is probably a disadvantage in Trilogy not having as much insolvency experience as the other contenders for control, particularly when it seems that there may be contention and litigation involved in the winding-up.

[26] In this case there is no evidence before me that the assets of the FMIF are in danger and need particular protection, except, indirectly, because of conflicts of interests which it is said will become evident if either the first respondent or Trilogy winds up FMIF.

[27] To the extent that the Trilogy application to be appointed temporary responsible entity is based on the idea that someone independent of the first respondent and its administrators ought to be appointed to control the FMIF, that will be achieved by the orders which I propose to make, although they differ from those which the applicant and Trilogy seek. In that regard, I have dealt with the applicant's arguments as to conflicts of interest and the need for independence at [97]ff below.

[28] To some extent, Trilogy will have potential conflicts of interest if it is in charge of the fund because it is the responsible entity of a feeder fund to FMIF. Further, Trilogy has a view that there ought to be litigation by members of the FMIF against the first respondent or its directors. It has engaged Piper Alderman to investigate such claims (as far back as November 2012) and has touted the idea publicly of a class action. There may be claims to be made, and it may be that it is rational to make them, depending on their prospects of success, likely cost and the likely prospect of recovering anything at the end of the day. At present, however, Trilogy has not investigated the matters to any extent[9] and I must say I find its advocacy of such claims prior to any proper assessment rather disconcerting. The first respondent says that Trilogy as a member has a right to claim against the first respondent and its directors if it wishes, but says that it seeks to become responsible entity of the fund so that it does not have to bear the cost of doing this, but can use the fund essentially to bear the expense of such actions. There is I think potential conflict of interest in this.

[29] The applicant advanced a general argument that it was undesirable for the responsible entity of the FMIF to be a company under external administration. There may be arguments to be made in cases where the fund itself will continue to

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9 For example, Court Document 91, paragraph 31.

trade as a going concern (for want of better terms). However, where the fund itself is to be brought to an end and its assets realised for the benefit of members (which should happen even in Trilogy's view), I cannot see that it is particularly undesirable for a responsible entity under external administration to have charge of this fund. It certainly does not outweigh the other factors which I consider bear upon my decision in this regard.

[30] Further, it was argued in a general way that ASIC might in the future act to further limit or wholly cancel the first respondent's financial services licence: there is the potential for breaches of the licence conditions due to the insolvency of the first respondent – see e.g., s 915B(3) of the Act. I do not think there is any realistic basis for present concern about that in circumstances where ASIC is an intervener in this litigation and is content for orders to be made which leave the first respondent as responsible entity, subject to another body being given responsibility for ensuring oversight of the winding-up of the fund.

[31] For all these reasons, I do not think it is in the interest of the members that Trilogy be appointed as temporary responsible entity. Nor, to deal with a submission made by counsel for Trilogy outside its application, do I think Trilogy ought to be appointed to wind up the FMIF, be receiver of the property of the FMIF, or to take responsibility for seeing that the FMIF is wound up.

ASIC Application and Shotton Application

[32] On 29 April 2013 Mr Shotton, a member of the FMIF, filed an application seeking an order pursuant to s 601ND of the Act that the first respondent be directed to wind up the FMIF and that an independent liquidator be appointed to take responsibility for ensuring that the FMIF was wound up in accordance with its constitution – s 601NF(1) of the Act.

[33] The ASIC application is similar. On 3 May 2013 ASIC filed an application seeking orders that the administrators of the first respondent be directed to wind up the fund pursuant to s 601ND(1)(a); that independent liquidators be appointed to take responsibility for ensuring that the fund was wound up in accordance with its constitution pursuant to s 601NF(1); that those liquidators be appointed as receivers of the property of the fund, either pursuant to s 1101B(1) or s 601NF(2) of the Act, and that they have wide powers to exercise as receivers. By the end of the hearing Mr Shotton joined with ASIC in proposing that receivers be appointed as proposed by ASIC.

Winding-up

[34] On 6 May 2013 the administrators of the first respondent resolved to wind up the fund on the basis that it cannot accomplish its purpose – s 601NC of the Act. They have been restrained from commencing the winding-up until this proceeding is resolved. Their position in relation to the first order sought by Shotton and ASIC is that it was unnecessary on the basis that the fund will in any event be wound up.

[35] All parties before the Court except the applicant agreed that the FMIF ought to be wound up. The current administrators depose at some length to the process undertaken by them in making the decision that the fund ought to be wound up. There was no real challenge to the substance of this evidence. Counsel for the

applicant asserted from the bar table that the fund was not insolvent.[10] I cannot determine that on the material before me, and no party advanced a case based on insolvency.

[36] Pursuant to s 601ND(1)(a) I have power to direct a responsible entity to wind up a scheme if it is just and equitable to do so. In this case it seems to me just and equitable to do so. The case law is to the effect that the principles concerning winding-up of companies on the just and equitable ground inform the Court's thinking in applications pursuant to s 601ND.[11] The financial position of the fund has already been outlined. From the end of 2012, if not before, those in charge of the company have been liquidating its assets with a view to returning capital to members. The fund was originally established to provide an investment which would provide regular income to unit holders and a return of capital at maturity – cll 11 and 12 of the constitution. This purpose has failed: there is no income and members can no longer exercise their rights to withdraw their investments in accordance with the constitution.[12]

[37] Trilogy does not advance the case that the fund should continue in a plenary way as a going concern. The point of difference between it and the other parties to this proceeding is that Trilogy puts itself forward as a more suitable person to take charge of the FMIF. It is a fund manager, unlike all the other persons proposed to take charge of the fund, who are insolvency practitioners. Trilogy has put material before the Court which shows that it has experience in dealing with distressed funds, including selling distressed assets to best advantage and dealing with claims against former fund managers. Against this background it is sworn – Court Document 29, paragraph 17 – that Trilogy would seek to: (a) consider selling the assets of the FIMF as appropriate and (b) obtain finance (either by external borrowing or on the sale of assets) to enable the development of some real properties, of which FIMF is mortgagee, to be completed. It is hoped that this second approach might provide higher sale prices than an insolvency practitioner might provide on a liquidation of the fund. In this regard Trilogy has a joint venture with a company named CYRE Trilogy Investment Management Pty Limited which specialises in marketing distressed property assets and assessing whether or not to complete incomplete development projects with a view to obtaining the best purchase price. Trilogy says that it would be advantageous if it were appointed as responsible entity for it would have an untrammelled financial services licence and full powers to pursue development of appropriate assets before sale, including borrowing for this purpose. It says that under its limited licence, the first respondent does not have sufficient power to act in this regard. For the same reason it says that I should not order the FMIF to be wound up.

[38] On behalf of the first respondent, a Mr Corbett swears that he has already performed a great deal of work, as leader of a team which has prepared a detailed analysis of the 27 groups of property over which the FMIF is mortgagee. He says that as part of that exercise he has considered development proposals for the properties. Neither he, nor Mr Wood, on behalf of Trilogy, identifies any particular property which should be developed prior to sale, or gives any detail as to even a class of properties which might be so developed.

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10 See *Capelli v Shephard* (2010) 77 ACSR 35 at [89]ff as to the colloquial concept of insolvency of a managed investment scheme.

11 *Equititrust* (above) at [29] and the cases cited there.

12 cf [13] *Equititrust,* above.

[39] It seems common ground before me that the winding-up of FMIF will take place over years. I do not think that the words of the limited financial services licence granted to the first respondent prohibit it developing property of which the fund is mortgagee in order to obtain a better price for that property in the course of winding-up. ASIC does not agitate such a limitation on this application, and in fact expressly does not prefer Trilogy or the first respondent as responsible entity. If there were to be doubt as to the first respondent's power to borrow or develop a particular property in the course of a winding-up, and there were a plainly sensible proposal in the interests of the fund, I cannot see that ASIC could not either clarify or modify the extent of powers under the limited financial services licence it has granted the first respondent.

