SUPREME COURT OF QUEENSLAND

CITATION:	*Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283
PARTIES:	**JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)(RECEIVERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288** (first applicant) AND **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)(RECEIVERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288** (second applicant) v **DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT 2001** (respondent)
FILE NO/S:	BS3508/15
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	15 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2015
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The parties submit minutes of the orders to be made to give effect to these reasons within 21 days of this order.** **2. The further hearing of the application is adjourned to a date to be fixed.**

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where the second applicant is the responsible entity of a managed investment scheme – where the first applicants are the liquidators of the second applicant – where the second applicant was directed to wind up the scheme – where the respondent was appointed to ensure that the scheme is wound up – where the respondent was appointed by the court as the receiver of the scheme property – where the first applicants applied to the court for directions to ascertain the powers and responsibilities of the first applicants and the respondent – whether there is a conflict between the applicants and respondent's powers and responsibilities under the *Corporations Act* 2001 (Cth) and the court orders

CORPORATIONS – WINDING UP - where the first applicants are the liquidators of the second applicant – where the second applicant is the responsible entity of a managed investment scheme – where the second applicant was directed to wind up the scheme – where the respondent was appointed to ensure that the scheme is wound up – where the respondent was appointed by the court as the receiver of the scheme property – where first applicants applied to the court for directions to ascertain the powers and responsibilities of the first applicants and the respondent – whether there is a conflict between the first applicant and respondent's powers and responsibilities under the *Corporations Act* 2001 (Cth) and the court orders

Bankruptcy Act 1966 (Ch), ss 58, 116(2)(b)
Corporations Act 2001 (Cth), ss 9, 111AC(2), 111AFA, 111AR, 111AT, 292, 298, 301, 302, 314, 319, 330, 331AAA, 340, 342, 420, 471A, 474, 477, 485, 511, 530A, 530B, 531, 539, 553, 555-564, 588FC, 588 FE, 588FF, 588M, 601AC, 601AD, 601FC, 601FD, 601FH, 601FS, 601GA, 601GB, 601HG, 601ND, 601NE, 601NF, 1317H, 1321
Joint Stock Companies Act 1856 (Imp)
Joint Stock Companies Act 1862 (Imp)
Law of Property Amendment Act 1859 (Imp)
Property Law Act 1974 (Qld), s 199
Trusts Act 1973 (Qld), ss 65, 72, 96

Corporations Regulations 2001 (Cth), rr 5.6.47, 5.6.48, 5.6.49, 5.6.52-5.6.56

Aitcherson v Lee (1856) 28 LT (OS) 115, cited
Australian Securities Commission v Melbourne Asset Management nominees Pty Ltd (1994) 49 FCR 334
Bass v Permanent Trustee Company Ltd (1998) 198 CLR 334; [1999] HCA 9, followed
Bruce v LM Investments Management Ltd (2013) 94 ACSR 684; [2013] QSC 192, related
Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of

Taxation (2009) 239 CLR 346; [2009] HCA 32, cited
Capelli v Shephard (2010) 29 VR 242; [2010] VSCA 2, referred to
Commission of Inland Revenue v Newmarket Trustees Ltd [2012] 3 NZLR 207; [2012] NZCA 351, cited
Commissioner of Taxation v Everett (1980) 143 CLR 440; [1980] HCA 6, cited
Chief Commissioner of Stamp Duties v Buckle (1998) 192 CLR 226; [1998] HCA 4, cited
Enviroinvest Ltd (rec and mgrs apptd) (in liq) (2010) 81 ACSR 145; [2010] VSC 549, referred to
Hall v Poolman (2009) 254 ALR 333; [2009] NSWCA 64, referred to
Horwarth Corporate Pty Ltd v Huie (1999) 32 ACSR 413; [1999] NSWSC 583, cited
Investa Properties Ltd v Westpac Property Funds Management Ltd (2001) 187 ALR 462; [2001] NSWSC 1089, cited
Jessup v Queensland Housing Commission [2002] 2 Qd R 270; [2001] QCA 312, cited
J W Murphy & P C Allen; re BPRC Ltd (in liq) (1996) 19 ACSR 569, referred to
Kemtron Pty Ltd v Commissioner of Stamp Duties [1984] 1 Qd R 576, referred to
Macedonian Orthodox Community Church St Petka Inc v Petar (2008) 237 CLR 66; [2008] HCA 42, followed
Miller v Cameron (1936) 54 CLR 572; [1936] HCA 13, cited
Re Equititrust Ltd (2011) 254 FLR 444; [2011] QSC 353, cited
Re Indopal Pty Ltd (1987) 12 ACLR 54, considered
Re Matheson; ex parte Worall v Matheson (1994) 49 FCR 454, cited
Re Mento Developments (Aust) Pty Ltd (in liq) (2009) 73 ACSR 622; [2009] VSC 343, cited
Re Obie Pty Ltd [1984] 1 Qd R 371, considered
Re Reid Murray Holdings Ltd (in liq) [1969] VR 315, referred to
Re Royal British Bank, ex parte Marcus (1856) 26 LJ Bk 1, cited
Re Royal British Bank, ex parte Shore (1857) 26 LJ Bk 17, cited
Re Stacks Managed Investments Ltd (2005) 219 ALR 532; [2005] NSWSC 753, cited
Re Stansfield DIY Wealth Pty Ltd (in liq) (2014) 291 FLR 17; [2014] NSWSC 1484, cited
Ron Kingham Real Estate Pty Ltd v Edgar [1999] 2 Qd R 439, cited
Saunders v Vautier (1841) 4 Beav 115; 49 ER 282; (1841) Cr & Ph 240; 41 ER 482, cited
Thorne Developments Pty Ltd v Thorne (2015) 106 ACSR 481; [2015] QSC 156, cited

University of New South Wales v Moorhouse (1975) 133 CLR 1; [1975] HCA 26, followed

COUNSEL: S Doyle QC with J Peden for the applicant
S Brown QC with D de Jersey for the respondent

SOLICITORS: Russells for the applicant
Tucker & Cowen for the respondent

Introduction

[1] **JACKSON J**: This amended application ("the application") is for directions in two winding ups. The first is a winding up in insolvency of the second applicant LM Investment Management Limited ("the applicant") as a company under the *Corporations Act* 2001 (Cth) ("CA"). The applicant is managed by the first applicant liquidators appointed to wind it up ("the liquidators").

[2] The second winding up is of a managed investment scheme that is a registered scheme under s 601EB of the CA. The scheme is known as the LM First Mortgage Investment Fund ("FMIF"). The applicant is the responsible entity of the FMIF. The scheme is constituted as a trust of which the applicant is trustee, both under the scheme constitution and the CA.

[3] On 21 August 2013, the "Court"[1] made an order under s 601ND(1) of the CA directing the applicant to wind up the FMIF. Thereupon, s 601NE(1) of the CA provides that the applicant, as responsible entity, must ensure that the scheme is wound up in accordance with its constitution and any orders of the Court made under s 601NF(2) of the CA. Under the latter subsection, the Court may, by order, give directions about how the FMIF is to be wound up if the Court thinks it necessary to do so.

[4] At the time of making the order directing the applicant to wind up the FMIF, the Court made an order under s 601NF(1) of the CA appointing the respondent to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and any orders under s 601NF(2).

[5] Also at the same time, the Court made orders under s 601NF(2), appointing the respondent receiver of the assets of the FMIF and giving him powers to carry out actions necessary for the winding up of the FMIF.

[6] Collectively, I will refer to those orders as "the existing orders". It will be necessary to consider them in more detail later in these reasons.

[7] The present application raises questions under the CA and the existing orders as to the relative powers and responsibilities of the applicant and the respondent in the winding up of the FMIF in the context of the simultaneous winding up of the applicant as a company.

[8] The application raises questions that in some respects do not seem to have required decision in earlier cases. In particular, the disputed questions revolve around the extent of the overlap of the duties and powers of the applicant and its

1 *Corporations Act* 2001 (Cth), s 9, definition "Court".

liquidators on the one hand and the duties and powers of the respondent, on the other hand.

[9] This dispute and the need to resolve of some of the questions debated is lamentable. In any event, the administration of the winding up of the FMIF is proving extremely costly. The respondent's expenses to date have significantly diminished the assets. At the end of the present application, the disputing parties will seek to have their costs met from the assets scheme property. The investors who are members of the scheme already face a huge shortfall between the amounts that they invested in the scheme and any distribution they might receive on the winding up of the scheme. They have no interest in the resolution of legal questions that will not see the scheme property realised to better advantage or distributed at a minimum of expense.

Some historical aspects

[10] In part, at least, the need to resolve the present questions is the product of the unwieldy statutory structure for winding up a managed investment scheme. That structure can result in dual responsibilities to ensure that the winding up is carried out in accordance with the scheme's constitution and any orders made by the court under s 601NF(2) of the CA. As previously stated, that responsibility is cast upon the applicant as the responsible entity by s 601NE(1) of the CA and the existing orders. It is also cast upon the respondent by s 601NF(1) and the existing orders.

[11] On many occasions, the resolution of questions that arise in the administration of the winding up of a company or group of companies or a managed investment scheme or schemes is a practical exercise. It does not call for historical analysis of the current statutory structure that regulates the processes. The present questions could be resolved in that way without wider discussion. But they are symptoms of an underlying infirmity that should not pass unnoticed.

[12] They also present an opportunity to mention the early academic career of the late Dr Bruce Harvey McPherson. He was affectionately known to his peers at the Bar as "the Doc", at a time when few legal practitioners achieved a doctoral thesis. Dr McPherson became a star in the Queensland legal firmament as a Judge, Senior Puisne Judge and Judge of the Court of Appeal of this Court as well as for his academic and historical writings. That stellar career began with a brilliant thesis upon the law of winding up of companies that formed the basis of *The Law of Company Liquidation*, first published in 1968, and still published under the name *McPherson's Law of Company Liquidation*, both in Australia and in a separate edition in the United Kingdom.[2] A mark of the author's pre-eminence in the field is that his work was exported from Australia to the United Kingdom. The reason to recall McPherson's work is his discussion of the nineteenth century development of the statutory framework for the winding up of joint stock companies.

[13] Before the statutes that formed the basis of modern company law were passed, the winding up of a joint stock company was attended by overwhelming

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2 See M Gronow and R Mason, *McPherson's Law of Company Liquidation*, 5th edn, 2006, Thomson Lawbook Co; A Keay, *McPherson's Law of Company Liquidation*, 3rd edn, 2013, Sweet & Maxwell.

substantive and procedural difficulties. The joint stock company was treated at law as a partnership. This presented grave risks for the creditor and member alike. The creditor was unable to get at company property by way of execution unless they were able to join and serve all the members of the firm, a near impossible practical task for a larger firm whose membership kept changing. The member was personally liable upon the company's debts and was unable to leave the company in a way that would terminate their ongoing liability for the firm's debts. Creditors pursued individual members of worth. The members of a failing company faced debtor's prison or absconded to the colonies to avoid the crushing burden of meeting all of the company's debts as an individual.

[14] The first attempts to reform these processes for joint stock companies by statute occurred in the 1840s, the time of Dickens. They led to a contest between the Court of Bankruptcy and the Court of Chancery. The story is told through the *Royal British Bank* case.[3] McPherson recounts the fractured methods for winding up a joint stock company under the first statutes that applied, including the unseemly contest for control between the assignee, representing the creditors, and the official manager, representing the members.[4] Further details are not critical to my present purpose, even though they make good reading.

[15] The root problem lay, in part, in the absence of an efficient legal method for the collection of the assets of the firm to be wound up, the ascertainment of its liabilities, the discharge of the liabilities so far as the assets would go, and the distribution of any surplus to the members or investors after that.

[16] In the case of companies, the solution came with the development of the model of incorporation of a company as a separate legal personality and the appointment of a liquidator to manage the company through the winding up process, initially under the *Joint Stock Companies Act* 1856 (Imp). The debts of the company were converted into a right to prove in the winding up. The liquidator was not an assignee of the assets, as was the assignee in personal bankruptcy.[5] The assets continued to be the assets of the company throughout the winding up process. When the process was complete, the debts paid so far as the assets would go, and any remaining or assets distributed, the company was dissolved.[6] The separate legal personality ceased.[7] There was no legal liability for any unpaid debt. There was no legal personality to hold any undistributed asset, which passed bona vacantia to the Crown.[8]

[17] This model for winding up a registered company was replicated under the *Companies Act* 1862 (Imp) and was adopted, continued and developed in this country through successive iterations of companies legislation until today, in the

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3 *Aitcherson v Lee* (1856) 28 LT (OS) 115; *Re Royal British Bank, ex parte Marcus* (1856) 26 LJ Bk1; *Re Royal British Bank, ex parte Shore* (1857) 26 LJ Bk 17.

4 B. McPherson, *The Law of Company Liquidation: being the law relating to liquidation of limited liability companies*, 2nd edn, 1980, Lawbook Co, 12-17.

5 This is still true – see *Corporations Act* 2001 (Cth), s 474.

6 See now *Corporations Act* 2001 (Cth), s 601 AC.

7 See now *Corporations Act* 2001 (Cth), s 601AD(1).

8 See now *Corporations Act* 2001 (Cth) ss 601AD(1A), 601AD(2).

case of the winding up of a company under the *Corporations Act* 2001 (Cth). It does not apply to a managed investment scheme.[9]

Winding up a trust

[18] In practical terms (and in all cases for registered schemes)[10] such schemes are usually a species of investment trust. In approaching the winding up of a registered scheme, the core difference between a scheme and a company is that although business people and lawyers alike in common parlance often refer to a trust as though it has separate legal personality, it does not.

[19] The modern law to wind up an insolvent trust remains largely unaffected by statute.[11] Leaving the rule in *Saunders v Vautier*[12] to one side, there is no power to wind up a private trust if none is contained in the trust instrument or under statute.[13]

[20] The relevant statutes mostly deal with the insolvency of the trustee. Where the trustee is an individual, that insolvency is dealt with under the *Bankruptcy Act* 1966 (Cth). But the assets of the trust are not necessarily in play, because they are not property divisible among the creditors of the bankrupt.[14] Similarly, where the trustee is a company, the insolvency is dealt with by the *Corporations Act* 2001 (Cth). But the assets of the trust are not necessarily in play, because they are not property of the corporation,[15] although the liquidator of a company trustee has the power to administer a trust of which the company is trustee.[16] In both scenarios, there is an important exception, which forms part of the property of the bankrupt or the property of the company.

[21] That exception is the right of indemnity, called a right of exoneration or a right of recoupment,[17] that a trustee has against the trust assets for a liability properly incurred as trustee. The personal right is supported by a proprietary right in the form of lien or charge over the trust assets to the extent of the right of indemnity.[18]

[22] When a trustee of a solvent trust becomes insolvent, it is a usual outcome, although it is not inevitable, that the trustee will be removed and replaced.[19] Unless statute intervenes, the removal of the trustee does not transfer the trustee's

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9 *Re Stacks Managed Investments Ltd* (2005) 219 ALR 532.

10 *Corporations Act* 2001 (Cth), s 601FC(2) and *Investa Properties Ltd v Westpac Property Funds Management Ltd* (2001) 187 ALR 462, 472 [40].

11 *Horwarth Corporate Pty Ltd v Huie* (1999) 32 ACSR 413.

12 (1841) 4 Beav 115; 49 ER 282; (1841) Cr & Ph 240; 41 ER 482.

13 *Horwarth Corporate Pty Ltd v Huie* (1999) 32 ACSR 413, 414-415 [8]-[13].

14 *Bankruptcy Act* 1966 (Ch), s 116(2)(b); cf *Re Matheson; ex parte Worall v Matheson* (1994) 49 FCR 454, 460E as to vesting of title of "property of the bankrupt" under s 58.

15 *Re Obie Pty Ltd* [1984] 1 Qd R 371.

16 *Re Stansfield DIY Wealth Pty Ltd (in liq)* (2014) 291 FLR 17, 19 [5]; *Commission of Inland Revenue v Newmarket Trustees Ltd* [2012] 3 NZLR 207, [71].

17 *Chief Commissioner of Stamp Duties v Buckle* (1998) 192 CLR 226, 245-247 [47]-[51].

18 *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346, 358 [43].

19 *Thorne Developments Pty Ltd v Thorne* (2015) 106 ACSR 481, 494 [59]; *Commission of Inland Revenue v Newmarket Trustees Ltd* [2012] 3 NZLR 207, [70]; *Re Matheson; ex p Worrall v Matheson* (1994) 49 FCR 462-463; *Miller v Cameron* (1936) 54 CLR 572, 575, 579 and 582.

liabilities to the new trustee. The former trustee's right of indemnity against trust assets for properly incurred debts is not lost.[20]

Provisions to wind up a registered scheme

[23] It is against this background that the statutory provisions of the CA operate for the winding up of a registered scheme. Subject to the relevant statutory provisions, the principles discussed above apply to the insolvency of a registered scheme and the corporate trustee or responsible entity of the scheme.[21]

[24] In the case of a registered scheme, s 601FS(1) of the CA provides that "if the responsible entity… changes the rights obligations and liabilities of the former responsible entity in relation to the scheme become the rights obligations and liabilities of the new responsible entity", subject to exceptions set out in s 601NF(2), including the maintenance of the former responsible entity's right of indemnity for expenses incurred as responsible entity.