[40] Nor am I convinced that making an order that the FMIF be wound up would remove from the person charged with winding-up the power to develop a particular property with a view to sale in the course of winding-up if it were in the interests of the fund. The fund was set up to invest in "mortgage investments" – cl 13.2 of its constitution – and cl 13.6 of the constitution makes it clear that in the ordinary course of its business it could exercise all the powers of a mortgagee. Indeed one would have thought that was a necessary and incidental part of running a business which invested in mortgage investments. The liquidator of a company would normally have the right to carry on the business of a company "so far as is necessary for the beneficial disposal or winding-up of that business" – see s 477(1)(a) of the Act. Here the constitution gives the responsible entity power to "manage the scheme" during the time of a winding-up until such time as all winding-up procedures have been completed and cl 16.7(e) gives such a responsible entity power to postpone the realisation of scheme property "for as long as it thinks fit". Again, if doubt arose about a particular proposal in the future s 601NF(2) allows the Court to make an appropriate direction. At the moment, there are no specific proposals, just some conceptual thinking.

[41] The second activity which Trilogy is keen to pursue is investigation of claims on behalf of the FMIF against the first respondent and/or the previous directors of the first respondent for conduct which is more fully detailed below, but which claims concern changes made to the first respondent's constitution being beyond power; related party transactions between the first respondent and Administration, and claims, perhaps in negligence, for the financial losses which were suffered by the FMIF during 2008 and 2009. These are the type of claims which are normally investigated, and if necessary, pursued by insolvency practitioners during the course of a company winding-up – cf s 477(2)(a) – and I cannot see that the limited financial services licence granted to the first respondent would prevent it from doing this. Nor is the potential existence of such claims a reason why I should not direct that the FMIF be wound up now. Clause 16.7(a) of the constitution obliges a responsible entity winding-up the fund to realise its assets. If there are claims to be made on behalf of the fund (and Trilogy has not investigated the position) then those choses in action would constitute property which the responsible entity, winding-up the scheme, would have power to pursue.

[42] In my view, it is desirable that the FMIF be wound up and its assets realised for unit holders. Further, I think it is desirable that I make an order that this occur. If I do not, the administrators will either need to call a meeting pursuant to cl 16.2(d) of the constitution or give members an opportunity to meet pursuant to cl 16.3(a) of the constitution; see also ss 601NB and 601NC which have very similar requirements.

At a general level, I should not be taken as opposing consulting the members as to the fate of the fund. However, for reasons which will appear from the discussion below, I anticipate at least the possibility that any meeting held pursuant to cl 16 of the constitution would be subject to contention between rival factions within the fund and litigation to test those rival contentions. Further, as my discussion of the 13 June 2013 meeting shows, there is a real possibility that the members will be showered with a great deal of information about rival contentions and that some of it may be misleading. Those circumstances must reduce the quality of the "democracy" invoked, and in my view make it desirable that I ought make an order.

[43] For all the above reasons I will make an order pursuant to s 601ND(1)(a) of the Act.

Appointments under s 601NF(1) and (2)

[44] The real issue joined between ASIC and Shotton on the one hand, and the first respondent on the other, was who ought to wind up the company, or take responsibility for the winding-up, as s 601FN(1) has it.[13]

[45] The first respondent submits that the provisions of Part 5C.9 of the Act make it clear that it is generally to be the responsible entity which winds up a managed investment scheme – ss 601NB, 601NC, 601ND and 601NE. I think this is right.

[46] Sections 601NE and 601NF(1) provide that the scheme is to be wound up "in accordance with its constitution and any orders" which the Court makes under s 601NF(2). There has been some consideration in the cases as to the width of the Court's power under s 601NF(2) to make directions (by order) about how a registered scheme is to be wound up, and I am grateful to Applegarth J for the review which is found in *Equitrust* (above) at [42]-[49], and his own views expressed at [50]ff in that case. While the scope of the power may not yet be fully explored, it is clear that there is not a wholesale importation of the scheme of company liquidation into the area of managed investment schemes. This is consistent, in my view, with the idea that it is generally the responsible entity which winds up the scheme in accordance with its constitution. Certainly this contrasts with e.g., the public aspects of a liquidation.

[47] Section 601NF(1) confers a jurisdiction in the Court to appoint a person other than the responsible entity to take responsibility for the winding-up of a scheme, "if the Court thinks it is necessary to do so". The first respondent submitted that the power of the Court to appoint was more limited than if the section had provided for an appointment where the Court thought it was convenient or desirable to do so. Again I think this correct, as a matter of plain English, against the background that the statute establishes a general regime where it is the responsible entity which will wind up a scheme in accordance with the constitution. It was the view taken by Fryberg J in *Re Orchard Aginvest Ltd.*[14] It was also the view of White J in *Re Stacks Managed Investments Ltd.*[15] Both these judges refused orders which might have been convenient or desirable, but were not necessary. Applegarth J took the

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13 In fact to a large extent this was also the point of the litigation for Trilogy whose primary position was that it would (eventually) have the task of realising the assets of the fund and who the applicant submitted ought be the person who was responsible for liquidating the fund if (contrary to its primary submission) an order to wind up the fund was made.

14 [2008] QSC 2, pp 8 and 9.

15 [2005] NSWSC 753 [50].

same view as to necessity in *Equititrust* at [51], and so did Judd J in *Shephard v Downey*.[16] The circumstances in which it is necessary to appoint will include a case where the responsible entity no longer exists or is not properly discharging its obligations in relation to a winding-up – s 601NF(1).

[48] Both ASIC and Shotton say that it is necessary to appoint someone to oversee the winding-up of FMIF pursuant to s 601MF because the first respondent cannot be relied upon to act in a balanced and impartial way in winding-up a fund where there are potential conflicts of interests and complex questions associated with them. ASIC in particular is concerned about the attitude of the first respondent demonstrated in relation to its calling a meeting of members of the FMIF; its dealings with ASIC, and its conduct in this proceeding. On behalf of Shotton various potential conflicts of interest between the interests of the FMIF, on the one hand, and the first respondent company; and the administrators themselves, on the other hand, were relied upon.[17] Trilogy also made criticism of the meeting and advanced submissions based on potential conflicts for the present administrators, and I deal with these in this part of the judgment. I now deal with each of these factual matters in turn.

Meeting 13 June 2013

[49] In response to receipt of Trilogy's application, the administrators of the first respondent caused a meeting of members of the fund to take place.

[50] Section 252B of the Act provides that the responsible entity of a registered scheme must hold a meeting of the scheme's members to vote on a proposed special or extraordinary resolution, if (inter alia) members with at least five per cent of the votes "that may be cast on the resolution" request it. It might be recalled that, in addition to being the responsible entity of FMIF, the first respondent is the responsible entity of two feeder funds which hold units in FMIF, and that one of the feeder funds is CPAIF. In fact the assets of CPAIF are held by a custodian trustee, the Trust Company. The administrators of the first respondent (as responsible entity of CPAIF) directed the Trust Company to request a meeting of members of FMIF pursuant to s 252B of the Act on the basis that it held 24 per cent of the issued units in FMIF. The Trust Company complied with that request without question, almost immediately, by sending the administrators (in their capacity as responsible entity for FMIF) a request in terms provided to the Trust Company by the administrators. The meeting request proposed two extraordinary, and interdependent, resolutions: (1) to remove the first respondent as the responsible entity of FMIF and (2) to appoint Trilogy in its stead. On this basis the administrators of the first respondent sent a notice convening a meeting.

[51] The administrators' purpose in calling the meeting was made plain in the notice of meeting. They wished to use the meeting as a strategy to defeat or damage Trilogy's prospects on its originating application. The introductory words of the covering letter to the notice of meeting are:

> "A Meeting is being called for the Fund by LM, the current manager.
> LM decided to call the Meeting because a unitholder has made an

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16 [2009] VSC 33 [132]-[133].

17 After the hearing on 30 July 2013, dealing in part with the appointment of independent liquidators of Administration, the conflict points relating to Administration fell away.

application to the Supreme Court of Queensland for Trilogy to be appointed as the Manager of the Fund in place of LM.