[25] The constitution for a registered scheme must have provisions for the winding up of the scheme,[22] but those provisions are not given statutory force, per se. There is no liquidator who winds up the scheme as a separate legal personality. There is no-one who is given the statutory powers of the liquidator of a company. The rights of the creditors are not converted into a right to prove in the winding up of the scheme.

[26] As previously mentioned, the responsible entity may be directed by order of the Court to wind up a registered scheme.[23] There are other pathways to a winding up by the responsible entity. Under each of those pathways, the responsible entity is obliged under s 601NE(1) to ensure the winding up in accordance with the constitution and any order of the court made under s 601NF(2).

[27] In the winding up of a company in insolvency, it is a common question whether the former officers have breached their duties to the company, usually the duties under ss 181-184 of the CA. An advantage of the appointment of a liquidator to wind up a company is that the liquidator is an independent person. A liquidator must often consider the question of the liability of a former officer to the company. Any correlative right to compensation[24] is part of the property of the company.

[28] These advantages do not apply where by order of the Court a responsible entity is directed to wind up an insolvent registered scheme. A responsible entity[25] and an officer[26] of the responsible entity owe duties analogous to some of the duties of an officer of a company. But there is no independent liquidator to consider the responsible entity's liability or the liability of an officer of the responsible entity.

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20 *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 349, 358 [43].

21 See R I Barrett, *Insolvency of Registered Managed Investment Schemes*, Paper delivered to the Banking and Financial Services Law Association at Queenstown, New Zealand, July 2008.

22 *Corporations Act* 2001 (Cth), s 601GA(1)(d).

23 *Corporations Act* 2001 (Cth), s 601ND(1).

24 For example, *Corporations Act* 2001 (Cth), s 1317H.

25 *Corporations Act* 2001 (Cth), s 601FC.

26 *Corporations Act* 2001 (Cth), s 601FD.

[29] However, s 601NF(1) enables the Court to order the appointment of another person to ensure that a registered scheme is wound up in accordance with the constitution and any order of the court made under s 601NF(2) of the CA.

[30] In some cases,[27] the result has followed that an order is made directing the responsible entity to wind up the scheme, while also making an order that an independent person is appointed to ensure that the scheme is wound up in accordance with its constitution and any order of the court made under s 601NF(2). Two different legal entities are thereby given the responsibility for achieving the same outcome. Putting to one side cases where the responsible entity is or might become paralysed, there is no apparent reason why, in general, that is thought to be a good idea. Where there is any question as to the responsible entity's liability for events that preceded the winding up, it is better to have someone independent to make relevant decisions.

[31] There is a potential for conflict between a responsible entity charged with the responsibility under s 601NE(1) and a person appointed under s 601NF(1) charged with the same responsibility over their respective roles in the winding up of a registered scheme. The hapless creditors and members can derive no benefit from such conflict.

[32] Where there is a real question as to the responsible entity's conduct that must be considered in the winding up of a registered scheme, the Court's usual approach should be to give the management of the winding up to the appointed person as an independent person.[28] In this case that is the respondent.

[33] The existing orders in this case are in part adapted to that end. They give to the respondent power to deal with the assets of the FMIF so as to collect and realise those assets. That is what he has been doing, subject to the rights of a secured creditor and the receivers appointed by that creditor.

[34] But that approach will not readily solve all the problems that arise when the responsible entity charged with the responsibility under s 601NE(1) is also a company in liquidation, for the reasons that follow.

[35] In a practical sense, the winding up of the FMIF requires that the debts of the applicant properly incurred as responsible entity and trustee (and other debts properly incurred by the respondent) be ascertained and paid from the property of the FMIF held on trust. The debts of the applicant, including those it incurred as responsible entity and trustee for the FMIF, are liabilities that the liquidators would ordinarily deal with by the process of proofs of debt in the winding up of the applicant.

[36] The liquidators are under a duty to do so under the relevant provisions of the CA.

[37] Those debts properly incurred by the applicant as trustee would ordinarily be dealt with by reference to a trustee's right of indemnity, whether by way of exoneration or recoupment, from the assets of the trust.

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27 *Re Equititrust Ltd* (2011) 254 FLR 444; cf *Capelli v Shephard* (2010) 29 VR 242, 245 [5].

28 I pass by the discussion in some of the cases whether a potential for conflict justifies the conclusion that the appointment of a person under s 601NF(1) is "necessary".

[38] In *Re Obie Pty Ltd*,[29] Thomas J said:

> "The property of a company which passes into the custody and control of a liquidator upon a winding up is commonly referred to as the "available assets" of the company. These comprise the items of property (including choses in action) which the liquidator must get in and in due course apply as directed by the *Companies (Queensland) Code* or by any other relevant statute. However the available assets do not include property which the company holds on trust (*Quistclose Investments Ltd. v. Rolls Razor Ltd.* [1970] A.C. 567, 580) or property which has been mortgaged or charged (*Re United Pacific Transport Pty. Ltd.* [1968] Qd.R. 517 at 521; McPherson, *The Law of Company Liquidation* (2nd ed.) p. 279)."[30]

[39] Where a company being wound up in insolvency carried on business as trustee of a trust, the process of the liquidator realising the assets of the company should reflect the legal truth that the assets of the trust are not beneficially the property of the company, but the company's right of indemnity and the lien that supports that right for debts properly incurred as trustee support a practical approach to the realisation of the assets held on trust and the use of the proceeds to indemnify the company trustee for properly incurred debts.

[40] Section 601FH(a) of the CA expressly provides that a provision of a registered scheme's constitution or other instrument that would deny a responsible entity that is being wound up a right to be indemnified out of the scheme property that it would have had if the company were not being wound up is void. In Queensland, there is a cognate provision that applies to a trust under the *Trusts Act* 1973 (Qld).[31]

[41] As well, s 601FH(b) provides that the right of the company to be indemnified out of the scheme property may only be exercised by the liquidator of the company. In this case, that is, the liquidators of the applicant.

[42] Absent an identified source of power to the contrary, the respondent has no power to deal with the debts of the applicant in the winding up of the applicant, including those debts incurred as responsible entity or trustee, and no power to deal with the applicant's right of indemnity out of the scheme property. The powers of the applicant in those respects are to be exercised by the liquidators.

[43] The respondent relies on the existing orders as a relevant source of power. This contention was put at two levels.

The effect of s 601NF(1)

[44] First, the respondent submitted that the applicant's responsibilities and powers to wind up the FMIF were displaced by the order appointing the respondent as the person to take responsibility for ensuring that the FMIF is wound up. He

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29 [1984] 1 Qd R 371.

30 [1984] 1 Qd R 371, 376.

31 *Trusts Act* 1973 (Qld), s 65 and 72; *Jessup v Queensland Housing Commission* [2002] 2 Qd R 270, 275; *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439, 441; and *Kemtron Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576, 585.

relied on the order made under s 601NF(1) as well as the orders made under s 601NF(2) as leading to that conclusion.

[45] I agree that the powers to make orders under s 601NF(1) and (2) include the power to make orders that could have the effect of dealing with and paying the creditors of a responsible entity of a registered scheme, at least subject to s 601FH. One express example of a case where such an order might be made under s 601NF(1) is where the responsible entity has ceased to exist. An order appointing a person to take responsibility for ensuring that a scheme is wound up in accordance with its constitution would require the person to do all things necessary to wind up the scheme that might have been done by the responsible entity if it had continued to exist. In such circumstances, it is likely to be necessary to make an appropriate order under s 601NF(2).

[46] But it is another thing to say that an order under s 601NF(1) appointing a person to take responsibility for ensuring that a scheme is wound up necessarily has that effect.

[47] That is because when an order is made by the court under s 601ND(1) to direct the responsible entity to wind up a scheme, s 601NE(1) expressly provides that the responsible entity must ensure that the scheme is wound up in accordance with its constitution and any orders made under s 601NF(2).

[48] In the present case, the responsibility of the applicant under s 601NE(1) to ensure that the FMIF is wound up in accordance with its constitution is engaged. An order made under s 601NF(2) can override those constitutional requirements. But an order made under s 601NF(1) appointing a person to take responsibility for ensuring that a scheme is wound up in accordance with its constitution does not have that effect, per se.

[49] The result of that analysis is that the distribution of powers between the applicant and the respondent in the present case is to be ascertained in substance from the operation of the existing orders made under s 601NF(2).

The operation of the order made under s 601NF(2)

[50] Second, the respondent submitted that the existing orders gave him power to generally conduct the winding up of the FMIF, including the subject matter of creditors and the ascertainment of the applicant's entitlement to indemnity from the scheme property.

[51] The existing orders do not say so much outright. They provide, relevantly, as follows:

> "1. Pursuant to section 601ND(1)(a) of the Corporations Act 2001 (Cth) ("the Act") LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 ("LMIM") in its capacity as Responsible Entity of the LM First Mortgage Income Fund is directed to wind up the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF") subject to the orders below.

2. Pursuant to section 601NF(1) of the Act, David Whyte ("Mr Whyte"), Partner of BDO Australia Limited ("BDO"), is appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution ("the appointment").

…

5. Pursuant to sections 601NF(2) of the Act, Mr Whyte is appointed as the receiver of the property of the FMIF.

6. Pursuant to sections 601NF(2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to paragraph 5 above, the powers set out in section 420 of the Act.

…

7. Without derogating in any way from in any way from (sic) the Appointment or the Receiver's powers pursuant to these Orders, Mr Whyte is authorised to:

(a) take all steps necessary to ensure the realisation of property of FMIF held by LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF by exercising any legal right of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF in relation to the property, including but not limited to:

…

(ii) providing a response as appropriate to matters raised by receivers of property of LMIM as Responsible Entity of the FMIF to which receivers have been appointed;

(iii) dealing with any creditors with security over the property of the FMIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of property…"

[52] An issue was raised as to the proper construction of the existing orders. The respondent sought to rely upon findings made by the Judge in the reasons given for making the orders.[32] The applicant sought to rely on the transcript of part of the hearing dealing with the form of orders made and her Honour's refusal to make requested further orders. I will return to these points. But the jumping off point is the operation of the text of the existing orders as made.

[53] First, par 1 directs the applicant to wind up the FMIF subject to the later paragraphs of the order. The qualification is important.

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32 See *Bruce v LM Investments Management Ltd* (2013) 94 ACSR 684.

[54] Second, par 2 appoints the respondent to take responsibility for ensuring that the FMIF is wound up. There is an unfortunate nuance introduced by the word "ensuring", because it is arguably consistent with the applicant having the primary role to wind up and the respondent having a secondary role of ensuring that it is done. However, that is not what is intended, having regard to the text and operation of par 1 and the subsequent paragraphs of the existing orders. The explanation lies in the language of s 60NF(1) itself, which refers to an order appointing a person "to take responsibility for ensuring" the winding up. In my view, that language does not require that the respondent's role is to be a secondary role. It depends on the orders that were made.

[55] Third, par 5 appointed the respondent as the receiver of the property of FMIF and par 6 gave him the powers set out in s 420 of the CA. There is a disconformity in that form of order, because the powers in s 420, on their face, relate to the "property of a corporation" and other aspects of a corporation's affairs. However, in context, par 6 should be construed to confer those powers upon the respondent in relation to the scheme property of the FMIF.

[56] There are two important powers under s 420. Under s 420(1) a receiver has power to do all things necessary or convenient to be done for or in connection with or as incidental to the attainment of the objectives for which the receiver was appointed. Further, under s 420(2)(h) a receiver has the power to carry on any business of the "corporation".

[57] Neither party made a particular submission as to whether the respondent has power to carry on the business of the FMIF as a scheme for the purpose of winding up the FMIF. However, the express power in par 7 to take all steps necessary to ensure the realisation of the property of the FMIF is also consistent with the existence of such a power for the purpose of realising the scheme property.

[58] Fourth, par 7(a)(iii) authorised the respondent to take all steps necessary to ensure the realisation of the scheme property of the FMIF including dealing with any creditors with security over that property.

[59] In my view, none of the other powers of the respondent is concerned with any power to pay or deal with creditors of the applicant in respect of debts incurred by the applicant as responsible entity and trustee for the FMIF.

[60] A usual consequence of a receiver's power to carry on the business of a corporation is that the receiver has authority as agent of the corporation to pay pre-receivership debts. It might be suggested that the power conferred on the respondent under s 420(2)(h), mutatis mutandis, has that effect in relation to the business of the FMIF, although none of the parties made that submission.

[61] However, a receiver's authority as agent of the corporation to pay pre-receivership debts is sometimes said to be terminated when a winding up order is made against the corporation. It is unnecessary to essay the limits to that statement which clearly exist.

[62] That is because whatever be the true principle as to the extent of the powers of a receiver of a corporation that goes into liquidation, it is important in the present

case not to look too far away from s 601NF(2) and the meaning and operation of an order appointing a receiver made under that subsection. If the order, properly construed, authorises the respondent to carry on the business of the FMIF, in my view it follows that it is intended that the respondent have the power to pay the debts of the applicant incurred in carrying on that business. Having regard to par 7(a), in my view, that power is conferred by the order at least in relation to taking all steps necessary to ensure the realisation of the property of the FMIF.

[63] And, as previously stated, par 1 of the existing orders directing the applicant to wind up the fund is subject to paras 6 and 7 of the order.

[64] The respondent's counsel strongly pressed the contention that the effect of making par 1 subject to the other orders of the existing orders, including par 2 appointing the respondent and par 5 conferring on him the power under s 420(1) of the CA, effectively displaces the applicant's responsibility to ensure that the scheme is wound up under s 601NE(1).

[65] The parties positions were framed in correspondence exchanged before the hearing of the application and refined by their submissions during the hearing. So, for the liquidators and the applicant it was submitted that the respondent's powers and functions were those of a receiver appointed to collect and realise the scheme property, after which he must relinquish possession of that property to the applicant. In my view, that is not what the existing orders provide or mean on their proper construction. There is no provision that possession of the scheme property is to be transferred to the applicant.

[66] For the respondent it was submitted that the applicant's role in the winding up of the scheme was limited to not much more than maintaining its suspended financial services licence. In my view, that is not what the existing orders provide or mean on their proper construction. There is no provision that the role of the applicant is to be so limited.

[67] In the light of those findings as to the proper construction of the existing orders, it is unnecessary to consider the contentions of the parties as to the effect of the Court's reasons generally or upon the argument for other orders that were not made on the application for the existing orders. For completeness, I record that, in my view, no different result would be reached if those matters are taken into account.

Conflict of powers and responsibilities

[68] Turning to more specific points, par 2 of the application read together with pars 1 to 4 of Sch 1 to the application seek directions as to whether the liquidators are responsible in the winding ups for many functions including the following:

(a) to pay the expenses and liabilities of the applicant as far as they relate to the FMIF as determined in accordance with ss 477(1)(b), (c), (d), 506(3) and 562 of the CA;
(b) to recover the assets of the FMIF which are available only to the liquidators because of Part 5.7B of the CA;
(c) to manage and deal with members, units and capital of the FMIF as required by the constitution, in particular cls 3.6, 16.6, 16.7(c),

16.7(f), 16.7(g), 18.2 and 21.1 of the constitution as well as some other "parts" of the constitution identified as parts 9,10,12,22 and 28 ; and

(d) to determine and report upon the financial status of the FMIF as required by identified clauses and parts of the the constitution.

Payment of expenses and liabilities of the applicant relating to the FMIF

[69] The powers under s 477(1)(b) of the CA is a power of a liquidator of a company to pay any class of creditors in full. The powers under s 477(1)(c) and (d) are powers of a liquidator to compromise claims of creditors and claims by and against other persons, including debtors.

[70] By referring in the application to paying "expenses and liabilities of the applicant", it appears that the liquidators intend to refer to the identified powers of a liquidator in relation to a creditor of or claimant against the applicant. By referring to them as far as they relate to the FMIF, it appears that the liquidators are interested in debts of or claims against the applicant which it incurred or became obliged to pay as trustee of the FMIF.

[71] The CA makes detailed provision as to creditors and claimants of the applicant. They include that debts are admissible to proof,[33] that a creditor may lodge[34] or the liquidator may admit informally[35] or call for proofs of debt,[36] that the court may fix a day after which proofs will be excluded[37] and many provisions that affect the priorities of secured and unsecured creditors.[38] There are procedural provisions as to the liquidator's consideration of a proof of debt.[39] And there are rights of appeal from the liquidator's admission or rejection of a proof of debt.[40]

[72] None of this applies to the respondent in relation to the FMIF.

[73] There is no cause, per se, for the respondent to be involved in the statutory process under the CA for the applicant to ascertain and pay creditors for claims made against the applicant. Although the respondent suggested in correspondence before the hearing that he might in some way deal with the creditors, instead of the statutory process, he did not press that submission at the hearing.