LM does not believe that the power of the Court to appoint a temporary or replacement manager can or should be exercised in the circumstances relied upon by Trilogy in its Court application. However, LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy. This is considered preferable to a court determined outcome where over 99% of investors, by value, will have no say in the outcome."

[52] The introduction to the notice of meeting is similar:

"The Meeting is being called by LM Investment Management Limited (Administrators Appointed), the current Manager of the Fund (LM). LM decided to call the Meeting because, following receipt from two unitholders of an application to the Supreme Court of Queensland for Trilogy Funds Management Limited (Trilogy) to be appointed as the Manager of the Fund in replacement of LM, and immediate consultations with ASIC, LM wished to consult Members in the proper forum, with adequate notice.

LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy. LM also wishes to avoid the costs and delay of multiple Court appearances, perhaps appeals, and multiple meetings which are the practically inevitable result of Trilogy's Court application. For example, it is doubtful that the Court has, or will exercise the power to appoint a temporary manager. Appeals are possible. This Meeting is considered preferable to a court determined outcome where there is no meeting, no vote and where, at present, over 99% of members, by value, will have no say in the outcome unless they wish to participate in legal proceedings." (my underlining)

[53] Neither the administrators of the first respondent, the Trust Company nor CPAIF wanted the meeting to pass the two resolutions proposed. The first respondent argued strenuously against the resolutions in material which it distributed to the members of the scheme. For example:

(a) "LM expects that if it remains as manager investors will recover distributions faster and in a greater amount."

(b) "LM also notes that Trilogy (unlike LM) does not hold the correct Corporations Act licence in order to be able to manage your Fund" and "LM has taken legal advice on the adequacy of Trilogy's AFSL. LM is confident that Trilogy's AFSL does not authorise it to operate the Fund."[18]

(c) "Further, in a recent court action involving another Fund managed by LM where there was a proposal to change the Trustee, the court ordered that the full legal costs of each party to the court proceedings should be met from the

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18 Trilogy (at that stage) had no licence to manage foreign currencies which was necessary for management of the FMIF. Trilogy now has an appropriate licence.

assets of the underlying Fund (even though the lawyers had promised they would not charge their clients).

Thus by calling a meeting to vote on the appointment of Trilogy as a replacement Responsible Entity LM is also cognisant that such a move is likely to save significant legal costs for the Fund."

(d) Under the heading "Does LM have the licence to manage the fund?":

"As you may be aware, on 9 April 2013 the Australian Securities & Investments Commission temporarily suspended LM's AFSL for a period of 2 years. However ASIC allowed LM's AFSL to continue in effect as though the suspension had not happened for all relevant provisions of the Corporations Act 2001 (Cth) so to permit LM, under the control of FTI as Administrators, to remain as the responsible entity of all LM's registered managed investment schemes for certain purposes which include investigating and preserving the assets and affairs of, or winding-up, LM's registered management investment schemes.

ASIC's decision to suspend the AFSL but allow LM and FTI to continue in this way, ensures that FTI as administrators may perform their statutory and other duties.

LM has, of course, taken legal advice on its position. LM is confident that its AFSL adequately authorises LM through FTI to continue to control the Fund."

(e) "Deutsche Bank has provided the fund with a secured loan facility since 2010. LM's obligations under the Deutsche Bank facility are secured in favour of Deutsche Bank under an ASIC registered charge over all the assets and undertaking of the Fund. The facility has been progressively reduced by approximately $0.5m per month and now has a loan balance of approximately $26.5m.

If the resolutions are approved in this Notice of Meeting, that will be an Event of Default under the facility agreement with Deutsche Bank, entitling it, for example, to appoint receivers to the Fund. The consequences upon the existing financial arrangements with Deutsche Bank are unknown at this stage.

FTI has the ongoing operational support of Deutsche Bank following the appointment as Voluntary Administrators (even though the appointment of administrators was an Event of Default)."

(f) "There are only three possible outcomes of the administration of LM – a Deed of Company Arrangement, a creditors' voluntary winding-up or (unlikely) LM is returned to the control of the directors. If LM is wound up, its liquidators will have access to the claw-back provisions of the Act – for example, recovery of unreasonable director-related transactions etc. There is room for debate as to whether these provisions could be invoked for the benefit of the Fund; and the administrators have not yet completed the investigation as to any transactions which might be available for the benefit of Members. On 12 April, 2013, the Chief Justice extended the time for the administrators to convene a second meeting of creditors until 25 July, 2013.

> While those matters are not clear, what is clear is that if Trilogy replaces LM as the Responsible Entity of the Fund, it will have no access at all to those provisions for the benefit of Members."

[54] Other less controversial arguments were made, for example, that LM had more familiarity with the assets of the fund than Trilogy, and that changing responsible entities might be expected to slow the process of recovery of assets in the fund. The administrators, using existing LM staff, it was said, were more familiar with the affairs of the fund and less likely to be taken advantage of by those owing money to the fund.

[55] The notice of meeting stated that Trilogy had been invited to participate in the process leading up to the meeting and provide information about itself to members.

[56] The above statements all come from the initial notice of meeting and covering letter dated 26 April 2013. That contemplated a meeting being held on 30 May 2013. However, there intervened correspondence between the first respondent and ASIC, and correspondence between the first respondent and Trilogy, regarding the information given to members, and the validity of the meeting. ASIC and Trilogy rely upon this as further showing that the first respondent, by its administrators, is unsuitable to wind up the FMIF. I deal with that correspondence now. As to the calling of the meeting, it is sufficient to note that the process was technical and somewhat artificial, and that the administrators (in effect) called a meeting to consider two resolutions they opposed.

Dealings with ASIC

[57] The ASIC correspondence needs to be read against a particular background. On 19 April 2013 ASIC became aware of the Trilogy application and was concerned as to the impact that might have on the "efficient resolution of the future of the various funds" of which the first respondent was responsible entity. On 23 April 2013 ASIC met with one of the administrators and the administrators' solicitors. At that meeting the administrators' solicitors suggested that the administrators could call a meeting of members to consider the appointment of a new responsible entity. He said that given a choice between the first respondent and Trilogy, "the first respondent would win".

[58] ASIC too said it preferred a solution not involving litigation and suggested the use of an enforceable undertaking issued by ASIC which obliged the administrators to call a meeting to vote on "resolutions for the appointment of a new responsible entity or that the funds be wound up". There was discussion as to how quickly the administrators could call a meeting and make a final decision as to winding-up. ASIC was concerned that if the enforceable undertaking solution was to be of utility to members it would need to occur sooner rather than later in order to save costs in the litigation, and associated with the appointment of a temporary responsible entity. As part of its discussions with the first respondent on 23 April, ASIC had informed the first respondent that it planned to intervene in the Court proceeding and that if ASIC and the first respondent could agree on the terms of an enforceable undertaking, ASIC would take the position in the litigation that it was preferable for the first respondent to remain as responsible entity.

[59] The next day, 24 April 2013, ASIC forwarded a draft enforceable undertaking to the administrators' solicitors, "for discussion purposes". The draft involved the administrators' undertaking to call meetings of the members of FMIF and:

> "At the meetings referred to in subparagraphs (a) and (b) above, the resolutions put to the unitholders for determination will include resolutions for:
>
> (i) the appointment of a responsible entity over each of the funds; and
>
> (ii) whether the fund should be wound-up and, if so, by whom."

ASIC asked, "Please let me know your clients' comments and proposed amendments. It may be that we think of some additional amendments from our end as well as we consider it further over the public holiday [25 April]."

[60] On 26 April 2013 the first respondent issued the notice of meeting and covering letter discussed above. It informed ASIC of this briefly. It did not give ASIC the material sent to members. The meeting actually convened would not, as ASIC had wanted, deal with the question of winding-up, and it dealt with the question of who would be the responsible entity in a much more specific way than ASIC had proposed. Plainly enough it contradicted ASIC's expectation that the administrators would work with ASIC as to what would be put at the meeting. It also contradicted their solicitor saying to an ASIC solicitor earlier on 26 April that he would send a re-drafted version of the enforceable undertaking – affidavit Gubbins filed 15 July 2013, paragraph 6. As well, when ASIC received the notice of meeting it had concerns it was misleading.