[74] Instead, he submitted that it was premature for there to be any consideration of the applicant's debts incurred as trustee. I reject that submission. I add that in my view an individual appointed by the court under s 601NF(1) with the powers of the respondent is, in effect, an officer of the court who should eschew tactical positions that will not progress the winding up as quickly and inexpensively as is possible.

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33 *Corporations Act* 2001 (Cth), s 553.
34 *Corporations Regulations* 2001 (Cth), r 5.6.49.
35 *Corporations Regulations* 2001 (Cth), r 5.6.47.
36 *Corporations Regulations* 2001 (Cth), r 5.6.48.
37 *Corporations Act* 2001 (Cth), s 485.
38 *Corporations Act* 2001 (Cth), s 555-564.
39 *Corporations Regulations* 2001 (Cth), rr 5.6.52-5.6.56.
40 *Corporations Act* 2001 (Cth), s 1321.

[75] Nevertheless, it is for the liquidators to get on with the process of ascertaining the creditors and claimants. It is not suggested that they are all related to the FMIF.

[76] How should the question of the applicant's right to an indemnity in respect of any such debts or claims be dealt with? After all is said and done, the present problem is not dissimilar to the problem faced when a company that is trustee of a trust becomes insolvent.

[77] For example, in *Re Indopal Pty Ltd*,[41] a trustee company went into liquidation. Under the trust deed, the company's appointment as trustee was terminated upon it entering liquidation. It was unclear whether, or the extent to which, the trustee was entitled to an indemnity from the trust assets for debts incurred as trustee. McLelland J appointed a receiver and manager of the trust assets to protect the company's interest under the lien it had for any right of indemnity.[42] His Honour also took the view that the court had an inherent or implied discretionary power to determine any question arising in the winding up that would enable determination of the question of the company's right to an indemnity.

[78] In my view, the court also has power under s 601NF(2) to make a necessary order as to the mechanism to deal with the right of indemnity as a liability to be paid from the assets of the FMIF, particularly having regard to the provision in s 601FH(b) that the right of indemnity may only be exercised by the liquidators of the applicant.

[79] At the hearing of the application, I requested the parties to give thought to the form of an appropriate process to be framed in an order under s 601NF(2). It seems to me that the process should require the applicant to identify debts or claims for which it claims to be entitled to an indemnity and to submit the same with any reasonably requested information to the respondent. The respondent as receiver should be empowered by order to admit or reject the claimed right against the assets of the FMIF. If necessary, either party should be able to apply for the Court's approval of the outcome or determination of any dispute.

Voidable transactions and insolvent trading

[80] Part 5.7B provides for a liquidator to apply to recover property of a company or compensation in respect of voidable transactions.[43] Perhaps oversimplifying, voidable transactions include insolvent transactions, unfair loans and unreasonable director-related transactions, as defined.[44] Insolvent transactions are broken down into unfair preferences and uncommercial transactions.[45] As well, the liquidator may apply to recover loss to the company for loss from a director for insolvent trading.[46]

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41 (1987) 12 ACLR 54.

42 See also the cases collected in *Re Stansfield DIY Wealth Pty Ltd (in liq)* (2014) 291 FLR 17, 26 [31]-[33.

43 *Corporations Act* 2001 (Cth), s 588FF.

44 *Corporations Act* 2001 (Cth), s 588FE.

45 *Corporations Act* 2001 (Cth), s 588FC.

46 *Corporations Act* 2001 (Cth), s 588M(2).

[81] These are rights conferred on a liquidator. If any rights of that kind may be available to the liquidators and if any amount recovered by exercising those rights may be held on trust for the FMIF, they must still be pursued by the liquidators, not the respondent.

[82] Although the respondent is appointed receiver of the property of the FMIF under par 5 of the existing orders and authorised to bring proceedings on behalf of the FMIF in the name of the applicant by par 7(b) of the existing orders, neither of those orders authorises the respondent to bring proceedings pursuant to rights that are expressly conferred upon the liquidators by the CA.

[83] It is unnecessary to say more at this stage. There may be a question whether an amount recoverable by the liquidators under Part 5.7B of the CA is held on trust for the FMIF once recovered. But the parties did not identify any particular claims or items of that kind and it is not appropriate to deal with the question further in the absence of a factual context.

Members units and capital

[84] By par 3 of Sch 1 to the application, the applicant and the liquidators seek particular directions as to a dozen provisions or parts of the constitution, including cls 3.6, 16.6, 16.7(c), 16.7(f), 16.7(g), 18.2 and 21.1 of the constitution. They should be dealt with separately.

[85] First, the applicant pursuant to ss 601NF(2) and the liquidators pursuant to s 511(1) of the CA seek a direction as to whether the liquidators are, in the winding up of the applicant and of the FMIF responsible for and shall discharge the functions, duties and responsibilities set out in cl 3.6 of the constitution.

[86] Clause 3.6 confers power upon the responsible entity to divide the scheme property into a number of units other than the pre-existing number.

[87] Section 601NE(3) of the CA provides that "interests" must not be issued in a registered scheme at a time after the responsible entity has become obliged to ensure the scheme is wound up. "Interest" is defined in s 9 of the CA to mean a right to benefits produced by the scheme. It may be that a division under cl 3.6 would be a prohibited issue of an interest. However, the respondent did not ultimately contend that the power under cl 3.6 was terminated by the making of the existing orders, so I will not consider that question further.

[88] The respondent's primary point in opposition to the direction sought as to the liquidators' responsibility as to any power of the applicant to act under cl 3.6 is that the question raised is hypothetical because there is no live dispute or occasion as to whether the power should be exercised. There are no facts raised as to why the power should be exercised.

[89] There is thus no order sought by the applicant under s 601NF(2) of the CA about how the scheme is to be wound up, except in an hypothetical sense. In those circumstances, I do not think "it is necessary to" give a direction as to whether the liquidators are responsible for and shall discharge the functions, duties and responsibilities set out in cl 3.6 of the constitution.

[90] As to s 511(1) of the CA, the liquidators of a company in voluntary winding up may make an application to determine any question arising in the winding up of the company. Section 511 appears in Part 5.5 of the CA, which deals with a voluntary winding up. Section 511 is not the appropriate section where the company is being wound up by the Court, as in this case.

[91] For a compulsory winding up by the Court, the appropriate section is s 479(3) of the CA. It provides that: "[t]he liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up." I will treat the application as one made under that subsection.

[92] Section 479(3) has statutory predecessors, in s 379(3) of the *Companies (Queensland) Code*, s 237(3) of the *Companies Act* 1961 (Qld), s 202(3) of the *Companies Act* 1931 (Qld), ultimately stretching back to s 23 of the *Companies (Winding Up) Act* 1890 (Imp). The similarity between s 479(3) and the statutory provisions for judicial advice to a trustee,[47] stemming from Lord St Leonard's Act, in s 30 of the *Law of Property Amendment Act* 1859 (Imp), is apparent.

[93] The purpose of the section has been analysed. In *J W Murphy & P C Allen; re BPRC Ltd (in liq)*[48] McLelland CJ said that "[i]t is to be emphasized that an application for directions… is an administrative non-adversary proceeding, and a direction given pursuant to that section has no effect on the substantive rights of persons external to the winding up."

[94] However, there is a contrary line of authority as to whether the section empowers the court to make binding orders in the nature of judgments determining substantive rights for the parties to the application.[49] And in the light of the judgments of the High Court in *Macedonian Orthodox Community Church St Petka Inc v Petar*,[50] any statement of a narrow view of the extent of the power granted under the section should be treated cautiously. Even before that case, a wide view of the court's power was taken in *Re Reid Murray Holdings Ltd (in liq),*[51] although Adam J resorted to the Court's inherent jurisdiction rather than specifically relying on s 237(3) of the *Companies Act* 1961 (Vic). And in *Hall v Poolman,*[52] the New South Wales Court of Appeal accepted that the principles set out in *Macedonian Orthodox Community Church St Petka Inc v Petar* apply to an application for judicial directions under s 479(3).

[95] In any event, there seems to me to be every reason to think that, generally speaking, the court "will not answer a question which may never arise", as seems to be the approach under provisions stemming from Lord St Leonard's Act.[53] I emphasise that this is a matter of discretion, not power. And, in my view, it must be recognised that the power of the Court to give directions under s 479(3) of the

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47 In Queensland, the power is now contained in s 96 of the *Trusts Act* 1973 (Qld).

48 (1996) 19 ACSR 569, 570.

49 *Australian Securities Commission v Melbourne Asset Management nominees Pty Ltd* (1994) 49 FCR 334.

50 (2008) 237 CLR 66, 89-90 [55]-[58].

51 [1969] VR 315.

52 (2009) 254 ALR 333, followed in *Re Mento Developments (Aust) Pty Ltd (in liq)* (2009) 73 ACSR 622, 633 [48].

53 *Macedonian Orthodox Community Church St Petka Inc v Petar* (2008) 237 CLR 66, 85, [43].

CA includes power to give advice not constrained by the principle that a declaration as to a purely hypothetical matter is not a proper exercise of judicial power.[54] The well-known principles that affect hypothetical questions in proceedings for a declaration inter partes,[55] do not apply, in my view. But, as in the case of an application under provisions stemming from Lord St Leonard's Act, I do not consider it appropriate to answer a question which may never arise.

[96] In my view, the Court should not answer the question whether the liquidators are, in the winding up of the applicant and of the FMIF, responsible for and shall discharge the functions, duties and responsibilities set out in cl 3.6, because it is a question that may never arise.

Managing scheme property

[97] Second, the applicant under s 601NF(2) and the liquidators under s 511(1) of the CA seek a direction as to whether the liquidators are, in the winding ups of the applicant and of the FMIF responsible for and shall discharge the functions, duties and responsibilities set out in cls 16.6, 16.7(c), 16.7(f), 16.7(g), 18.2 and 21.1 of the constitution. Those provisions are as follows:

> "16.6 The RE shall manage the Scheme until such time as all winding up procedures have been completed.
>
> 16.7 Subject to the provisions of this clause 16 upon winding up of the Scheme the RE must:
>
> …
>
> (c) subject to any special rights or restrictions attached to any Unit, distribute the net proceeds of realisation among the Members in the same proportion specified in Clause 12.4;
>
> …
>
> (f) The RE may retain for as long as it thinks fit any part of the Scheme Property which in its opinion may be required to meet any actual or contingent liability of the Scheme.
>
> (g) The RE must distribute among the Members in accordance with clause 16.7 anything retained under clause 16.7(f) which is subsequently not required.

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54 *Bass v Permanent Trustee Company Ltd* (1998) 198 CLR 334, 355-357 [45]-[48].

55 *University of New South Wales v Moorhouse* (1975) 133 CLR 1, 10; *Bass v Permanent Trustee Company* (1998) 198 CLR 334.

…

18.2 **Payment of Debts**

The RE may set aside any money from the Scheme Property which, in the RE's opinion, is sufficient to meet any present or future obligation of the Scheme.

…

21.1 **Custodian to hold as agent of RE**

The Scheme Property will be held in the same of the Custodian as agent for the RE on the terms and conditions as detailed in the Custody Agreement."

[98] The general point that this part of the application exposes is whether these are functions to be carried out by the applicant in the winding up under the existing orders. In this respect, the application is one for directions about how a registered scheme is to wound up and, in my view, is brought by the applicant under s 601NF(2) of the CA.

[99] As to cl 16.6, in my view, the obligation of the applicant to manage the FMIF until such time as all winding up procedures have been completed is subject to the appointment of the respondent as a person responsible for ensuring that the FMIF is wound up under par 2 of the existing orders having regard to his appointment as receiver and the powers granted to him under pars 3 to 7 of the existing orders.

[100] As to cl 16.7, in my view, the applicant's obligation under cl 16.7(c) to distribute the net proceeds of realisation among the Members in the same proportion specified in cl 12.4 is affected by the existing orders. The respondent is the receiver of and has possession of the scheme property of the FMIF under par 5 of the existing orders. The applicant is not in possession of any part of the scheme property. The applicant's obligation to make any distribution cannot be exercised until it is in possession of scheme property. That will not occur unless an order is made that the respondent go out of possession of the scheme property. In substance, the applicant's obligation under cl 16.7(c) is suspended by the operation of the existing orders.

[101] Although it may not be necessary to resolve this part of the application, I would add that the parties' submissions traversed two further questions.

[102] First, as previously stated, the applicant and the liquidators submitted that when the respondent has completed collecting and realising the assets of the FMIF he will be obliged to relinquish possession of them to the applicant. In my view, he is not authorised to do so without an order of the Court.

[103] Second, the respondent submitted that he is authorised under the existing orders to make distributions to the members of the FMIF. In my view, neither his appointment under s 601NF(1) of the CA nor the provisions of the existing orders made under s 601NF(2) of the Act clearly authorises him to make distributions

without further order in the circumstance that the existing orders also direct the applicant to wind up the FIFA.

[104] The substance of his existing appointment includes his appointment as receiver. As previously observed, the power under s 420(1) of the CA is that a receiver has power to do all things necessary or convenient to be done for or in connection with or as incidental to the attainment of the objectives for which the receiver was appointed. The respondent argued that power extended to the attainment of the objectives under the order appointing the respondent as the person to take responsibility for ensuring that the FMIF is wound up.

[105] While I accept that that is a cogent argument, the specific orders made as to the respondent's powers to realise the property of FMIF and bring, defend or maintain proceedings are indicative of a narrower focus, notwithstanding that they are expressed to be "without derogating in any way from the Appointment or the Receiver's powers pursuant to these Orders".

[106] In the result, it seems to me to be appropriate to clarify the position by making a direction under s 601NF(2) that the respondent is not to make a distribution to the members of the FMIF without the authority of an order of the Court.

[107] The applicant's right under cl 16.6(f) to retain any part of the scheme property which in its opinion may be required to meet any actual or contingent liability of the Scheme is, in my view, affected by the operation of par 5 of the existing orders. The applicant is not in possession of the scheme property. There is an assumption underlying cl 16.6(f) that the responsible entity has possession. While not in possession of the property, the right to retain property for the required purpose cannot be engaged.

[108] The applicant's correlative obligation under cl 16.7(g) to distribute anything retained which is subsequently not required is also not one that can be engaged, also because it is not in possession of any of the scheme property.

[109] As to cl 18.2, the applicant's power to set aside any money from the scheme property which in the applicant's opinion is sufficient to meet any present or future liability of the scheme is, in my view, affected by the existing orders. Again, the assumption underlying cl 18.2 is that the applicant is in possession of the money. While not in possession of the property, the power to set aside money from that property cannot be engaged. Under the existing orders, if the applicant is in possession of scheme property the respondent is to obtain possession of the property.

[110] Clause 21.1 provides that the scheme property will be held in the name of the Custodian as agent for the responsible entity on the terms and conditions as detailed in the Custody Agreement. The appointment of the respondent as receiver of the property of the FMIF could operate inconsistently with possession of the Custodian provided for in cl 21.1. However, the applicant did not tender evidence that there was in fact any problem of that kind or that it affected the applicant.

[111] In my view, this is another a question that may never arise. In any event, the Court should not answer the question whether the liquidators are, in the winding

up of the applicant and of the FMIF, responsible for and shall discharge the functions, duties and responsibilities set out in cl 21.1, because that clause does not provide for a function of the applicant. It provides for a function of the Custodian.

Register of members and membership

[112] Third, the applicant under s 601NF(2) and the liquidators under s 511(1) of the CA seek a direction as to whether the liquidators are, in the winding ups of the applicant and of the FMIF responsible for and shall discharge the functions, duties and responsibilities set out in other "parts" of the constitution identified as parts 9,10,12,22 and 28

[113] I mention cl 22 of the constitution next, because it is convenient to deal with it before cls 9 and 10. Clause 22 provides that the responsible entity must keep and establish a register of members and any other registers required by law. The applicant submits that it is required to do so, not the respondent. I agree. There is nothing in the existing orders that charges the respondent with that function and thereby relieves the applicant from doing so. Paragraph 8(a) of the existing orders assumed that the applicant had the register and nothing to the contrary was expressly provided.

[114] As a matter of fact, the respondent has maintained a register of members since August 2013. In my view, that is not what the existing orders provide for, except to the extent that the provision under par 2 of the existing orders that the respondent is appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution might have that effect. If the applicant is not maintaining the register of members, that paragraph of the existing orders authorises the respondent to do so.

[115] Clause 9 of the constitution provides for the transfer of units in the scheme. The applicant is responsible for recording a transfer, subject to its powers to refuse registration. There is a difference here between the effect of a winding up order for a registered scheme and a winding up order for a company. In the case of a company, under s 468A of the CA, a transfer of shares made after the commencement of the winding up is void, subject to exceptions. There is no express restriction of that kind in the case of a registered scheme. The interest of a member of the FMIF is assignable at law under s 199 of the *Property Law Act* 1974 (Qld).[56] It is unnecessary to discuss the alternative method of assignment in equity. The constitution of the FMIF, as a "document that is legally enforceable as between the member and the members and the responsible entity",[57] creates rights and obligations as between the applicant and a member wanting to transfer their units under cl 9 of the constitution.