[61] On 29 April 2013 the first respondent informed ASIC that it was not willing to enter into an enforceable undertaking and not willing to seek a resolution as to wind up the FMIF – affidavit Hayden filed 15 July 2013, paragraph 31(a). When asked to explain, the administrators said there would be negative connotations for them in entering into an enforceable undertaking and that they did not think it appropriate to seek a resolution from the meeting as to winding-up of the FMIF before a vote on who the FMIF desired as responsible entity. They said that if the meeting rejected Trilogy they would convene another meeting "promptly" to consider and approve any decision they might make to wind up the fund. These decisions were said to have been taken by the administrators after "two days of intensive consultation" with two firms of solicitors and with "other expert advisors".

[62] In an affidavit filed 2 May 2013 the administrator, Ms Muller, swears to a desire to "ensure that our conduct of the [first respondent] was to the extent possible, satisfactory to ASIC ..." – Court Document 46, paragraph 12. And further, "... Mr Park and I have been discussing with ASIC a proposal for undertakings to meet any concerns of ASIC and any 'bona fide' (concerns) of members in relation to the conduct of the fund", paragraph 16. I find it difficult to see this as consistent with the reality of the first respondent's interactions with ASIC. On 21 May 2013, solicitors for the administrators sent an amended draft enforceable undertaking to ASIC. The time for a co-operative solution had well since passed.

Correspondence Prior to 13 June Meeting

[63] To return to correspondence dealing with the proposed meeting, on 8 May 2013 ASIC wrote to the administrators' solicitors calling for an explanation as to various matters raised in the notice of meeting including, as to those matters I have summarised above, how it was that the first respondent thought calling a meeting would save legal costs in relation to the Trilogy application and how the ability of the first respondent to use Part 5.7B of the Act (clawback provisions) was a genuine point of differentiation between the first respondent and Trilogy so far as the FMIF was concerned. The letter also objected to the first set of underlined words at [52] above, which it said implied that ASIC had approved the first respondent's calling the meeting.

[64] As to the saving of costs point, no convincing explanation was provided by the first respondent. It pointed out that at the time of publishing the notice of meeting the Trilogy application had been made but the ASIC and Shotton applications had not. It was said against that background that:

> "It was our client's view that the court would adjourn the Original Proceedings until after the Meeting (at this time we understand that no party to the proceedings suggested that the proceedings were urgent). It was expected that the results of the vote at the Meeting would strongly inform the court proceedings. In addition, it was also thought possible that by convening the Meeting the two unitholders who had commenced the Original Proceedings might discontinue those proceedings and certainly would have if the meeting resolved to appoint Trilogy." – Norton Rose letter 10 May 2013, Court Document 73, p 35 exhibits.

[65] The only realistic way that legal costs would have been saved by calling a meeting was if the meeting voted to appoint Trilogy as temporary responsible entity. The notice distinctly does not say this. Indeed, this is the very result which the first respondent strongly urged members to reject. I think the notice was misleading about cost savings initially and became more so as events unfolded – see the following discussion.

[66] The letter of 10 May 2013 provided no convincing explanation in relation to the concern expressed by ASIC as to the clawback point and rejected ASIC's concern as to the notice implying that the first respondent had ASIC's sanction for its calling the meeting.

[67] ASIC was unconvinced and called upon the first respondent to issue an amended notice addressing its concerns. The first respondent proposed to put further information about the meeting on its website. It provided a draft of the further information it proposed to use to ASIC. By that stage concerns had been raised as to the legal basis on which a meeting seeking to change the responsible entity could be convened. Solicitors acting for the first respondent relied upon ss 601FL and 601FM of the Act.

[68] On 21 May 2013 ASIC called on solicitors acting for the first respondent to either adjourn their meeting until after the date (then) allocated to hear both the Trilogy application and the ASIC and Shotton applications, or alternatively cancel the meeting altogether. ASIC made its request on the basis that the vote of the meeting

would not impact on the majority of competing claims to be determined in the litigation so that the stated reason for convening the meeting – avoiding costs, delay and uncertainty – were inapplicable. It questioned whether s 601FL was applicable to the meeting.

[69] On 27 May lawyers for the first respondent rejected the idea that they would adjourn or cancel the meeting saying:

> "The Meeting will provide an opportunity for members to democratically vote on the direction and future of their fund. There is no logical reason why that opportunity should be taken away from members. Members only other chance to let their views be known to the Court is to appear at the Court hearing which would be a significant financial burden on members, as well as being totally impractical considering the number of members holding units in the FMIF." (my underlining)

Later in the same communication, "Our client's objective in calling the Meeting has been to allow investors to democratically determine who they wish to manage their fund. Our client is committed to this." (my underlining). It was said that if the resolutions were passed that would be the end of the Trilogy application, and if they were not passed, the results would inform the Court on the Trilogy application. The solicitors reiterated reliance on ss 601FL and 601FM of the Act as a basis for the proposed meeting. The solicitors said that the meeting would be adjourned to allow the further explanatory material they proposed to be considered by members and provided further drafts (amended) of that material to ASIC.

[70] From 6 May 2013 solicitors for Trilogy raised matters which went to the validity of the proposed meeting organised by the first respondent – see exhibits 4ff to Court Document 91. Their letters set out clearly, succinctly, and in my view correctly, the reasons why ss 601FL and 601FM of the Act do not allow the proposed meeting (see below). Solicitors for the first respondent made little attempt to meet the legal substance of the points advanced against them, but would not concede the point.

[71] From 6 May 2013 Trilogy actively encouraged members of the feeder fund of which it was responsible entity (around 20 per cent of membership of FMIF) not to participate in the proposed meeting. Further, on 23 May 2013 Trilogy adopted the position that it did not consent to being appointed by any meeting held as a consequence of the first respondent's notice, and called on the administrators to abandon the meeting which it said was not validly called, inutile and an attempted circumvention of Trilogy's court proceedings.

[72] Supplementary information was posted by the first respondent on the FMIF website in the form of a question and answer document dated 27 May 2013. As to the costs and utility of the proposed meeting, the additional information, at question one, rather seems to concede the point that there was little chance that the meeting would, at that stage, save costs or avoid litigation, but a further justification – informing the Court as to the wishes of the members – was raised. For the first time it was stated that the main cost saving would result if the meeting appointed Trilogy as responsible entity. It was still not plainly acknowledged that this was the only realistic scenario in which cost savings could ever have been made. Although Trilogy's lack of consent to being appointed at the meeting was raised, nothing

express was said as to any remaining utility in the meeting given Trilogy's attitude. Instead it was said:

> "It seems that Trilogy prefers to put both you (should you elect to put your views to the Court) and your fund to the significant costs associated with the Court proceedings rather than allow the matter to be determined in the more usual and democratic manner in a meeting of members. This is particularly so given the Court adjourned the proceedings till 15 July in part to allow the meeting to run its course." – Court Document 73, exhibit bundle 15. (my underlining)

[73] While submissions were apparently made on behalf of the first respondent at an interlocutory stage, that the proceeding ought to be adjourned to allow the proposed meeting to occur, I have not seen anything to show that the Court granted an adjournment of the proceeding for this purpose. In fact, counsel for the first respondent conceded it did not.[19]

[74] For the first time, at question six of the 27 May 2013 document, the first respondent clearly stated the limited nature of the licence granted to it by ASIC – i.e., to investigate and preserve, in train of either winding-up the scheme or transferring to a new responsible entity. Until then the information given to members was, in my view, misleading because it implied that the first respondent had a licence which enabled it to continue to manage the FMIF short of a winding-up – see [53(d)] above – and nowhere stated that unless the first respondent wound up FMIF it was obliged to appoint another responsible entity. These were very relevant matters for members to know prior to a vote on the appointment of a new responsible entity.[20]

[75] I assume, in response to ASIC's complaint that the notice of meeting implied ASIC had approved the course, material at question nine of this document stated that the first respondent was "solely responsible for the Notice of Meeting and the decision to call the meeting. ASIC was not provided a copy of the Notice of Meeting to review prior to its dispatch and, as such, ASIC did not approve the Notice of Meeting. Prior approval of such Notices by ASIC is not required." That may (or may not) have been apt to dispel the implication of which ASIC originally complained. By the time this statement was published ASIC disapproved in the plainest terms of the meeting and had called upon the first respondent to cancel it. The new statement did not reveal the true position regarding ASIC's attitude to the meeting.

[76] No reference was made to either Trilogy or ASIC's questioning the statutory basis for the meeting. Earlier in the document (at question two) it was stated, "The reason that Trilogy has provided for not consenting is that they believe that the matter should be determined by the Court". In fact Trilogy relied upon its assertions of invalidity as well.

[77] Some information was provided as to the clawback provisions and moderated the statements made in the notice of meeting which claimed that members would be advantaged if the first respondent remained as responsible entity. I note however that the information was not as frank as the view provided to ASIC about this on 1 May 2003, "It is at least hypothetically possible ...". Why the members were being given information about a legally novel, hypothetical advantage is not clear. I

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19 t 1-25.

20 Ms Muller conceded this – tt 1-52-53.

think the clawback information was initially, and remained, misleading in that it implied some real point of distinction between the first respondent and Trilogy.

[78] On 28 May 2013 ASIC again called upon the first respondent to cancel the proposed meeting. It called for more information in train of enquiries as to whether or not the meeting could validly have been called having regard to ss 252B, 601FL and 601FM of the Act.

[79] The meeting was held on 13 June 2013.

Validity of Meeting

[80] The first respondent relied upon two sections of the Act as allowing the meeting of 13 June 2013. Section 601FL(1) provides:

> "If the responsible entity of a registered scheme wants to retire, it must call a members' meeting to explain its reason for wanting to retire and to enable the members to vote on a resolution to choose a company to be the new responsible entity. ..."

[81] Section 601FM provides:

> "If members of a registered scheme want to remove the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on a resolution that the current responsible entity should be removed and a resolution choosing a company to be the new responsible entity."

[82] Neither s 601FL or 601FM allowed the meeting which took place on 13 June 2013. The opening words of each of those sections describe a circumstance which did not exist. Section 601FL allows a meeting, "if the responsible entity of a registered scheme wants to retire". The first respondent did not want to retire as responsible entity, it wanted to test, or defeat, Trilogy's application to the Court to be appointed as new responsible entity. Section 601FM allows a meeting "if members of a registered scheme want to remove the responsible entity". Here no members of the registered scheme who wished to remove the responsible entity called the meeting. Insofar as there was any relevant state of mind of any member of this scheme, it was the state of mind of the administrators of the first respondent in their capacity as responsible entity of the CPIAL feeder fund, expressed on their behalf by the Trust Company. The desire of the administrators was to remain as responsible entity.

[83] Counsel for the first respondent argued that these introductory words in ss 601FL(1) and 601FM(1) could not possibly be read as a real requirement that there be a subjective intention in terms of the literal meaning of the words. He asked rhetorically how the subjective intention of numerous members who purported to act pursuant to s 601FM(1) might be determined, and what might occur if the intention of some members was different from the intention of others. In terms of s 601FL(1), I think it is quite clear that a subjective intention on the part of the responsible entity is required, for the responsible entity must explain to the members' meeting the reason for its wanting to retire.[21] I do not see any reason for interpreting the introductory words at s 601FM(1) differently.

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21 See *ASIC v Wellington Investment Management Limited & Anor* [2008] QSC 243, per McMurdo J.

[84] In addition, as to s 601FM(1), ASIC says that the feeder fund CPIAL (whether through the Trust Company or otherwise) was not entitled to take action under Division 1 of Part 2G.4 for the calling of a members' meeting because, returning to the words of s 252B(1), above at [50], although CPIAL was a member with more than five per cent of the units in the scheme, it did not have "at least five per cent of the votes that may be cast on the resolution". ASIC says CPIAL was an "associate" of the first respondent within s 15(1)(a) of the Act: it was a person who was in concert with the first respondent in calling the meeting and voting at it. Thus CPIAL was precluded from voting because of the provisions of s 253E:

> "The responsible entity of a registered scheme and its associates are not entitled to vote their interest on a resolution at a meeting of the scheme's members if they have an interest in the resolution or matter other than as a member. ..."

[85] It may be accepted that the first respondent had an interest as, and in remaining as, responsible entity of the scheme, which is an interest "other than as a member" for s 253E of the Act.[22] Sections 12, 15 and 16 of the Act, set up a horribly complex scheme for deciding who is an "associate" within the meaning of s 253E. However, it seems to me that the decision of White J in *Everest Capital Limited v Trust Company Ltd*[23] is determinative of the position here. In my view, Trust Company was not entitled to vote at the 13 June 2013 meeting because in voting its interest it was acting as agent of the first respondent. Further, in any event, having regard to the provisions of ss 12, 15 and 16 of the Act, it seems to me that s 15(1)(a) of the Act applies and that the first respondent and Trust Company were relevantly acting in concert, and that, in accordance with the decision in *Everest*,[24] s 16(1)(a) would not apply.

Conclusions as to Meeting and Related Conduct

[86] In my view it is plain that calling the meeting was a tactic by the first respondent which had the aim of seeing off its rival for control of FMIF.[25] Real concerns are raised in my mind by the misleading statements given in the information to members. It is difficult to see any explanation for these matters other than that the first respondent was pursuing its continuing control of the FMIF in a manner which was at odds with the interests of the members. In the absence of any other convincing explanation, I see the choice not to work with ASIC and not to hold a meeting at a time which allowed resolutions as to winding-up at the same time as resolutions as to the responsible entity, in the same light. The initial failure to properly disclose to members the true nature of the limited financial securities licence bears on this last point.

[87] I think it is very significant that when Trilogy's lawyers made a reasoned attack on the statutory basis for the meeting, and when ASIC attacked both the material given to members and the statutory validity of the meeting, the first respondent refused to

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22 This is conceded by Ms Muller – Court Document 79, paragraph 66.

23 [2010] NSWSC 231 [77]ff.

24 [89]ff above.

25 I should be careful in interpreting this (in isolation) as a marker of self-interest in the first respondent's administrators, rather than action in the interests of the members of the fund, because ASIC certainly had a similar strategy in the interests of the members of the fund. Perhaps it is a hindsight view to say that had an applications judge been persuaded to hear the point dealt with at [9] to [20] of this judgment, a much simpler and cheaper solution was available.

moderate its position, except inadequately in the question and answer document. The law as to the validity of the meeting is complex, and misinterpretation of it could readily be forgiven. However, the first respondent made little substantial response to the matters raised by Trilogy and ASIC. I cannot understand why a responsible entity acting solely in the interests of members would not attempt to accommodate or moderate its position in light of those arguments and the objective facts. Certainly by the time Trilogy had refused to consent to any appointment via the meeting,[26] there was no utility in the meeting except perhaps as a poll to inform the Court of what the members wanted. However, given the information which had been provided to members, including the misleading information; the information that Trilogy was not licensed to perform as responsible entity, and the information that Trilogy would not consent to perform as responsible entity if appointed by the meeting, any objective observer must have doubted the meeting's use even as a poll.

[88] From the underlined passages in the extracts at [52], [69] and [72] above, it can be seen that the administrators insisted on the meeting as some sort of democratic right in the members which the Trilogy application was designed to subvert. The evidence of Ms Muller in cross-examination as to the justification for, utility of, and likely outcome of the meeting was similar. She swore, as she had in her affidavit, that she thought there was "an appreciable chance" that Trilogy would be elected as responsible entity by the meeting. In cross-examination she said that was her view at all times up until the vote closed.[27] Unless Ms Muller was using the word "appreciable" to mean "very slight", I have difficulty accepting that was her genuine belief by the time members had been informed that Trilogy (a) did not have a licence to operate as responsible entity; and (b) did not consent to do so. That the first respondent insisted as it did on its position in relation to the meeting when objectively it had become quite untenable to my mind demonstrates that the interests of the members of the scheme were not at the forefront of the thinking of those making the decisions.