[116] Accordingly, a member of the FMIF is entitled to such a transfer until the FMIF is wound up. The existing orders make no provision about the applicant's rights and obligations under cl 9. In my view, the functions under cl 9 are presently a responsibility of the applicant. There is nothing that charges the respondent with those functions and thereby relieves the applicant from doing so.

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56 *Commissioner of Taxation v Everett* (1980) 143 CLR 440, 447.

57 *Corporations Act* 2001 (Cth), s 601GB.

[117] Clause 10 of the constitution deals with the transmission of units in the event of a member's death, bankruptcy or other legal disability. The existing orders make no provision about the applicant's rights and obligations under cl 10. In my view, the functions under cl 10 are presently a responsibility of the applicant. There is nothing in the existing orders that charges the respondent with those functions and thereby relieves the applicant from doing so.

[118] The respondent's affidavits show that, like the register of members, he has assumed responsibility for effecting transfers and transmissions. If the applicant is not managing the transfers and transmission, paragraph 2 of the existing orders authorises the respondent to do so.

[119] However, in my view the better course going forward is for a specific order to be made under s 601NF(2) that the respondent be responsible for the functions under cls 22, 9 and 10 of the constitution.

[120] Clause 12 of the constitution provides for distributions to members. It is related to cl 11 that defines distributable income. In my view, cl 12 is only indirectly relevant. The power of distribution on a winding up of the FMIF is that conferred by cl 16.7(c) of the constitution. That clause picks up the proportions provided for under cl 12.4.

[121] I have previously mentioned that, in my view, the respondent is not authorised to transfer possession of the property of the FMIF to the applicant without the authority of an order of the Court.

[122] In my view, the Court should not answer the question whether the liquidators are, in the winding up of the applicant and of the FMIF, responsible for and shall discharge the functions, duties and responsibilities set out in cl 12, because it is a question that may never arise.

[123] Clause 28 of the constitution provides that the responsible entity may at any time call and convene a meeting of Members and must do so when required by law. The applicant submits that it is the party with that power and obligation, not the respondent.

[124] On the face of it, there is nothing in the existing orders that charges the respondent with those functions. If it were necessary to call a meeting to ensure the realisation of the property of the FMIF, he might be able to do so under par 2 and par 7(a) of the existing orders, but that is not the sole function of cl 28. It might be necessary for the applicant or the respondent to call a meeting of members to discharge their responsibilities under s 601NE(1) or s 601NF(1) respectively.

[125] In the circumstances, in my view, it is unnecessary to say more. At present, it is not suggested that either the applicant or the respondent needs to call a meeting for any particular purpose. In my view, at this juncture, the Court should not make a direction about the responsibility of the liquidators or the applicant to call a meeting at a general level.

Financial and directors' reports and audit obligations under the CA

[126] Paragraph 3 of the application and pars 1 to 8 of Sch 2 to the application seek directions as to whether the applicant is responsible for the following in the winding ups:

(a) to prepare, for each financial year, a financial report for the FMIF pursuant to Div 1 Pt 2M.3 of the CA;
(b) to have the financial report audited in accordance with Div 3 of Pt 2M.3 of the CA;
(c) to report to members of the FMIF in accordance with Div 4 of Pt 2M.3 of the CA;
(d) to lodge with ASIC the report pursuant to Div 5 of Pt 2M.3 of the CA;
(e) to prepare for each half-year a financial report for the FMIF pursuant to Div 2 of Pt 2M.3 of the CA;
(f) to lodge with ASIC the half-yearly financial report for the FMIF and the auditor's report pursuant to Div 3 of Pt 2M.3 of the CA; and
(g) to engage a registered company auditor an audit firm or an authorised company audit company in relation to the FMIF's compliance plan under s 601HG of the CA.

[127] The parties did not devote any detailed submissions as to the extent of the applicant's financial or members' reporting or audit obligations under the CA generally, or the extent of the application of provisions of Ch 2M of the CA to the FMIF. The submissions made were directed to some aspects of those obligations in the winding up of the scheme. It is necessary to start more generally.

[128] Under Pt 2M.3 of the CA, as a registered scheme, the FMIF was required to prepare an annual financial report[58] and an annual directors' report.[59] The financial report of a registered scheme for a financial year must be audited.[60] And a registered scheme must report to members[61] and lodge the financial report with ASIC.[62]

[129] As well, because there may be 100 or more people who reside in this jurisdiction and hold interests in the FMIF, units in the FMIF may be ED Securities.[63] If the securities in the FMIF are ED Securities, the undertaking of the FMIF is a "disclosing entity" for the purpose of the CA.[64] If the undertaking of the FMIF is a disclosing entity, it must prepare a financial report for each half-year and have the financial report audited or reviewed in accordance with Div 3 of Part

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58 *Corporations Act* 2001 (Cth), s 292(1). The section does not say by whom, but it must be the responsible entity.
59 *Corporations Act* 2001 (Cth), s 298(1).
60 *Corporations Act* 2001 (Cth), s 301(1).
61 *Corporations Act* 2001 (Cth), s 314(1).
62 *Corporations Act* 2001 (Cth), s 319(1).
63 *Corporations Act* 2001 (Cth), s 111AFA(2).
64 *Corporations Act* 2001 (Cth), s 111AC(2).

2M.3 of the CA.[65] It must lodge with ASIC such a half-yearly financial report and auditor's report.[66]

[130] The responsible entity of a registered scheme must appoint an auditor.[67]

[131] The operation of these provisions is not automatically suspended when a registered scheme is ordered to be wound up.

[132] In the case of a company ordered to be wound up in insolvency or by the Court, s 471A of the CA provides that a person cannot exercise and must not purport to perform or exercise a function or power as an officer of the company. Accordingly, the directors cannot prepare a financial report a directors' report for the purposes of Ch 2M, let alone have them audited. As well, s 330 of the CA provides that an auditor of a company ceases to hold office if an order is made by the Court for the winding up of the company.

[133] Section 530A of the CA requires each officer to deliver all books of the company in the officer's possession to the liquidator. The liquidator is entitled to possession of the books of the company.[68] The liquidator must keep proper books.[69] Chapter 5 contains a quite different reporting regime for a liquidator. The liquidator must lodge accounts and a statement of position at 6 monthly intervals.[70] ASIC has the power to require an audit of the account and statement of position.[71]

[134] Despite the foregoing, ASIC takes the view that at least some companies being wound up may have to comply with Part 2M.3 of the CA. Accordingly, the ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251 ("the instrument"), s 5, provides that a company does not have to comply with Pt 2M.3 if it would otherwise have been required to lodge a report under that Part if as at the relevant day a liquidator is appointed to the company.[72]

[135] These provisions do not apply in the winding up of a registered scheme.

[136] Instead, the applicant submits that its responsibilities as responsible entity under Ch 2M are not altered by the existing orders. In general, I agree. There is a qualification in relation to the audit obligations of a registered scheme. Section 331AD of the CA provides that if the Court makes an order directing the responsible entity to wind up the scheme an auditor of the registered scheme ceases to hold office.

[137] As well, in *Enviroinvest Ltd (rec and mgrs apptd) (in liq)*[73] the court doubted that the requirements to have a financial report audited for a financial year and to obtain an audit report applied to a managed investment scheme in the course of being wound up, because "Division 3" (presumably Pt 2M.3) presupposes the

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65 *Corporations Act* 2001 (Cth), s 302(b).
66 *Corporations Act* 2001 (Cth), s 302(c).
67 *Corporations Act* 2001 (Cth), s 331AAA.
68 *Corporations Act* 2001 (Cth), s 530B.
69 *Corporations Act* 2001 (Cth), s 531.
70 *Corporations Act* 2001 (Cth), s 539(1).
71 *Corporations Act* 2001 (Cth), s 539(2).
72 Section 5 appears to have been made under s 341 of the CA.
73 (2010) 81 ACSR 145, 155 [42].

active role of directors and a continuing business or undertaking. I am not persuaded that reasoning is sufficient to dispose of the case of a registered scheme, although I accept that the cessation of the role of directors of a company being wound up and the provisions of s 539 of the CA are cogent reasons in favour of s 301 of the CA not continuing to apply in the winding up of a company. However, in my view, that reasoning does not speak directly to the winding up of a registered scheme.

[138] The respondent appears to have obtained the books and records of the applicant in relation to the FMIF under par 3 of the existing orders. The applicant does not have access to the books and records of the respondent's activities as receiver of the FMIF under the existing orders since they were made. Yet, the financial reporting obligations under Pt 2M.3 of the CA appear to continue.

[139] The respondent submits that there are provisions under which the applicant's obligations to prepare financial reports and audit obligations may be suspended or relieved.