Conduct of the Litigation

[89] ASIC made a separate but connected submission that the first respondent's conduct of this proceeding has been over-zealous. It pointed to the volume of material filed on behalf of the first respondent and the scope of issues sought to be agitated.[28] ASIC submitted that there was a disproportion evident when the interests of the unit holders were considered. It was said that a *Beddoe*[29] application ought to have been made. It is right that a responsible entity is a trustee under the Act. It is probably also right that this matter has more of an urgent and commercial flavour than the type of trust matter in which a *Beddoe* application is usually made. Nonetheless, in my view the conduct of the first respondent in this litigation was combative and partisan in a way which I see as reflective of the administrators acting in their own interests to keep control of the winding-up of the FMIF, rather than acting in the interests of the members.

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26 I accept there is no criticism of Trilogy to be made in relation to this stance, it was correct in saying that the meeting was invalidly called.

27 t 1-54.

28 The Court file in this matter to 12 July 2013 showed 102 documents filed. These included affidavits of expert accountants and affidavits of considerable (some unjustifiable) size. There were many more filed by leave at the hearing before me.

29 [1893] 1 Ch 547.

[90] The affidavit of Hellen (Court Document 40) was relied upon by ASIC as an illustration of the attitude it complains of. It was said that the affidavit was at no time likely to provide much assistance to the Court. Mr Hellen gives expert evidence as a forensic accounting specialist, with extensive experience as a liquidator. He was briefed to prepare a report regarding Trilogy's financial position. From Mr Hellen's recitation of his instructions, it appears that solicitors acting for the administrators of the first respondent were concerned about a contingent liability in the amount of $81 million in Trilogy's accounts, and were concerned otherwise to have Mr Hellen identify avenues of further investigation, either in relation to that matter or otherwise, as to whether Trilogy had a sound financial position. Mr Hellen was briefed "on the evening of 29 April 2013" and expresses reservation that he has had "very limited time" to undertake his assessment. His affidavit was filed on 2 May 2013. He heavily qualifies his report saying that it is based on interim and annual financial reports but he has seen few underlying documents.

[91] Mr Hellen comes to the unremarkable conclusion that if litigation against Trilogy, in which an amount of $81 million was claimed, were to go against Trilogy, Trilogy would be driven either to rely upon insurance or seek indemnity from a managed fund of which it was responsible entity. Mr Hellen could not assist with an opinion as to whether those sources would allow Trilogy to pay a judgment of $81 million. Nor could he give any further useful information about Trilogy's financial position: it had an excess of assets over liabilities and made a small operating profit.

[92] Before the conclusion of the hearing before me, judgment was given in Trilogy's favour in the litigation concerned and an appeal against that judgment was lodged and then withdrawn, so the substance of Trilogy's financial position did not concern me. Had it concerned me, Mr Hellen's report would not have been any more use to me than my own examination of the financial accounts with which he was briefed. Nor really could it have been expected to be. It seems an extravagant use of members' funds.

[93] An associated point is that in contrast to the highly qualified and inconclusive report by Mr Hellen, one of the administrators, Muller, swears at Court Document 46, paragraph 74, that Trilogy will not be able to pay the judgment debt if it loses the relevant litigation. It is hard to see this statement as anything other than unprofessionally robust and partisan when it is compared to Mr Hellen's conclusions. It is significant that it is a statement squarely within Ms Muller's area of professional expertise as a liquidator. Not only that, it is in a part of her affidavit where she swears that material published by Trilogy and its solicitors contains "numerous statements" that are "either false or misleading" – Court Document 46, paragraph 68. There was no argument before me that Trilogy and its solicitors have published false or misleading statements. These are serious allegations, especially when made against professional people. More material of similar flavour is found in the same affidavit at paragraph 77.

[94] Solicitors acting for the first respondent filed an affidavit of over 800 pages – Court Documents 16, 17 and 18 – which was of such marginal relevance that it was not referred to in either written or oral submissions by any party. Further, Court Document 52, which itself has over 100 pages of exhibits, is a solicitor's affidavit which was read on the hearing before me but was little more than combative and querulous commentary on the litigation. Separately, the description in this affidavit of the enormous amount of affidavit material exchanged and the late hours and

weekend work by solicitors, reveals a worrying scenario as to litigation costs in circumstances where the first respondent ought firmly to be keeping in mind the interests of members of an illiquid, and perhaps insolvent, fund.

[95] Ms Muller's affidavit, which is Court Document 79, is characterised by the sort of sniping and argumentative passages which one would hope not to find in any affidavit, let alone an affidavit of someone who is an officer of the Court and a trustee acting on behalf of others – see for example paragraphs 11, 14(c), 22, 66, 75 and 81. It is evident from that affidavit that she is acting very much in the legal arena – she swears responses to written submissions on interlocutory applications and swears to circumstances where she and her solicitor participate in telephone conversations with other solicitors, the content of which conversations was contentious before me.

[96] I will not go on to multiply examples. However, there are many, both in the affidavits filed on behalf of the first respondent, and in the correspondence it and its solicitors undertook.

Conflicts and Potential Conflicts of Interest

[97] In *Re Stewden Nominees No 4 Pty Ltd*[30] Bowen CJ in Eq rejected the appointment of a liquidator who was a member of a firm which had audited the company's accounts in the past. He said that there was the potential for conflict if, for example, the liquidator had to take action which called into question the prior accounts of the company. He said, "It is important that a liquidator should be independent, and should be seen to be independent (*Re Allebart Pty Ltd* [1971] 1 NSWLR 24, at p 30)."

[98] Similarly in *Re Giant Resources Limited*[31] Ryan J said:

> "... a liquidator should not be put in a position where his independence might be open to challenge. It is of the greatest importance that there should be no possibility of criticism attaching to one of the Court's own officers on the ground of a conflict of interest. The liquidator needs to be seen to be independent in any matter which his duties as liquidator may require him to investigate."

[99] Lastly, in *Handberg v Cant*[32] Finkelstein J said:

> "If there are, or are likely to be, disputes between companies in liquidation that are under the control of one liquidator then as a general rule different persons should be appointed as liquidator to each company [authorities omitted]. This is not to say that it is inappropriate to appoint one person as a liquidator of a group of companies or companies that are closely connected [authorities omitted]. But once the likelihood of conflict becomes apparent it is necessary to take action."

[100] Both Shotton and Trilogy advance a number of factual scenarios as illustrating that if the current administrators of the first respondent were to wind up FMIF they would face actual and potential conflicts of interest.

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30 [1975] 1 ACLR 185, 187.
31 [1991] 1 Qd R 107, 117.
32 [2006] FCA 17, [14].

[101] Under the constitution of FMIF the responsible entity is entitled to a management fee of up to 5.5 per cent per annum of the value of the assets of the fund. The administrators swear that they will not pay the first respondent this management fee from FMIF. There would no doubt be difficulties and expense involved in valuing, and throughout the course of a winding-up, revaluing, the assets of FMIF in order to calculate the management fee, but it would not be impossible. In circumstances where both the first respondent and FMIF are being wound up and there is doubt as to the solvency of both, there is at least a potential conflict to be resolved between the desire of the creditors of the first respondent and the interests of the FMIF.

[102] The evidence as to what the administrators will do as to this fee is rather vague and not adequately documented.[33] While the administrators say they have "agreed" not to charge a management fee, I do not know who that agreement was with. I am not convinced that any arrangement they have made in relation to management fees would be sustainable if there were real pressure exerted by creditors of the first respondent.

[103] It has been mentioned that there are three feeder funds to FMIF, two controlled by the first respondent as responsible entity, and one by Trilogy as responsible entity. FMIF categorises its feeder fund members as a separate class of investors (class B investors), as it is entitled to do under its constitution. While the first respondent (before administration) suspended distributions to unit holders from 1 January 2011, there were distributions of nearly $17 million to class B unit holders in the year ending 30 June 2012. From the evidence given before me,[34] it appears this was an accounting exercise, undertaken because the feeder funds accounts did not balance without such a distribution. This rather illustrates that the first respondent (before administrators were appointed) was facing a conflict between its duties as responsible entity of FMIF and as responsible entity of the feeder funds.

[104] It is no criticism of the current administrators that they have not, in the short time available to them, formulated their position in relation to this distribution. The administrators concede that it may need to be investigated and that it may give rise to a claim on behalf of some unit holders of FMIF. "Undoing" the transaction would be difficult because almost $16 million of the distribution has been reinvested into the FMIF on behalf of class B unit holders, diluting the interests of other members. This was conceded by Mr Park in cross-examination, though he swore to the contrary in his affidavit.[35]

[105] I think this issue of distribution to B class shareholders illustrates the potential for conflict between the interests of the feeder funds and the FMIF if one responsible entity has charge of all of them. There is potential for this type of conflict to arise again, including in attempts to undo the 2012 transaction should it be found necessary. In this respect, Trilogy is the responsible entity of one of the feeder funds owning 20 per cent or so of units in the FMIF and the potential for conflict would apply as much if Trilogy were the responsible entity of FMIF, or the liquidator of FMIF.

[106] There are further issues which may arise as between FMIF and the first respondent. In both 2011 and 2012 the fund paid around $5 million to the first respondent as

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33 tt 2-14 – 2-16.

34 See Note 3 to the accounts at p 173 of the exhibit bundle to Court Document 2 and t 2-18.

35 t 2-19.

"loan management fees". There may be a question as to the legitimacy of these payments under the constitution of FMIF, as they seem to be in addition to management fees, and on their face do not seem to have been expenses. Once again the administrators have not yet formed a concluded position as to this, but acknowledge the potential for an overpayment, and acknowledge that the process of reversing the entries may prove to be complex,[36] though again Mr Park originally swore to the contrary.

[107] Trilogy relies upon an affidavit read by the first respondent sworn by Mr Corbett. He swears that the first respondent had not obtained valuations for most of the properties over which FMIF had mortgage security "for at least two years preceding the appointment" of the current administrators. It may thus be that management fees have been based on valuations which are too high. Any claim to recover such overpayments may involve a conflict between duties to the creditors of the first respondent and duties to the members of FMIF if the person liquidating both the first respondent and FMIF is the same person.

[108] Further Trilogy says that from 2002 there were changes made to the constitution of the FMIF without meetings of members, which increased the maximum loan to value ratio for lending by FMIF. It increased from 66 per cent in 2002 to 85 per cent in 2006. The power of the responsible entity to make changes to the constitution without a meeting of members was a limited one – it could only make changes which would not adversely affect unit holders' rights. Trilogy points to this as a potential basis for a claim on behalf of members of the fund against the first respondent, or its directors.

[109] With a broad brush, Trilogy identifies around $168 million of related party transactions which it says, in a very general way, might give rise to the possibility of conflicts between the fund and the first respondent.

[110] Trilogy also says that because of the spectacular collapse of the value of assets under management during 2008-2009 there may be legal claims, for example in negligence, which the FMIF has against the first respondent as responsible entity. On the material before me this seems quite speculative. No proper investigations have been undertaken by any party at this stage. Obviously there is the potential for conflict if such a claim were to be made because it appears that the current administrators will be the liquidators of the first respondent and will have to adjudicate on any proof of debt lodged by or on behalf of investors in FMIF. Were there to be litigation, they would be on both sides of the record. In that regard I note that the Trilogy interests have been active in lodging proofs in the administration but cannot give any idea as to the quantum of the amounts claimed, or the basis upon which they are said to be owing.

[111] On behalf of Shotton it was said that the responsible entity may have engaged in joint lending between FMIF and other funds controlled by the first respondent as responsible entity before administrators were appointed. On the material before me, this seemed a rather academic proposition.

[112] Counsel for the first respondent emphasises the fact that in all the cases discussed above the conflict of interest identified is potential only, and in some of the cases very little material can be put before the Court. That may be accepted, but I am not

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36 t 2-21.

of the view that the matters raised by Trilogy or Shotton are academic or theoretical only.

[113] The administrators say that if it became necessary, because of a conflict, various measures could be put in place to deal with any conflict which actually arose. If a conflict were identified by the administrators, they swear that they would seek legal advice. They swear that an option would be to approach the Court. They swear that a special purpose liquidator could be appointed to the first respondent company if that became necessary. Counsel for the first respondent said that if there were to be litigation between the feeder funds and the first respondent, Trilogy could be appointed as a representative defendant for the feeder funds so that the litigation could continue with an independent contradictor. In any given scenario the administrators postulate solutions involving their preferring to continue as liquidators of the FMIF and jettisoning any other role.

[114] The solicitor appearing for Mr Shotton points out this is consistent with the administrators' desire to retain control of the FMIF. The endeavours of the first respondent do have this flavour about them. At the conclusion of the hearing one of the alternative draft orders they proposed was that the ASIC and Shotton applications be dismissed on the administrators' undertaking to do all things necessary to secure independent liquidators to the first respondent company and to Administration. No notice of any such thing had been given at any prior time during the proceeding, and I was not convinced that there had been any consideration of the separate interests of the first respondent company or Administration,[37] and the effect that such a proposed order would have on those companies in terms, for example, of wasted costs to date. It may be that those companies have less assets than the fund, but I was told that the first respondent company had assets of around $7 million. I had no basis to assess how much of the administrators' planned charges related to the first respondent company and to Administration; what proportion of that would be wasted if new administrators or liquidators were appointed to those companies, and what proportion that waste of cost would bear to the overall picture of those companies' liquidations. It seemed to me that the administrators were acting without regard to the interests of those companies in order to propose a situation where there could be no possibility of potential conflicts clouding their continuing control of FMIF.

[115] Counsel for the first respondent made a submission that it is a fundamental part of any liquidator's task to deal with conflicts of interest which may arise from time to time, including on the adjudication of claims, and in that respect, a liquidator's role can involve adjudication. That is right no doubt as a general proposition. I note that in *Shephard v Downey*[38] Judd J preferred to appoint an independent liquidator rather than a liquidator with similar potential conflicts as raised here. He made the point that, even though it might be possible to manage potential conflicts through undertakings and directions in the future should they arise, his preference was to forestall such a process by having the appointment of someone independent from the start.[39]

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37 See argument as to this at tt 3-40ff.

38 [2009] VSC 33 [134].

39 Note: This discussion of Judd J occurred in circumstances where he had determined (and it was uncontroversial in the case before him) that an appointment ought to be made under s 601NF(1), viz it was necessary that someone be appointed to take responsibility for the liquidation other than the responsible entity because the responsible entity itself conceded it was not capable of undertaking the

[116] The first respondent submitted that the administrators would have a statutory duty as liquidators of the fund to properly investigate and pursue claims against the first respondent and that there was no basis for thinking they would not pursue this duty "independently, professionally and with due care".[40] In my view, the material discussed as to the conduct of the members meeting on 13 June 2013; interaction with ASIC, and the conduct of this litigation do give a basis for thinking otherwise. At paragraph 33 of Court Document 79 Ms Muller swears that she is aware of the need to, "remain astute to ensure that, as the administration continues, no conflicts arise, whether potential or actual. We intend to seek advice from solicitors ..." She names the two firms of solicitors who had charge of the correspondence relating to the 13 June 2013 meeting. At paragraph 34 of that affidavit Ms Muller says, "As I have explained in paragraphs 12-30 above, my and Mr Park's current understanding is there are no such conflicts exist or are likely to arise". I do not think it can be said on any objective view of the evidence that conflicts are not likely to arise. I do not have confidence that the administrators would adequately identify and deal fairly with conflicts if they were to arise.