[140] First, the respondent submits that s 7 of the instrument can relieve a responsible entity from compliance with Pt 2M.3 and s 601HG of the CA. That section applies if either:

(a) the responsible entity (in this case the applicant) has lodged a notice under reg 5C.9.01 of the Regulations in the approved form, telling ASIC that the winding up of the scheme has commenced; or

(b) a person appointed under s 601NF(1) of the CA (in this case the respondent) has lodged a notice telling ASIC that the person has been appointed by the Court to take responsibility for ensuring that the scheme is wound up in accordance with the scheme's constitution.

[141] I was informed by the parties at the hearing of the application that the respondent had lodged a notice telling ASIC of his appointment under s 601NF(1). However, there is a further requirement under s 7, namely that either the responsible entity or the person appointed under s 601NF(1) must lodge a copy of a "scheme insolvency resolution".

[142] A "scheme insolvency resolution" is defined in s 4 of the instrument to mean "a resolution to the effect that for a period of at least 12 months the scheme property has been insufficient to meet the debts of the responsible entity of the scheme incurred in that capacity as and when they were due and payable."

[143] No such resolution has been lodged, on the evidence. Nevertheless, it seems at least possible that one could be lodged.[74] If it is done, the applicant will be relieved of the ongoing reporting obligations under Pt 2M.3.

[144] I note that for a registered scheme being wound up, s 13 of the instrument, in effect, inserts a provision into the CA providing for different reporting

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74 As to insolvency of a registered scheme generally, see *Capelli v Shephard* (2010) 29 VR 242, [89] ff.

obligations of a responsible entity or person appointed under s 601NF(1). The operation of that section was not referred to by the parties in submissions.

[145] Second, the respondent submits that under s 111AT(1) of the CA, ASIC may by writing exempt the applicant from all or specified disclosing entity provisions. By s 111AR of the CA, the provisions of Ch 2M of the CA as they apply to disclosing entities are disclosing entity provisions.

[146] I note that s 340(1) of the CA (read together with s 340(3)) in effect provides that, on an application authorised by a resolution of "the directors" in relation to a registered scheme, ASIC may make an order in writing relieving a registered scheme from all or specified requirements of Pts 2M.2, 2M.3 and 2M.4 of the CA. Regulatory guide 174 issued by ASIC in May 2015 corresponds. Under s 342 of the CA, it is a condition of making an order under s 340 that ASIC must first be satisfied that compliance would make the financial reports or other reports misleading, or be inappropriate or impose unreasonable burdens.

[147] It may be that the applicant can apply for individual relief from the requirements of the relevant provisions in Pt 2M under s 340(1). However, "the directors" are required to authorise and sign the application. There may be a question as to who "the directors" of a registered scheme are or why they should be required to authorise the application in the case of a registered scheme that is being wound up by a responsible entity in liquidation. However, the parties did not address s 340 in submissions, so I will not consider it further.

[148] The point of the foregoing summary is not to resolve whether if any of these applications is made the applicant will be relieved. That is hypothetical. At present, the applicant is not relieved.

[149] I would add that the applicants and liquidators' affidavits and the applicant and liquidators' counsel in submissions also referred to the applicants' obligations in relation to its taxation affairs.[75] However, no paragraph of the application raised that subject matter. I was informed by the respondent's counsel that the secured creditor's receivers were attending to submission of BAS statements, but there was no elaboration of the basis for that.

[150] There was no sufficient identification of the relevant obligations or the respective parties' positions under the relevant taxation legislation for me to consider whether any direction is required on this account.

[151] In my view, an appropriate direction to make is to the effect that if the applicant is unable to obtain relief from the financial reporting obligations of Pt 2M.3 of the CA, the respondent must provide to the applicant reasonably requested information to enable the applicant to comply with those obligations.

[152] I will hear the parties as to the appropriate form of order.

Reports on the financial status of the FMIF

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75 The affidavit referred to s 161 and Pt III Div 6 of the *Income Tax Assessment Act* 1936 (Cth) and ss 31.5 and 184.1 of *A New Tax System (Goods and Services) Act* 1999 (Cth).

[153] By par 2 of the application and par 4 of Sch 1 to the application the applicant seeks directions as to the liquidators' responsibilities under seven provisions or parts of the constitution, being cls 16.10, 27.1 and 27. 4 of the constitution and parts 11, 12 and 14 of the constitution. They too should be dealt with separately. For convenience, I will deal with them in an order different to that in the application.

[154] Clause 27.4 of the constitution provides that the accounts of the scheme must be kept and prepared in accordance with the applicable accounting standards and the CA and that the responsible entity must report to members concerning the affairs of the scheme and their holdings as required by the CA.

[155] To the extent that cl 27.4 requires compliance with the CA, there is nothing to be added to the prior discussion of the applicant's obligation to keep accounts or report to members under the provisions of the CA. If the applicant is relieved from the requirements of the CA, cl 27.4 will not be engaged. There may be a question whether cl 27.4, properly construed, independently obliges the applicant to keep and prepare accounts, but the applicant made no submissions about that. In my view, it would not be appropriate to enter upon that question in the absence of any specific argument about it.

[156] Clause 27.1 of the constitution provides, in effect, that the responsible entity must appoint an auditor:

> (a) to regularly audit the accounts in relation to the scheme and perform the other duties required of the scheme's auditors under the constitution and the law; and
> (b) of the compliance plan for the scheme.

[157] In my view, cl 27.1 operates as a constitutional requirement that the responsible entity appoint an auditor apart from the CA, so as to perform the audits required under the constitution and the CA. Those under the CA have been mentioned previously. As to the operation of an independent obligation to audit under the constitution, the operation of cl 27.1 would depend on the operation of cl 27.4, as also previously mentioned.

[158] The requirement that the responsible entity must appoint an auditor of the compliance plan for the scheme reflects the positive statutory obligation under s 601HG(1) of the CA that a responsible entity must ensure that at all times a registered auditor is engaged to audit compliance with the scheme's compliance plan. In the result, in my view, it is in unnecessary to say more about the operation of cl 27.1 or the applicant's obligations under that clause.

[159] Clause 27.5 additionally requires the responsible entity to cause the scheme auditor to audit and report on the scheme's accounts and the compliance plan auditor to audit and report on the compliance plan. Each of those audits is to be done in the manner required by the CA. Having regard to the discussion of the operation of audits required by the CA set out previously, it is unnecessary to say more as to the operation of cl 27.5 or the applicant's obligations under it.

[160] Clause 16.10 of the constitution provides that the responsible entity shall arrange for an auditor to audit the final accounts of the scheme after the scheme is wound

up. There is no equivalent audit requirement provided for in the CA. The applicant submits that the responsibility to arrange for the audit is its obligation. I agree. But the time has not arrived for that audit and will not do so for many months.

[161] Thus, the respondent submits that any direction about carrying out the audit arranging function under cl 16.10 would be premature. I agree.

[162] Nevertheless, it may clarify the parties' positions to record my view that the existing orders do not provide for the respondent to arrange any of the audits. No order has been made under s 601NF(2) which alters the effect of the operation of the constitution or the CA in relation to the applicant's audit obligations.

Parts 11, 12 and 14 of the constitution

[163] Paragraph 2 of the application and par 4 of Schedule 1 to the application also seek directions as to whether the liquidators are responsible for and shall discharge the functions, duties and responsibilities "to determine and report upon the financial status of the FMIF as required by… parts 11, 12 and 14 of the constitution". There are no such parts of the constitution. However, it may be that the applicants intended to refer to the clauses in the constitution bearing those numbers.

[164] Clauses 11 and 12 of the constitution deal with distributions of distributable income and capital distributions. I have previously dealt with cl 12. Similarly, in my view, the Court should not answer the question whether, in the winding up of the applicant and of the FMIF, the liquidators are responsible for and shall discharge the functions, duties and responsibilities set out in cl 11, because it is a question that may (in fact will probably never) never arise.

[165] Clause 14 of the constitution deals with a complaints procedure. The liquidators and the applicant made no reference to this clause in their submissions and no facts are raised that suggest any question has arisen as to the applicant dealing with complaints under the procedure or otherwise. In my view, it is unnecessary to make any direction as to cl 14.

[166] **Other orders sought and disposition**

[167] The application also seeks an order that the liquidators' remuneration, and the costs and expenses of discharging the functions duties and responsibilities for which they are responsible shall be paid from the scheme property of the FMIF, including the costs of the application.

[168] However, at the hearing, the applicant's and liquidators counsel requested that the hearing of that part of the application be adjourned until the determination of the directions questions dealt with in these reasons. The respondent did not oppose that approach.

[169] I will hear the parties as to the orders that should be made consistently with these reasons.