[117] Were it just that there was a real potential for conflicts of interest to arise in the future, I like Judd J in *Shephard v Downey* – see [115] above – would prefer an independent liquidator for the fund. Like Fryberg J in *Re Orchard Aginvest Ltd* (above), I would see this as desirable. But I would accept, as he did in that case, that that would not be enough to give me power to make an order pursuant to s 601NF(1). It would not be necessary. In this case there is more. The administrators of the first respondent have, in my view, demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act*. My view is that they have preferred their own commercial interests to the interests of the fund. This is demonstrated in the conduct I have outlined above in relation to the 13 June 2013 meeting; their dealings with ASIC, and their conduct with this litigation. It extends to the point where both administrators have sworn to matters which they either conceded were wrong in cross-examination – [104] and [106] above – or in my view are not consonant with reality – [62], [88], [93] and [116] above. In a winding-up where conflicts might well arise, and may involve questions of some complexity, I feel no assurance that the current administration would act properly in the interests of members of the fund in identifying those issues or in dealing with them. In my view, that makes it necessary that someone independent have charge of winding-up FMIF pursuant to s 601NF(1) of the Act.

[118] In a submission alternative to his main submission on the hearing, counsel for the first respondent advanced a draft order which would provide for an independent person to have some oversight of the first respondent during the time that the first respondent as responsible entity wound up the FMIF. The idea was that the first respondent would consult with, and report to, that independent person and that the first respondent would not, without the consent of that independent person, bring or defend legal proceedings or dispose of any secured property. The independent person was to be given, "on receipt" any written claim or demand against the fund and have full power to inspect the books and records of the fund. The first

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liquidation. Thus the discussion to which I refer by Judd J occurred in the context where he had found it was necessary to appoint someone, and in those circumstances preferred to appoint someone independent. He did not come to the conclusion that it was necessary to appoint somebody under s 601NF(1) because of potential conflicts of interest.

40 Written submissions, paragraph 60.

respondent offered to comply with any written directions of the independent person as to winding-up of the fund. The submission was that this was the minimum necessary direction to be given under s 601NF(2).

[119] The difficulty I have with the type of reporting envisaged by that order is that it depends, except in some few defined circumstances, on the administrators recognising that a matter is one worthy of report to the independent person, and making a full and fair report of the facts which the independent person would need to judge whether or not action should be taken on behalf of the fund, and whether or not there were conflicts arising which might necessitate action being taken. In addition, it is easier to compel the administrators in such a situation to report positive acts to the independent supervisor than to attempt to define circumstances in which they ought to discuss issues and concerns arising in the winding-up where they propose to take no action. For these reasons I am not convinced that such an order would allay the concerns which the administrators' conduct raises. I think that more is necessary to ensure that the winding-up of the first respondent proceeds regularly in accordance with the constitution of the fund and the law.

Who Ought to be Appointed

[120] There was some controversy as to who ought to be appointed. ASIC nominated liquidators who had the lowest schedule of rates of all those before me. That is certainly something in their favour. Although, when fees are charged on an hourly basis, efficiency and effectiveness in work practices will probably have more impact on the overall bill than rates alone. The costs of ASIC's nominee were not much less than the person put forward by Mr Shotton – David Whyte, liquidator. Trilogy, a major interested party, supported Mr Whyte in the event that it was not appointed, and I think that is of some significance. Mr Whyte, like all the proposed candidates, is well qualified for the job but I note that he has particular experience in a similar fund winding-up pursuant to s 601NF(1) – Equititrust. It was faintly suggested that he had a conflict which would prevent him acting but I do not accept that is so. In all the circumstances, I think he ought to be appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution pursuant to s 601NF(1).

[121] The provision at s 601ND(1) which allows a Court to direct that the responsible entity winds up a scheme, and the provision at s 601NF(1) which allows a Court to appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution do not, to my mind, sit happily together. In particular they give the distinct potential for two separate sets of insolvency practitioners to charge a distressed fund. My view in this case is that Mr Whyte should in substance and effect conduct the winding-up of the fund. In *Equititrust* that was the view of Applegarth J and he used a mechanism – constituting the person charged with winding the scheme up as receiver – to give that person the necessary powers. It was not contended by Shotton or Trilogy that I should make any different order in this case. Trilogy said I ought not appoint a receiver because to do so would damage the way the fund was perceived by creditors and by those who might potentially buy its assets. In circumstances where Deutsch Bank has already been appointed as receiver and where the responsible entity of the fund is itself in administration, and likely to be in liquidation, I am not deterred by this consideration. The fact of the matter is that the fund has reached a point where it

must be wound up. I will appoint Mr Whyte receiver of the property of the fund under s 601NF(2) of the Act.

[122] The first respondent argued that receivers ought not be appointed under s 1101B of the Act (on ASIC's application) because the breach which ASIC relied upon to give it power to ask for the appointment of receivers was one committed before administrators were appointed and one which itself did not justify this relief. For those reasons I do not rely upon s 1101B of the Act in appointing Mr Whyte as receiver.

[123] I now deal with two remaining matters raised in argument.

Wishes of the Members

[124] It is uncontroversial that the Court should have regard to the wishes of members of a scheme such as this when deciding its fate. In this regard the first respondent urged that I should interpret the results of the vote of the meeting of 13 June 2013 as indicating that the members did not want Trilogy as responsible entity. Only about 45 per cent of those eligible to vote at the meeting participated in it. Of that group 20 per cent abstained (almost entirely the feeder funds). Of the 25 per cent of members who voted, around 24 per cent voted against the motions. I find the result of the meeting of very limited assistance. Information given to the members by the first respondent before the meeting was misleading in several respects. As well, it was to the effect that Trilogy did not have the correct financial services licence required to run the fund. That was correct at the time but is no longer correct. The members voting at the meeting had been told that Trilogy did not consent to be appointed as responsible entity at the meeting. In those circumstances one wonders that any votes were cast in favour of Trilogy.

[125] Some members of the fund appeared on the hearing. The Bruces have an investment of around $144,000 in the fund. Mr Shotton also has a relatively small investment in the fund. Two additional members – Nunn and Byrne – have small investments in the fund. They supported the first respondent on the application. Mr Nunn apparently worked for the first respondent for eight or nine years.

[126] As responsible entity of the wholesale mortgage income fund Trilogy has around 20 per cent of the total units in the fund, equating to around $74 million worth of units. The balance of the fund (somewhat over 50 per cent) is held by individual investors with investments ranging between $1,000 and $8 million. Trilogy's views are therefore significant.[41]

[127] While I have been astute to recognise the interests of members of the fund, it must be acknowledged that my decision is grounded more on substantive matters than on attempting to implement the wishes of any particular member or group of members.

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[41] Trilogy relies upon an affidavit of a solicitor which purposes to show that members support Trilogy as responsible entity. However, it is remarkable for what it does not say. There is no information as to how the members were prompted to express their views or what information they had about the issues in dispute before me. It is of little assistance.

Waste of Work

[128] On behalf of the first respondent it is said that to charge any person other than the current administrators with the winding-up of FMIF would be to waste the cost of the work which the administrators have performed to date. Quite clearly when the nature of the work performed to date is considered, not all of it would be wasted.[42] The current administrators say they would co-operate with anybody who is charged with responsibility of winding-up the fund, and indeed it would be absolutely extraordinary if they did not. The current administrators were appointed in March 2013. They have been restrained from commencing a winding-up pending the outcome of this proceeding. It appears that any winding-up will take some years,[43] so that while there may indeed be waste, the proportion is likely to be small in the overall cost of the winding-up. Fees to date have not been charged, but it is sworn that as at 27 June 2013 the administrators propose to charge the fund $960,756 and an unspecified part of $1,174,399 they have notionally charged to the first respondent company. There is nothing to show what has been achieved for those proposed charges. The administrators accept their charges must be approved by the company or the Court. I very much doubt that most of the costs of the 13 June 2013 meeting would be approved as necessary and appropriate and I have doubts as to some of the costs of this litigation.

[129] Bearing all these points in mind, I cannot see that the potential for some wasted fees would deter me from making an appointment under s 601NF(1).

[130] I will ask the parties to bring in minutes of order. I will hear submissions on costs.

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42 See cross-examination, tt 2-23ff.

43 Ms Muller swears an estimate of three years.